

Making the Australian Economy Work Better - Workplace Relations



March 2005

AI Group's workplace relations reform proposals are designed to:

- Improve the competitiveness of Australian industry;
- Maintain high employment and low inflation;
- Promote closer relations and mutual obligations between employers and employees;
- Preserve a fair and stable safety net of minimum rights and conditions;
- Maximise national consistency in workplace relations laws and reduce the regulatory burden;
- Meet the needs of contemporary workplaces, including recognition of the diversity of the workforce and the importance of increased participation;
- Recognise that one size does not fit all and that employers and employees want choices; and
- Breathe new life into Australia's enterprise bargaining system

Making the Australian Economy Work ^{even} Better - Workplace Relations

AI GROUP'S PLAN TO RE-SHAPE AUSTRALIA'S WORKPLACE RELATIONS SYSTEM

Enterprise Agreements

- The primary mechanism for setting wages and conditions
- A reinvigorated bargaining system
- A simpler "no disadvantage test"
- Simpler approval processes and the option of longer term agreements
- Reinforcement of the need to "genuinely try to reach agreement"
- Improved compliance and enforcement
- More powers for the AIRC to deal with pattern bargaining and damaging industrial action
- Secret ballots to authorise industrial action

The Safety Net of Minimum Wages and Conditions

Minimum Conditions to be set by Federal Legislation

- Notice of Termination
- Unpaid Parental Leave
- Long Service Leave
- Redundancy Pay Exemption for Small Business
- Unfair Dismissal Protection
- Sex, Race, Disability and Age Discrimination Protection

Minimum Award Conditions to be set by the Australian Industrial Relations Commission (AIRC)

- Classifications and Rates of Pay for Adults, Juniors, Trainees, Apprentices and Persons with Disabilities
- Hours of Work and Meal Breaks
- Annual Leave
- Sick, Carer's & Bereavement Leave
- Penalty Rates and Loadings for Overtime, Shift, Weekend and Public Holiday Work (*but not for employees performing work at a higher level than AQF 4*)
- Casual Loading
- Redundancy Pay (*except small business*)
- Stand-down Provisions
- Avoidance of Disputes
- Superannuation (*to be reviewed in July 2008 when new "earnings base" legislation takes effect*)

Minimum Conditions to be set by State Legislation

- OHS
- EEO (*except Sex, Race, Disability and Age which would be dealt with Federally*)
- Jury Service
- Public Holidays

Award Rationalisation and Simplification

- Major award rationalisation and simplification exercise to be undertaken to achieve:
- One Australian Industry Award for each major industry sector (20 or so in total rather than the existing 1000 industry awards)
 - Simplified content in awards
- This exercise to be overseen by the AIRC but with significant legislative direction regarding objectives, content, structure and timing

Setting of Minimum Wages

- Establishment of a new Minimum Wages Commission (MWC) comprising economic and other experts
- The MWC would conduct its own research as well as hearing from relevant parties
- The MWC would make recommendations to the AIRC on adjustments to minimum wages
- The Act to prevent the AIRC adjusting minimum wages by more than the MWC's recommended adjustment

Stability of the Safety Net

Award variations only in exceptional circumstances (other than minimum wages adjustments)

Foreword

During this term, the Federal Government has an historic opportunity to reform Australia's workplace relations system to better position Australia for the challenges which lie ahead. It is vital that such opportunity not be lost.

Many positive changes have been made to Australia's workplace relations system over the past 11 years, but the task of reforming the system is far from complete. The economic and demographic challenges which Australia will face over the next decade necessitate that the Federal Government waste no time in developing and implementing a workplace relations system which matches the needs of a modern economy and contemporary Australian workplaces.

In determining the shape of the reforms, the Government should be guided by the need for Australia's workplace relations system to promote productivity, flexibility, harmony and fairness. The system must suit the needs of all workplaces – large and small, unionised and non-unionised, in a wide range of industry sectors. One that promotes closer relations and mutual obligations between employers and employees, whilst furthering economic growth and increasing participation in the workforce. One size does not fit all.

Over recent years, the Australian Industry Group (Ai Group) has written a large number of submissions, comprising thousands of pages of arguments, in support of workplace relations reform. A further holistic analysis of Australia's workplace relations system has been carried out by Ai Group over the past four months. A detailed plan has been developed for re-shaping Australia's workplace relations system to bring it in line with the needs of workplaces in the twenty first century.

Ai Group's reform proposals are practical and workable. They have been developed in conjunction with CEOs and senior HR practitioners of companies in a wide range of sectors – whose role it will be to implement the reforms. The reform proposals have also been developed through the experiences of Ai Group's approximately 50 professional workplace relations advisers who are involved on a daily basis in assisting enterprises to reach agreements, avoid and solve disputes, and manage a myriad of workplace relations issues.

This submission has been prepared under the guidance of a Taskforce of Members of Ai Group's National Executive, chaired by Mr John Ingram, the National President of Ai Group, and comprising Chief Executives of member companies.

At a meeting on 23 February 2005, Ai Group's National Executive considered and endorsed the content of this submission. On 24 February 2005, the Board of the Australian Constructors Association (ACA) considered and endorsed the content of Chapter 12 which relates to workplace relations reform in the building and construction industry.

Ai Group is one of the largest national industry bodies in Australia, representing employers in the manufacturing, construction, automotive, transport, information technology, telecommunications, call centre, labour hire 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 over 130 years and is well qualified to comment on workplace relations reform matters. This submission is made by Ai Group and on behalf of the Engineering Employers' Association, South Australia.

A handwritten signature in black ink, appearing to read "Heather Ridout", is positioned to the left of a vertical line.

Heather Ridout
Chief Executive

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1.0 Executive summary

Ai Group has prepared a detailed plan for re-shaping Australia's workplace relations system to bring it in line with the needs of workplaces in the twenty first century.

Ai Group's workplace relations reform proposals are designed to:

- Improve the competitiveness of Australian industry;
- Maintain high employment and low inflation;
- Promote closer relations and mutual obligations between employers and employees;
- Preserve a fair and stable safety net of minimum rights and conditions;
- Maximise national consistency in workplace relations laws and reduce the regulatory burden;
- Meet the needs of contemporary workplaces, including recognition of the diversity of the workforce and the importance of increased participation;
- Recognise that one size does not fit all and that employers and employees want choices; and
- Breathe new life into Australia's enterprise bargaining system.

A broad outline of Ai Group's reform proposals is set out below.

The approach which should be taken to reform

The Government should implement a comprehensive package of workplace relations reform via one bill. Such a coordinated approach would:

- Assist the Government, together with industry bodies, to communicate the effects of the legislative changes to employers and employees;
- Assist employers and employees to better understand the impacts of all of the elements of the Government's legislative reform package and the interrelationships between different elements of the package;

- Enable employers to identify and implement the changes which need to be made to their policies, procedures and work practices to comply with, and take advantage of, the opportunities for enhanced productivity and flexibility presented by the new workplace relations laws;
- Minimise the risk of unintended consequences arising, which could occur if a fragmented approach is taken to workplace relations reform; and
- Avoid uncertainty.

One logical exception is the building and construction industry reform program which the Government has announced. Given the industry-specific nature of many of the problems and potential solutions identified by the Cole Royal Commission, it would be sensible to deal with those matters in a separate bill.

Important timing considerations

It is essential that legislative reforms to address the significant workplace relations problems which exist in the building and construction industry be enacted and operational by no later than **30 September 2005**, given that some 4000 construction and electrical contracting certified agreements expire between October and December 2005.

It is also vital that the general workplace relations reform bill be enacted and operational by no later than **1 January 2006**, given that over 500 manufacturing industry certified agreements expire in the first half of 2006.

A fair and stable safety net of minimum conditions

Ai Group proposes that the safety net of minimum conditions be restructured, with a particular focus upon:

- The harmonisation and rationalisation of Federal, State and Tribunal relations to reduce complexity and overlap; and
- Reducing unnecessary regulation and allowing more matters to be determined at the enterprise level.

There are four pillars which underpin Ai Group's proposals:

1. Minimum conditions set by Federal legislation;
2. Minimum conditions set by State legislation;
3. Minimum conditions set by the Australian Industrial Relations Commission (AIRC); and
4. Minimum conditions determined at the enterprise.

Wherever possible, there should be no overlap or duplication between minimum conditions set by Federal legislation, State legislation or the AIRC.

Ai Group proposes that the following minimum conditions be set by **Federal legislation**:

- Termination of employment – including:
 - Notice of termination;
 - Protection against unfair dismissal;
 - A redundancy pay exemption for small business;
- Unpaid parental leave;
- Long service leave; and
- Protection against sex, race, disability and age discrimination.

The following minimum conditions should be set via **State legislation**:

- Occupational Health and Safety (OHS);
- EEO (except sex, race, disability and age discrimination which should be covered exclusively by Federal legislation);
- Jury service;
- Public holidays.

Ai Group supports a substantial part of the safety net continuing to be maintained by the **AIRC**, within an appropriate framework set by the *Workplace Relations Act*. The

Tribunal approach assists in ensuring a “fair go all round” and is likely to result in more consistency over time.

Ai Group proposes that the following remain allowable award matters:

- Classifications and rates of pay for adults, juniors, trainees, apprentices and persons with disabilities;
- Hours of work and meal breaks;
- Annual leave;
- Sick, carer’s and bereavement leave;
- Penalty rates and loadings for overtime, shift, weekend and public holiday work (but not for employees performing work at a higher level than AQF 4, eg. C7 in the *Metal, Engineering and Associated Industries Award*);
- Casual loading;
- Redundancy pay (except small business);
- Stand-down provisions;
- Avoidance of disputes;
- Superannuation.¹

Ai Group supports further award simplification. However, simplifying the existing 2200 Federal awards to remove matters which would no longer be allowable would require the devotion of vast resources by the AIRC, unions and employer associations. To avoid a massive wastage of resources and the perpetuation of outdated award structures, further award simplification should be carried out in conjunction with a major award rationalisation exercise.

Strong legislative direction needs to be given to the AIRC requiring the Commission to undertake the necessary award rationalisation exercise, as set out below:

¹ This should be reviewed after 1 July 2008 when the *Superannuation Laws Amendment (2004 Measures No. 2) Act 2004* takes effect. From that date, companies will no longer be entitled to apply the “earning base” contained within an award for the purposes of calculating superannuation contributions and will be required to calculate contributions in accordance with the provisions of the *Superannuation Guarantee Legislation*.

- The Act should set out a relatively small number of major industry sectors for which awards would be retained.
- The 18 industry sectors recognised within the Act for Victoria (which are based on ANZSIC Codes) should be used as a starting point but there may need to be a small number of additional industries recognised. That is, Ai Group proposes that the existing 1000 or so industry / multi-employer awards be replaced by approximately 20 new awards.
- The Act should give the new industry awards a contemporary name to highlight the break from the past, eg. Australian Industry Awards.
- The Act should define the outer boundaries of each award. If the determination of the scope of each of the new industry awards is left exclusively to the AIRC, the vested interests of different registered organisations may result in the award rationalisation exercise becoming extremely complex and time consuming. Setting out the outer boundaries of each industry award within the legislation, would assist in freeing up the AIRC to concentrate on determining the content of award clauses dealing with minimum conditions.
- The Act should set out a timeframe for the completion of the award rationalisation exercise and provide that existing industry and multi-employer awards are no longer enforceable after that date.
- The objects of the Act should be varied to make it clear that the provisions of the new industry awards need to be flexible and have penalty rates and other provisions which are set at a level which recognises the need for companies to be globally competitive.

The Act needs to be amended to ensure that award variations can only occur in exceptional circumstances (other than minimum wage adjustments) where there are powerful economic reasons for a variation, or social reasons that outweigh the economic and social costs.

An appropriate mechanism to set minimum wages

The current system of adjusting minimum wages is not working effectively. The *Safety Net Review* cases are consistently resulting in wage adjustments far in excess of both inflation and general productivity improvements. In recent years, safety net adjustments have even exceeded average enterprise agreement outcomes.

It is essential that any decision to increase minimum wages only be made after a rigorous economic analysis. The annual *Safety Net Review Cases* are not the most appropriate mechanism for such analysis to be carried out, for the following reasons:

- The adversarial nature of the proceedings, with ambit claims, and arguments which distort the true economic picture, is not conducive to arriving at a sound economic decision;
- Few, if any, Members of the Commission who hear the case have economic qualifications;
- Few of the advocates involved in the case have economic qualifications or expertise.

Given the economic challenges facing Australia over the years ahead, Ai Group believes that a more appropriate system of determining adjustments to minimum wages needs to be implemented – one that will ensure a greater degree of economic analysis and rigour.

The elements of the system proposed by Ai Group are as follows:

- A UK-style Minimum Wages Commission (MWC) should be established. The MWC should:
 - Be chaired by an Economist or industry expert;
 - Comprise a multi-discipline panel of experts;
 - Contain a Reserve Bank representative;
 - Conduct its own research as well as hearing from relevant parties.

- The MWC should make recommendations to the AIRC on adjustments to minimum award wages.
- The *Workplace Relations Act* should be amended to require the AIRC to give great weight to recommendations of the MWC in adjusting minimum award wages.
- The Act should prevent the AIRC imposing higher minimum wage increases than that recommended by the MWC.

An independent tribunal with roles and powers appropriate for contemporary workplaces

The AIRC has served Australia well over time and it is essential that it continue to do so in the future. The Commission has come to be part of the Australian social fabric and it imparts a particular flavour of fairness and a widely-held perception of fairness. This does not mean that the AIRC should not change to fit the needs of the reshaped workplace relations system. The following changes to the AIRC's role, powers and structure should occur:

- The Commission should be renamed the Australian Workplace Relations Commission;
- There should be a significant modification in the Commission's powers to make and vary awards, as set out in Chapter 4 of this submission;
- The Commission's role in adjusting minimum wages should be altered, as set out in Chapter 5;
- The Commission should have increased powers to deal with damaging industrial action and to oversee secret ballots to authorise the taking of industrial action, as set out in Chapter 7;

- Improved training and development programs should be implemented for Members of the Commission;
- A mediation service should be established within the Commission; and
- The Commission should only have the power to arbitrate to settle disputes concerning the application of an enterprise agreement, if expressly given such power under the avoidance of disputes procedure in the enterprise agreement, and appeal rights should apply.

Breathing new life into Australia’s enterprise agreement making system

Under the *Workplace Relations Act*, reaching agreement at the enterprise level is the primary means of setting wages and conditions. 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 breathe new life into it. The following steps should be taken:

- The removal of barriers which prevent employers and employees choosing the form of agreement which they prefer (eg. removing the barriers which prevent, in some circumstances, an employee covered by a certified agreement entering into an AWA);
- The removal of unreasonable union intervention rights regarding s.170LK agreements reached between employers and their employees;
- Extending the maximum term for certified agreements to five years;
- Simplifying the filing and approval procedures for certified agreements and AWAs;
- Simplifying the “no disadvantage test” and improving its operation;
- Outlawing industrial action in pursuit of pattern bargaining;
- Implementing measures to address inappropriate coercion by unions and hidden interests during bargaining;

- Extending the list of “objectionable provisions” which cannot be included in certified agreements;
- Codifying the requirement that parties “genuinely try to reach agreement” before taking industrial action, including requiring that negotiating parties demonstrate a preparedness to negotiate an agreement which takes into account the individual circumstances of the relevant enterprise and its need for ongoing productivity improvements;
- Overturning the Federal Court’s *Emwest* decision and outlawing industrial action during the life of certified agreements;
- Giving the AIRC the power to suspend protected industrial action rights and order a cooling-off period;
- Enabling the AIRC to suspend a bargaining period if industrial action is threatening to cause significant damage to third parties;
- Ensuring that parties faced with industrial action are given sufficient notice to enable them to take defensive action;
- Requiring that a secret ballot be held before industrial action is taken.

Improved compliance and enforcement

The rule of law in society is severely undermined if workplace relations laws are not complied with. Legislative amendments are necessary: to create a specific and substantial penalty for taking or organising unlawful industrial action; to impose a time limit on the AIRC for determining s.127 orders to stop or prevent industrial action; and to outlaw the misuse of occupational health and safety as an industrial weapon against employers.

Ensuring that registered organisations operate responsibly

Registered organisations have an important representative role to play and must be allowed to operate effectively. At the same time, it is important that registered organisations operate responsibly. To obtain an appropriate balance the Act should be amended to: reinforce freedom of association principles; extend the existing Federal prohibition on bargaining agent’s fee provisions to State agreements; prevent the misuse of freedom of association laws to restrict outsourcing and offshoring;

tighten right of entry laws to overcome problems which have been arising; and implement measures to assist employees who wish to establish an enterprise association.

More effective termination of employment laws

Numerous problems are arising for employers and employees due to the existing highly complex system of intertwined Federal and State unfair dismissal laws. The Government should legislate to: create a unitary Federal unfair dismissal system for Constitutional Corporations; reduce some of the major constraints of procedural fairness where there is a valid reason for a dismissal; reinstate the redundancy pay exemption for small business; exempt small business from unfair dismissal laws; and exclude seasonal employees in the food industry from the operation of unfair dismissal laws.

Enabling businesses to engage the forms of labour they need to operate efficiently

To remain efficient and globally competitive, businesses need to have the flexibility to engage the forms of labour which they need, regardless of the industry that they work in. Accordingly:

- Provisions relating to different forms of employment should be removed from awards (except casual loadings and relevant exemptions) allowing flexibility for these issues to be determined at the enterprise level;
- The AIRC should not have the power to issue orders or make or vary awards which restrict the engagement of different forms of employment, or of contractors or labour hire;
- Certified agreement provisions which prohibit the engagement of contractors or labour hire or impose unreasonable restrictions on such engagements (eg. a requirement that the contractor pay “site rates”, or that the contractor have an enterprise agreement with the relevant union, or that the company provide

a list of all contractors being used to the union) should be “objectionable provisions” and unable to be contained within agreements.

Reforming workplace relations in the building and construction industry

Chapter 12 of this submission has been jointly developed by Ai Group and the Australian Constructors Association (ACA). Ai Group and the ACA strongly support the objectives of the *Building and Construction Industry Improvement Bill 2003* (“the BCII Bill”) but are of the view that several amendments need to be made to the Bill to make it workable. These include amendments to several key definitions, the role of the Building Code and the pattern bargaining provisions. Also, a genuine mechanism needs to be created for the certification of project agreements for major projects, subject to stringent tests.

2.0 Context, themes and objectives of reform

2.1 Context for reform

Workplace relations do not evolve purely under their own steam; rather, they form part of much broader economic and social processes.

Australian industry is now, more than ever before, competing in a globally connected world economy characterised by high levels of competition and intense pressures on prices. Australia's prosperity in this marketplace is dependent upon organisational structures and management practices being efficient, productive and highly flexible.

The industrialisation of China presents a mammoth challenge to Australia's manufacturers, as does India to Australia's information and communication technology (ICT) companies. Over the next 10 years, two countries, each over sixty times our size are set to rapidly grow and massively expand their export activities. Australia's success in this environment will depend on its adaptability.

There are numerous mind-boggling statistics.

- China currently has 15,000 highway projects underway covering 162,000 kilometres of road – enough to circle the equator four times;
- China will produce 325,000 engineers this year. This is five times as many as the US;
- In 2003 China accounted for 40% of global cement consumption; it accounted for 30% of the growth in oil demand; 90% of the growth in steel demand and 99% of the growth in demand for copper.

Australia, as a medium-sized, open economy has little choice but to adapt as these forces play out. The best we can say is that our success in the face of these opportunities and these challenges will depend on our adaptability - how well we can switch out of and into areas of activity according to the vicissitudes of global markets.

In addition to the challenges presented by globalisation, demographic forces will create significant challenges over the years ahead. The combination of an inadequate fertility rate and a rapidly ageing population requires that alternative sources of productivity be found to replace the diminishing contribution to improved living standards delivered by growth in the number of working age Australians. Two such alternatives are higher rates of participation in the workforce and greater rates of productivity growth. Workplace relations are central to both of these.

Capacity constraints in the economy such as skill shortages and infrastructure inadequacies are also likely to dampen economic growth over the years ahead. Workplace relations matters are inextricably linked with these issues. A modern approach to skill development will assist in overcoming skill shortages, and the reform of workplace relations in the construction industry will reduce the cost of infrastructure.

Further, Australia's workplace relations system needs to take account of the ever-increasing diversity of the workforce. Today, there is no comparable 'social norm' around which we can construct a simple characterisation of the Australian workforce. People now have much longer and more varied periods of study; they have more leisure time and more leisure activities; they have children on their own; they have much higher levels of consumption; they dissolve their marriages; they remarry; they remain unmarried; they change jobs more often; they work on a part-time or casual basis much more; they appear to be permanently leaving the workforce at an earlier age; and, of course, women participate much more in the paid workforce.

These changes represent a great legacy of the twentieth century and there should be little doubt that they will continue to develop and exert their influences in the twenty-first century. Their influence on workplace relations is far from the least of these.

Just as Australia's workplace relations system has yet to come to terms completely with the increased diversity of the workforce, the system is still well short of adjusting to the much greater role the State has come to play in meeting equity objectives by supplementing the outcomes of the private economy through our highly progressive taxation and income support systems. These shortcomings are highlighted by the

difficulties the Australian Industrial Relations Commission (AIRC) has in accommodating in its decisions the interplay between the annual safety net adjustments to minimum wages and the income tax and income support systems.

Many positive changes have been made to Australia's workplace relations system over the past 11 years which have assisted in meeting the challenges described above, but the task of reforming the system is far from complete. Ongoing productivity and flexibility improvements need to be secured, and employers and employees need to be given greater freedom to implement work arrangements which suit their own unique circumstances.

2.2 Themes and objectives of reform

Ai Group's workplace relations reform proposals are designed to:

- Improve the competitiveness of Australian industry;
- Maintain high employment and low inflation;
- Promote closer relations and mutual obligations between employers and employees;
- Preserve a fair and stable safety net of minimum rights and conditions;
- Maximise national consistency in workplace relations laws and reduce the regulatory burden;
- Meet the needs of contemporary workplaces, including recognition of the diversity of the workforce and the importance of increased participation;
- Recognise that one size does not fit all and that employers and employees want choices; and
- Breathe new life into Australia's enterprise bargaining system.

3.0 The approach which should be taken to reform and important timing considerations

3.1 The approach which should be taken to reform

A strategic approach should be taken to further workplace relations reform, rather than a fragmented one. The goal should be the achievement of more flexible, productive and harmonious workplace relations.

Over the past 11 years, there have been two substantial packages of workplace relations legislative reform implemented. In 1993, the ALP Government commenced the process of refocussing the workplace relations system away from centralised outcomes and towards the enterprise. A further substantial shift in this direction was achieved through the reform package introduced by the Coalition Government in 1996.

In 1999, the Government endeavoured to implement a third substantial package of reform through the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999* which would have delivered significant reform across a wide range of areas. The Bill failed to pass through the Senate and consequently the Government announced a change of direction and began pursuing reform through a series of smaller bills each dealing with one topic. This strategy has had only limited success. Whilst some worthwhile bills passed through the Senate during the last term of Government, numerous others were blocked by the Opposition and the Australian Democrats or were heavily amended and consequently did not achieve the objectives of the original bills.

Given the changed situation in the Senate from 1 July 2005, the Government should return to its previous approach and implement a comprehensive package of workplace relations reform via one bill. Such a coordinated approach would:

- Assist the Government, together with industry bodies, to communicate the effects of the legislative changes to employers and employees;

- Assist employers and employees to better understand the impacts of all of the elements of the Government's legislative reform package and the interrelationships between different elements of the package;
- Enable employers to identify and implement the changes which need to be made to their policies, procedures and work practices to comply with, and take advantage of, the opportunities for enhanced productivity and flexibility presented by the new workplace relations laws;
- Minimise the risk of unintended consequences arising, which could occur if a fragmented approach is taken to workplace relations reform;
- Avoid uncertainty.

A comprehensive workplace relations reform bill should be drafted, following consultation with industry, and an exposure draft of the bill released for public comment. Alternatively, instead of an exposure draft, the bill could be introduced into Parliament and referred to a Senate Committee for inquiry. After taking into account the submissions made, the bill should be enacted without delay.

Ai Group favours the approach of varying the *Workplace Relations Act* through a comprehensive reform bill, rather than the introduction of a completely new Act, or rewriting the whole *Workplace Relations Act*. Rewriting the *Workplace Relations Act* or the introduction of a completely new Act could lead to years of costly litigation about matters which are settled and operating effectively. The potential for this is highlighted by the considerable sums spent by Ai Group over the past few years in pursuing appeals in the *Emwest* and *Electrolux* cases. The *Emwest* case revolved around the interpretation of one sentence in the Act and the *Electrolux* case revolved around the interpretation of one paragraph.

One logical exception to the approach of incorporating all of the elements of the reform package within the one bill, would be the treatment of the building and construction industry reforms which the Government has announced. Given the industry-specific nature of many of the problems and potential solutions identified by Commissioner Cole, it would be sensible to deal with those matters within a separate bill.

Various workplace relations reform bills were enacted during the last term, or this term, of Government, all of which were amended as a result of negotiations between the Government and Opposition parties. These Acts can be placed into two categories:

- Those where the reform objectives of the original version of the bill were achieved; and
- Those where the reform objectives of the original version of the bill were not achieved.

There is plenty of scope for debate about which category each of the Acts should be placed in. An assessment by Ai Group places the Acts in the following categories:

Those where the reform objectives of the original version of the bill were achieved:

- *Workplace Relations Amendment (Improved Protection for Victorian Workers) Act 2003;*
- *Workplace Relations Amendment (Registration and Accountability of Organisations) Act 2002;*
- *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Act 2003;*
- *Workplace Relations Amendment (Fair Termination) Act 2003;*
- *Workplace Relations Amendment (Protection for Emergency Management Volunteers) Act 2003;*
- *Workplace Relations Amendment (Agreement Validation) Act 2004.*

Those where the reform objectives of the original version of the bill were not achieved:

- *Workplace Relations Amendment (Genuine Bargaining) Act 2002;*
- *Workplace Relations Amendment (Transmission of Business) Act 2004;*
- *Workplace Relations Amendment (Improved Remedies for Unprotected Action) Act 2004;*

- *Workplace Relations Amendment (Codification of Contempt Offences) Act 2004.*

It is important that the Government not overlook the reforms that were not achieved via the Acts set out in the second list above, due to the need to significantly amend each bill to gain the approval of the Australian Democrats and/or the ALP in the Senate.

Also, the inclusion of particular Acts within the first list above, does not mean that there is no need for further reform in the area dealt with in the Act. For example, the *Workplace Relations Amendment (Improved Protection for Victorian Workers) Act* has led to the development of a common rule award system for Victoria. However, this does not obviate the need to create a much less complex system of minimum wages and conditions.

3.2 Important timing considerations

There are some vital timing considerations relating the reform of workplace relations generally, together with the reform of workplace relations in the building and construction industry.

It is essential that legislative reforms to address the significant workplace relations problems which exist in the **building and construction industry** be enacted and operational by no later than **30 September 2005**, given that some 4000 construction and electrical contracting certified agreements expire between October and December 2005. The *Building and Construction Industry Improvement Bill 2003* (“the BCII Bill”) has already been the subject of an extensive consultation process and a lengthy Senate Committee inquiry. Therefore, a further lengthy consultation process regarding this Bill is unnecessary. The amendments which Ai Group and the Australian Constructors Association (ACA) believe need to be made to the Bill are set out in Chapter 12 of this submission.

In contrast, the general workplace relations reform legislation would need to be the subject of a robust consultation process to ensure that the impacts upon industry and

employees are fully evaluated before the legislation comes into effect. The time required for such consultation and the Parliamentary process would appear to make it unlikely that any general workplace relations reform legislation could be operative before late 2005.

It is vital that the **general workplace relations reform** bill be enacted and operational by no later than **1 January 2006**, given that over 500 manufacturing industry certified agreements expire in the first half of 2006².

For the past five years, the unions have been endeavouring to replace genuine enterprise bargaining in the manufacturing industry with industry-wide pattern agreements. They made two concerted attempts in 2000 and 2003 (which they called *Campaign 2000* and *Campaign 2003*) and these were vigorously opposed by Ai Group and its members. So far, the unions have failed to entrench pattern bargaining in the manufacturing industry.

Despite their failure to achieve a common enterprise agreement outcome across the manufacturing industry, the unions have succeeded in lining up the expiry dates of more than 500 manufacturing industry enterprise agreements on 31 March 2006. This has occurred as a result of the unions' consistent refusal to sign enterprise agreements which do not expire on this date.

Without legislative reform, the unions will no doubt continue to press to entrench costly and damaging industry-wide outcomes upon employers in the manufacturing and construction industries.

In the event that there is duplication in the content of the BCII legislation and the general workplace relations reform legislation, once both pieces of legislation are in operation, consideration should be given to amending the BCII legislation at that time to remove the provisions which are duplicated in the general workplace relations reform legislation.

² *Agreement making in Australia under the Workplace Relations Act - 2002 and 2003*, p.32.

4.0 A fair and stable safety net of minimum conditions

4.1 Background

Australia has a Medusa-like workplace relations system with a breathtaking array of intertwined and inconsistent state and federal employment laws and industrial instruments. There are six separate workplace relations systems – the federal and five state systems. 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;
- 2200 federal awards and a further 2000 State awards;
- 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.

The current complex web of employment laws and regulations is unfair on both employers and employees. Fairness does not necessitate complexity - indeed fairness is often impeded by complexity. It is almost impossible for businesses to

know fully what is required of them at the present time. Harmonisation of Federal and State workplace relations laws and regulations should be given a high priority.

Ai Group proposes that the safety net of minimum conditions be restructured, with a particular focus upon:

- The harmonisation and rationalisation of Federal, State and Tribunal relations to reduce complexity and overlap;
- Reducing unnecessary regulation and allowing more matters to be determined at the enterprise level.

There are four pillars which underpin Ai Group's proposals:

1. Minimum conditions set by Federal legislation;
2. Minimum conditions set by State legislation;
3. Minimum conditions set by the AIRC; and
4. Minimum conditions determined at the enterprise.

Wherever possible, there should be no overlap or duplication between minimum conditions set by Federal legislation, State legislation or the AIRC.

4.2 Minimum conditions set by Federal legislation

Ai Group proposes that the following minimum conditions be set by Federal legislation:

- Termination of employment – including:
 - Notice of termination;
 - Protection against unfair dismissal;
 - A redundancy pay exemption for small business;
- Unpaid parental leave;
- Long service leave; and
- Protection against sex, race, disability and age discrimination.

Each of the above minimum conditions is discussed below.

Notice of termination

The notice of termination which an employer is required to give to an employee is set out in s.170CM of the Act. This legislative provision is underpinned by the External Affairs Power. Given that notice of termination is adequately dealt with in the Act, it is appropriate that this issue be removed as an allowable award matter. It is important, however, that the Act be amended to ensure that employees have an obligation to provide notice of termination to their employer, and that employers have the right to withhold monies due to employees if notice is not given.

Protection against unfair dismissal

The current unfair dismissal laws in the *Workplace Relations Act* rely on the External Affairs Power under the Constitution. Given this fact, it would appear to be possible for the Government to continue with the existing reliance on the External Affairs Power and legislate to extend the Federal unfair dismissal system to 100 per cent of Australian workers. Alternatively, if the Government is not prepared to use the External Affairs Power, as set out in section 10.1 of this submission the Corporations Power should be used to create a unitary Federal unfair dismissal system for employees of Constitutional Corporations.

Redundancy pay exemption for small business

The existing redundancy provisions of the Act (eg. s.170FA) rely upon the External Affairs Power under the Constitution and are linked to the *Convention Concerning Termination of Employment at the Initiative of the Employer*, which is set out in Schedule 10 of the Act. Clause 5 of Article 2 of the Convention enables laws to be created providing special arrangements for small businesses. Accordingly, it would appear to be possible to continue with the existing reliance on the External Affairs Power and legislate to create a redundancy pay exemption covering 100 per cent of small businesses. Alternatively, if the Government is not prepared to use the External Affairs Power, as set out in section 10.3 of this submission redundancy pay for small

businesses should be removed as an allowable award matter and the Corporations Power should be used to create a redundancy pay exemption for all small businesses which are Corporations.

Unpaid parental leave

Division 5 of Part VIA and Schedule 14 of the *Workplace Relations Act* provide parental leave entitlements which largely mirror the standard Federal award provisions. The External Affairs Power has been used to underpin the parental leave provisions in the Act.

Given that the minimum condition of parental leave is comprehensively dealt with in the Act, parental leave should be removed as an allowable award matter. There would also be benefit in amending s.170KA(4) of the Act to provide that the Federal provisions override any parental leave provisions in State awards and laws.

Long service leave

A great deal of inconsistency exists regarding long service leave provisions in various States. Also, despite the questionable relevance of long service leave in the twenty first century and the fact that no other country in the world provides a similar benefit, various State Governments have recently decided to increase long service leave entitlements. The Queensland legislation was altered in relatively recent times and the Victorian Government has just announced its intention to increase entitlements in Victoria.

The Federal Government should use the Corporations power to legislate to create long service leave provisions for all Corporations. The provisions should be consistent with those contained within the Federal long service leave awards which operate in the metals, graphic arts, vehicle and food industries.

The Federal award long service leave provisions are appropriately adopted within a Federal long service leave law because:

- The Federal long service leave standard already applies to a large number of employees in each State;
- The federal standard is similar to the current Victorian and Western Australian standards;
- The federal long service leave standard has now been linked to the redundancy provisions in federal awards as a result of the *Redundancy Test Case* decision;
- The adoption of the Federal award standard within Federal legislation would not increase employment costs, whereas the adoption of any of the State or Territory long service leave standards (other than the current Victorian or Western Australian standards) would increase employment costs and decrease the competitiveness of Australian industry.

If the Federal Government accepts Ai Group's proposal, as described above, and legislates to apply the Federal award long service leave standard to all Corporations it will no longer be necessary for long service leave to remain an allowable award matter. If, however, the Government is not prepared to legislate for long service leave, Ai Group strongly opposes the deletion of long service leave as an allowable matter.

Making long service leave non-allowable in federal awards would do nothing to achieve national consistency but rather would result in tens of thousands of employers (eg. those in the metals, graphic arts, vehicle and food industries) losing the benefit of nationally consistent long service leave provisions. Such employers would be forced to apply provisions which differ markedly in each State.

Also, there would be significant additional costs for businesses because more generous State standards apply in most States. There would also be significant additional compliance costs due to the added complexity which would be imposed on businesses which operate across more than one State.

It should be noted that the majority of respondents to the federal long service leave awards are small businesses. There are many thousands of these businesses. Imposing the State and Territory long service leave standards upon such businesses

would significantly increase their employment costs. (For example, in South Australia the long service leave accrual rate is 50 per cent higher under the State standard than the Federal standard and the pro rata entitlement applies three years earlier. Under the NSW standard, the pro rata entitlement applies five years earlier than under the Federal award standard).

Sex, Race, Disability and Age Discrimination

At the present time, the structure of Australia's sex, race, disability and age discrimination laws promote "forum shopping" by employees, because these forms of discrimination are addressed in Federal laws as well as in EEO legislation in every State and Territory. The Federal sex, age, race and disability discrimination laws should be amended to exclude the operation of State sex, race, disability and age discrimination laws, given that the Federal laws adequately deal with these forms of discrimination. Given that the Federal laws primarily rely on the External Affairs Power (including the recently enacted *Age Discrimination Act*), Ai Group can see no reason why the proposed amendments cannot be made to the Federal laws.

4.3 Minimum conditions set by State legislation

Ai Group proposes that the following minimum conditions be set via State legislation:

- Occupational Health and Safety (OHS);
- EEO (except sex, race, disability and age discrimination which should be covered exclusively by Federal legislation);
- Jury service;
- Public holidays.

All of the above areas are comprehensively addressed within existing State legislation.

It is important that all Governments work to achieve greater harmony between OHS laws. In this regard, the Australian Safety and Compensation Council (ASCC) has a very important role to play. Ai Group has expressed a strong interest to the Federal

Government in becoming a member of the ASCC.

Jury service and public holiday provisions should be removed as allowable award matters, with the exception of provisions dealing with payment for work on public holidays as set out in section 4.4 below.

4.4 Minimum conditions set by the AIRC

Ai Group supports a substantial part of the safety net continuing to be maintained by the AIRC, within an appropriate framework set by the *Workplace Relations Act*. The Tribunal approach assists in ensuring a “fair go all round” and is likely to result in more consistency over time.

Allowable award matters

Ai Group proposes that the following remain allowable award matters:

- Classifications and rates of pay for adults, juniors, trainees, apprentices and persons with disabilities;
- Hours of work and meal breaks;
- Annual leave;
- Sick, carer’s and bereavement leave;
- Penalty rates and loadings for overtime, shift, weekend and public holiday work (but not for employees performing work at a higher level than AQF 4, eg. C7 in the *Metal, Engineering and Associated Industries Award*³);
- Casual loading;
- Redundancy pay (except small business);
- Stand-down provisions;
- Avoidance of disputes;
- Superannuation.⁴

³ The reason for this cut-off is explained below in the section relating to award rationalisation

⁴ This should be reviewed after 1 July 2008 when the *Superannuation Laws Amendment (2004 Measures No. 2) Act 2004* takes effect. From that date, companies will no longer be entitled to apply the “earning base” contained within an award for the purposes of calculating superannuation

Ai Group further proposes that the following minimum conditions be removed from awards:

- Type of employment (except casual loading and relevant exemptions) – *to be dealt with at the enterprise level*;
- Allowances - *to be dealt with at the enterprise level*;
- Incentive payments, piece rates and bonuses - *to be dealt with at the enterprise level*;
- Notice of termination – *to be dealt with in Federal legislation*;
- Public holidays – *to be dealt with in State legislation*;
- Jury service – *to be dealt with in State legislation*;
- Redundancy pay for small business.

Award simplification

As set out above, Ai Group supports further award simplification. However, simplifying the existing 2200 Federal awards to remove matters which would no longer be allowable would require the devotion of massive resources by the AIRC, unions and employer associations. For example, Ai Group devoted over 2000 hours of its professional staff's time in the simplification of the *Metal Industry Award*. There were more than 25 negotiating meetings between Ai Group and the metal unions and more than 35 AIRC hearings and conferences. The Metals Award is only one of 250 federal awards which Ai Group has a significant interest in. Ai Group is a party to approximately 100 federal awards.

To avoid a massive wastage of resources and the perpetuation of outdated award structures, further award simplification should be carried out in conjunction with a major award rationalisation exercise.

contributions and will be required to calculate contributions in accordance with the provisions of the *Superannuation Guarantee Legislation*.

Award rationalisation

The idea that we need to maintain 2200 federal awards to preserve a fair safety net is nonsense. While award simplification has been useful in updating the content of existing awards, little had been done to rationalise the coverage of different awards. The coverage of a high proportion of industry awards still reflect the eligibility rules of former unions which had long since amalgamated into larger organisations.

In the 2001 and 2002 *Safety Net Review Cases*, Ai Group urged the Commission to convene a Conference of the major parties to explore relevant issues relating to award rationalisation and endeavour to achieve consensus on the way forward.

In its 2001 *Safety Net Review Decision*, the Commission said:⁵

“[157] We accept that this issue is important. However we are not persuaded that now is the time for a conference. Many of the parties to awards are currently required to commit a significant amount of time to the simplification of awards which is a process required by the WROLA Act. This process should continue to be given priority. We note that simplification has already led to significant rationalisation of award coverage in a number of areas. We encourage award parties to continue to consider rationalisation of award structures either as part of award simplification or independently. The desirability of a conference subsequently to discuss the rationalisation of awards is a matter which may be raised again at an appropriate time.”

The following year, in its 2002 *Safety Net Review Decision*, the Commission said:⁶

“[224] AiG made submissions concerning what it described as "award structures". It submitted that there was merit in considering having one award for each major industry sector or, as an interim step, combining awards within major segments of each industry. It proposed that the Commission should convene a conference to explore relevant issues and to endeavour to achieve

⁵ *Safety Net Review – Wages – May 2001* (2001) 104 IR 314 at 350

⁶ *Safety Net Review – Wages – May 2002* (2002) 112 IR 411 at 469

consensus amongst the numerous parties who would be involved in the process.

[225] AiG made a submission in the Safety Net Review case last year requesting that a conference be held. The Commission referred to this in its May 2001 decision. Like that Full Bench we accept that this issue is important. We have given consideration to the most appropriate way in which it should be progressed but are not persuaded that a conference without any concrete proposals will be useful. If an application is made on behalf of an employer or group of employers it will provide an appropriate factual framework in which to consider each of the issues that will undoubtedly then arise. These can then be dealt with in the first instance by conciliation.”

Ai Group is concerned that if the problem of inappropriate award structures is left to the Commission or to the parties to awards to address within the existing legislative framework, the problem may never be addressed.

Strong legislative direction needs to be given to the AIRC requiring the Commission to undertake a major award rationalisation exercise, as set out below:

- The Act should set out a relatively small number of major industry sectors for which awards would be retained.
- The 18 industry sectors recognised within the Act for Victoria (which are based on the ANZSIC Codes) should be used as a starting point but there may need to be a small number of additional industries recognised. That is, Ai Group proposes that the existing 1000 or so industry / Multi-employer awards be replaced by approximately 20 new awards.
- The Act should give the new industry awards a contemporary name to highlight the break from the past, eg. Australian Industry Awards.
- The Act should define the outer boundaries of each award (in a similar way that the BCII Bill defines the scope of the construction industry). If the

determination of the scope of each of the new industry awards is left exclusively to the AIRC, the vested interests of different industrial parties may result in the award rationalisation exercise becoming extremely complex and time consuming. Setting out the outer boundaries of each industry award within the legislation, will assist in freeing up the AIRC to concentrate on determining the content of award clauses dealing with minimum conditions.

- The Act should set out a timeframe for the completion of the award rationalisation exercise and provide that existing industry and multi-employer awards are no longer enforceable after that date.
- The objects of the Act should be varied to make it clear that the provisions of the new industry awards need to be flexible and have penalty rates and other provisions which are set at a level which recognises the need for companies to be globally competitive.
- The *Contract Call Centre Industry Award 2003*, which largely mirrors the *Telecommunications Services Industry Award 2002*, is a useful model for structuring a genuine industry award applicable to a large number of employees of different types in an industry. These two awards have flexible provisions and penalty rates which are set at a level which recognises the need for companies in these sectors to be globally competitive. A Full Bench of the AIRC, which included President Giudice, adopted the hours of work and penalty provisions of the *Telecommunications Service Industry Award 2002* in an arbitrated decision in the lengthy *Global Telesales Case*⁷.
- Similar to the provisions of the *Contract Call Centre Industry Award 2003* and the *Telecommunications Services Industry Award 2002* (which were achieved by consent between Ai Group and various unions), penalty rates and loadings for overtime, shift, weekend and public holiday work should not apply to employees performing work at a higher level than AQF 4 or equivalent.

⁷ PR927484 and PR931316

Many companies with their own enterprise awards strongly support the maintenance of such awards. Therefore, the flexibility for companies to retain **existing** enterprise awards should be retained.

Proposed approach to drafting the Act to reflect Ai Group’s award rationalisation and simplification proposals

In effect, Ai Group is proposing that the outer boundaries of the Commission’s award-making powers be set in three directions:

- Allowable industry awards (ie. the 20 or so proposed awards);
- Allowable boundaries for industry awards;
- Allowable award matters.

Within each of the above areas, the AIRC would need to be satisfied that jurisdiction existed to make an award in the terms sought by an applicant (eg. that there was ambit) and also that there was merit in making such an award.

To give effect to Ai Group’s award rationalisation and simplification proposals, the *Workplace Relations Act* could be redrafted to add new subsections (3) and (4) after s.89A(2) – Allowable award matters,⁸ as follows:

“89A(3) Allowable Australian Industry Awards *The Commission’s power to make an award dealing with the matters covered by subsection (2) – allowable award matters, is limited to making one award for each of the following industries, to be known as Australian Industry Awards:*

- (a) *Agricultural, Forestry and Fishing*
- (b) *Mining*
- (c) *Manufacturing*
- (d) *Electricity, Gas and Water Supply*
- (e) *Construction*
- (f) *Wholesale Trade*

⁸ With consequent renumber of the existing provisions

- (g) *Retail Trade*
- (h) *Accommodation, Cafes and Restaurants*
- (i) *Transport and Storage*
- (j) *Communication Services*
- (k) *Finance and Insurance*
- (l) *Property and Business Services*
- (m) *Government Administration*
- (n) *Education Services*
- (o) *Health and Community Services*
- (p) *Cultural and Recreational Services*
- (q) *Personal and Other Services*
- (r) *Any other industry identified in the Regulations for the purposes of s.89A(3).*

89A(4) Allowable boundaries for Australian Industry Awards

The Commission's power to make an Australian Industry Award does not include the power to make or vary an award to extend the scope of the award beyond the following boundaries:

- (a) *Agricultural, Forestry and Fishing*

(insert definition for this industry)

- (b) *Mining*

(insert definition for this industry)

- (c) *etc".*

4.5 Stability of the safety net of minimum conditions

Over recent years there has been a concerted attempt by unions to extend the reach of the award system through the creation of new award test case standards. For example, there have been union test case applications pursued to impose stringent “one size fits all” regulations on working hours; to extend redundancy provisions; to entrench a selective suite of entitlements in the name of work/family balance and to constrain the employment of workers on a casual basis.

The shift to an award system which operates as a safety net should have resulted in there being far fewer test cases and other applications to vary awards and far less likelihood of the onus of proof being satisfied when applications are made. This occurred for a few years after the award changes were introduced in 1996, but in recent times the unions seem to have realised that the allowable matters in awards cover all of the significant terms and conditions of employment and that the AIRC is prepared to entertain a wide range of applications to vary awards.

The *Workplace Relations Act* needs to be amended to ensure that award variations can only occur in exceptional circumstances (other than minimum wage adjustments) where there are powerful economic reasons for a variation, or social reasons that outweigh the economic and social costs.

5.0 An appropriate mechanism to set minimum wages

The current system of adjusting minimum wages is not working effectively. The *Safety Net Review* cases are consistently resulting in wage adjustments far in excess of both inflation and general productivity improvements. In recent years, safety net adjustments have even exceeded average enterprise agreement outcomes.

Setting the minimum level of wages for the low paid is fraught with the potential for unintended consequences. If the level of adjustment to minimum wages is not appropriate, the intended beneficiaries may be left worst off in a more fragile employment environment and business could be burdened with higher costs at a time when they need to be more competitive than ever.

There is no doubt that, on average, low paid workers are far more susceptible to periods of unemployment and underemployment than higher paid workers. Low paid workers are often employed as casuals or part-timers and high turnover abounds. Low paid workers frequently and involuntarily move between low wage jobs and periods of unemployment.

It also needs to be recognised that the benefits which flow to the low paid from *Safety Net Review Cases* are not what they first seem. By the time that low paid employees pay tax on the wage increase awarded and have their family assistance benefits adjusted downwards, the benefit is substantially reduced. At the same time, the cost to employers is much higher than the increase awarded, once on-costs such as superannuation, workers' compensation and payroll tax are taken into account.

It is essential that any decision to increase minimum wages only be made after a rigorous economic analysis. The annual *Safety Net Review Cases* are not the most appropriate mechanism for such analysis to be carried out, for the following reasons:

- The adversarial nature of the proceedings, with ambit claims, and arguments which distort the true economic picture, is not conducive to arriving at a sound economic decision;
- Few, if any, Members of the Commission who hear the case have economic qualifications;
- Few of the advocates involved in the case have economic qualifications or expertise.

Given the economic challenges facing Australia over the years ahead, Ai Group believes that a more appropriate system of determining adjustments to minimum wages needs to be implemented – one that will ensure a greater degree of economic analysis and rigour.

The elements of the system proposed by Ai Group are as follows:

- A UK-style Minimum Wages Commission (MWC) should be established. The MWC should:
 - Be chaired by an Economist or industry expert;
 - Comprise a multi-discipline panel of experts;
 - Contain a Reserve Bank representative;
 - Conduct its own research as well as hearing from relevant parties.
- The MWC should make recommendations to the AIRC on adjustments to minimum award wages.
- The *Workplace Relations Act* should be amended to require the AIRC to give great weight to recommendations of the MWC in adjusting minimum award wages.
- The Act should prevent the AIRC imposing higher minimum wage increases than that recommended by the MWC.

6.0 An independent tribunal with roles and powers appropriate for contemporary workplaces

The AIRC has served Australia well over time and it is essential that it continue to do so in the future. The Commission has come to be part of the Australian social fabric and it imparts a particular flavour of fairness and a widely-held perception of fairness. This does not mean that the AIRC should not change to fit the needs of the reshaped workplace relations system.

The following changes to the AIRC's role, powers and structure should occur:

- The Commission should be renamed the Australian Workplace Relations Commission;
- There should be a significant modification in the Commission's powers to make and vary awards, as set out in Chapter 4 of this submission;
- The Commission's role in adjusting minimum wages should be altered, as set out in Chapter 5;
- The Commission should have increased powers to deal with damaging industrial action and to oversee secret ballots to authorise the taking of industrial action, as set out in Chapter 7;
- Improved training and development programs should be implemented for Members of the Commission; and
- A mediation service should be established within the Commission.

- The Commission should only have the power to arbitrate to settle disputes concerning the application of an enterprise agreement, if expressly given such power under the avoidance of disputes procedure in the enterprise agreement, and appeal rights should apply. In two relatively recent Full Bench decisions, the AIRC held that unless a certified agreement expressly or impliedly limits the Commission's powers to settle disputes which arise, then the Commission will have broad powers to arbitrate when disputes arise (*Qantas Flight Catering Ltd v ASU*, PR939695, 23 October 2003 and *Telstra Corporation v CEPU*, PR940569, 18 November 2003).

7.0 Breathing new life into Australia's enterprise agreement making system

7.1 Background

Under the *Workplace Relations Act*, reaching agreement at the enterprise level is the primary means of setting wages and conditions, underpinned by a safety net of minimum wages and conditions. This approach needs to be preserved and built upon.

Enterprise bargaining has been extremely important for Australian companies. The enterprise focus has assisted companies to transform and effectively compete in global markets. The overall outcome has been greater efficiency, better workplace relationships and improved productivity and performance. Undoubtedly enterprise bargaining has contributed to the sustained period of productivity growth which has been a feature of the Australian economy over recent years.

For employees, enterprise bargaining 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. The system was introduced more than a decade ago and most employers with enterprise agreements have now participated in five or more rounds of bargaining.

Many employers are currently dissatisfied with the enterprise bargaining system due to the disruption which it periodically causes to their normally harmonious relations with employees. This view is particularly evident in the manufacturing sector where, during the past five years, employers have been subjected to two disruptive union pattern bargaining campaigns.

Also, many employers have stopped using the enterprise bargaining process as a tool to drive workplace change, for three prime reasons:

- Strong union opposition to any new measures to improve productivity being incorporated within enterprise agreements;
- An apparent perception that the scope for productivity-related bargaining within their enterprise has been exhausted; and
- A view that measures to improve productivity and efficiency are best introduced as part of the process of managing a business, rather than negotiated with unions.

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 the employers concerned.

The solution is not to abandon the enterprise bargaining system but rather to address the problems which are currently occurring and implement some legislative initiatives to re-invigorate the bargaining process. It is vital that wages and conditions be determined as far as possible at the enterprise level, upon a foundation of fair minimum standards.

The legislative reforms set out below are designed to breath new life into Australia's enterprise bargaining system. Some, but not all, of the legislative reform proposals are dealt with in the *Workplace Relations Amendment (Better Bargaining) Bill 2003*, the *Workplace Relations Amendment (Simplifying Agreement-Making) Bill 2004*, the *Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002*, the *Building and Construction Industry Improvement Bill 2003* and the original version of the *Workplace Relations Amendment (Genuine Bargaining) Bill 2002*.

7.2 Preserving various existing key elements of Australia's enterprise bargaining system

The existing broad structure of Australia's enterprise bargaining laws remains appropriate, including the following key elements:

- Agreement making options should continue to include: formal and informal agreements, agreements with employees collectively or individually, and agreements with unions or directly with employees;
- Certified agreements should be subject to a "no disadvantage test" which should be administered by the AIRC, as part of its role in certifying agreements;
- The AIRC should retain its existing powers to intervene in enterprise bargaining disputes and should have some new powers, as set out in the sections which follow;
- Australian Workplace Agreements (AWAs) should be subject to a "no disadvantage test" which should be administered by the Office of the Employment Advocate (OEA), as part of its role in approving AWAs;
- Protected action should be available during the negotiation of certified agreements, subject to various procedural and other requirements;
- The existing principle that the AIRC has no power to force a party to bargain should remain⁹.

7.3 The removal of barriers preventing employers and employees choosing the form of agreement which they prefer

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.

⁹ 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.

The provisions of the Act discussed below - ss.170VQ(6)(a) and 170LY(1)(b) - operate as barriers which can prevent employers and employees choosing the form of agreement which they prefer. Hence, these provisions should be repealed.

Removal of restrictions preventing employers offering AWAs to employees covered under a certified agreement

S.170VQ(6)(a) of the Act provides that AWAs cannot prevail over certified agreements which are already in operation and have not yet reached their nominal expiry date, unless the certified agreement contains a provision which expressly allows AWAs to be reached during the life of the certified agreement. Unions generally vigorously oppose the inclusion of an “AWA enabling clause” in certified agreements and, therefore, most companies are unable to enter into AWAs with any of the employees covered by a certified agreement regardless of the wishes of individual employees (eg. an individual employee may wish to reach agreement with his or her employer on more flexible hours of work or leave arrangements to enable the employee to better balance work and family responsibilities).

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. Accordingly, the restriction in s.170VQ(6)(a) of the Act should be removed.

In addition, to prevent unions frustrating the intent of the above legislative change, the Act should be varied to deem certified agreement provisions that prevent an employer entering into an AWA with an employee to be an “objectionable provision” in a similar manner to the existing objectionable provisions set out in s.298Z(5).¹⁰ This issue is discussed in more detail in section 7.12 of this submission.

¹⁰ Such restrictive provisions are vigorously pursued by unions in the manufacturing and construction sectors, particularly in Victoria, and as a result are relatively common in agreements which operate in these industries.

Removal of restrictions preventing employers entering into a new certified agreement to override an earlier certified agreement

A further restriction on agreement making is contained within s.170LY(1)(b) of the Act. This section prevents parties entering into a new certified agreement to override an existing certified agreement which has not reached its nominal expiry date.

S.170LY(1)(b) causes particular hardship for employers involved in the transmission of a business. The incoming employer is prevented from entering into a new certified agreement to override the certified agreement applicable when the business was being operated by the outgoing employer. When a business (or part of it) transmits from one employer to another, the incoming employer needs to have the option of reaching agreement with the employees engaged within the transmitted business (or part) on appropriate conditions of employment and work arrangements, rather than being locked-in to the arrangements which applied prior to the transmission¹¹. S.170LY(1)(b) should be repealed.

7.4 The removal of unreasonable intervention rights

Section 43(2)(a) of the Act gives a union the right to intervene and be heard when an application for a s.170LK certified agreement has been made, in circumstances where an employee covered by the agreement has requested that the union represent him or her. This is appropriate. However, s.170M(3) is not appropriate and should be repealed. A union should not have the right to be bound by an agreement reached directly between an employer and its employees, simply because, say, one employee requests that the union be bound. Some s.170LK agreements cover thousands of employees in workplaces where there is a very low incidence of union membership. Where a union becomes bound by a s.170LK agreement, the process of re-negotiating, varying, extending or terminating the agreement becomes more complex and difficult.

¹¹ The *Workplace Relations Amendment (Transmission of Business) Act 2004* enables the incoming employer to seek an order from the AIRC that the old certified agreement/s no longer apply, but such orders may or may not be granted and are subject to relatively rigid conditions. This issue is dealt with in more detail in section 7.8 of this submission.

In addition, there is merit in the idea of giving s.170LK agreements a specific name to reinforce their importance within the workplace relations system.

7.5 Providing more flexibility regarding the term of certified agreements

The existing three year maximum term for certified agreements is overly restrictive and operates against the interests of both employers and employees in some circumstances. The maximum term should be five years.

In the construction industry four or five year construction periods for major projects are not uncommon. It is difficult to maintain a stable workplace relations environment on a project 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 stage during construction.

Amending the Act to enable certified agreements to continue for up to five years is consistent with international workplace relations developments. Five year terms are very common for workplace agreements in the USA and are widely supported by both employer and union parties in that country due to the greater certainty which they provide.

7.6 Improving procedures for agreement making

The procedures for the certification of agreements and the making of Australian Workplace Agreements (AWAs) should be simplified as set out below:

- In most circumstances public hearings should not be required for the certification (or the variation, extension or termination) of agreements. Hearings should only be required where the employer or an employee bound by the agreement has requested one and the Commission is satisfied that there are reasonable grounds for the request;

- Where a certified agreement (including ss.170LK, 170LJ, 170LL and 170LS agreements) undergoes minor changes during the 14 day agreement consideration period, the AIRC should have the discretion to waive the requirement to recommence the 14 day period;
- The filing and approval processes for AWAs should be simplified as follows:
 - AWAs should take effect from the day of signing, unless the parties specify a later date;
 - Employees should only be able to sign AWAs after the employer has given the employee an information statement (issued by the OEA) and explained the effect of the AWA;
 - The employee should be able to withdraw consent to an AWA within a cooling-off period (5 days from signing for new employees and 14 days for existing employees);
 - The employer should be required to make application to the OEA for the approval of an AWA within 21 days of the date when the AWA commences operation.

7.7 An appropriate “no disadvantage test”

At the present time, as set out in s.170XA of the Act, the “no disadvantage test” involves a comparison between the terms of the relevant certified agreement or AWA and the provisions of:

- Relevant awards (or designated awards);
- Relevant State laws; and
- Relevant Federal laws.

To improve flexibility regarding agreement-making, it would be beneficial to simplify the “no disadvantage test”. The merits of the following two options should be explored.

Option 1 – A continuation of the existing “no disadvantage test”

If the existing “no disadvantage test” is continued, the rationalisation and simplification of the safety net of minimum conditions, as proposed in Chapter 4, would automatically result in a simpler “no disadvantage test”. This is because there would be fewer relevant awards and the content of the remaining awards would be simplified.

Option 2 – A “no disadvantage test” which involved a comparison against a set of legislated minimum conditions

An alternative simplified “no disadvantage test” could be achieved by requiring that the terms of the relevant certified agreement or AWA be compared against the provisions of:

- A set of legislated minimum conditions;
- Relevant State laws; and
- Relevant Federal laws.

The minimum conditions in Schedule 1A of the Act which are presently only applicable in Victoria, are worthy of consideration as the legislated set of minimum conditions referred to above.

7.8 Improving the operation of the “no disadvantage test”

Legislative amendments are required to address two difficulties which are arising regarding the “no disadvantage test”.

Firstly, some members of the AIRC (albeit a minority) are currently refusing to certify agreements unless the agreement contains the actual rates of pay of the employees covered by the agreement. Their rationale for adopting this approach appears to be a belief that the certified agreement itself should contain all of the information necessary to ascertain whether the agreement passes the “no disadvantage test”. This approach is unfair on those employers who pay individual employees different

wage rates on the basis of merit and those who wish to keep their wage rates confidential from competitors. It should be sufficient that the statutory declarations which accompany the application for certification specify that the employer is paying the employees covered by the agreement a wage rate which equals or exceeds the relevant award rate or, if a lower wage rate is paid, specifies the lower rate and why the agreement should be regarded as meeting the “no disadvantage test”.

Secondly, an amendment made to the *Workplace Relations Amendment (Transmission of Business) Bill* prior to its passage through Parliament, imposed a “no disadvantage test” upon orders to prevent certified agreements becoming binding upon incoming employers when a business (or part of one) is transmitted. This is unduly restrictive, particularly in circumstances where, say, a business is transmitted from the public to the private sector. The incoming employer must be able to operate the transmitted business with conditions of employment which are appropriate and enable competitiveness in the relevant market. The AIRC should be able to weigh up all of the circumstances surrounding an application for a s.170MBA order when deciding whether or not to grant the order.

7.9 The relationship between enterprise agreements and Federal and State laws

S.170LZ(4) and 170VR(4) of the Act provide that certified agreements and AWAs respectively can only displace a condition of employment that is specified in a Commonwealth law if the condition of employment is identified in the Regulations. Depending upon which minimum conditions the Federal Government decides to legislate for, ss.170LK(4) and 170VR(4) may need to be amended, or a Regulation made, to enable the minimum conditions in the legislation to be varied via a certified agreement or an AWA. For example, if the Government decides to legislate for long service leave (as proposed by Ai Group in Chapter 4 of this submission), it is appropriate that certified agreements and AWAs be permitted to override such legislative provision to enable cashing-out of long service leave by agreement, if this option is not provided for in the legislation.

7.10 Measures to address pattern bargaining

Several unions in Australia (notably the CFMEU, AMWU, ETU and TWU) pursue pattern bargaining because they believe it gives them the best of both worlds - the increased union power and saving of resources which comes from industry bargaining and access to protected industrial action which was introduced in Australia exclusively for enterprise bargaining.

In recent years, unions have pursued highly damaging pattern bargaining campaigns in the construction and manufacturing industries. Three quarters of all certified agreements in Australia operate in these industries¹².

In the construction industry over the past 10 years, union pattern bargaining campaigns have led to the implementation of very excessive industry-wide improvements in wages and working conditions and overly restrictive work practices, at great economic cost.

In the manufacturing industry, the unions pursued pattern bargaining campaigns in 2000 and 2003 (which they called *Campaign 2000* and *Campaign 2003*). These campaigns caused significant disruption to companies but ultimately failed to entrench pattern bargaining in the industry. However, the unions clearly intend to make another concerted attempt in early 2006 when more than 500 manufacturing agreements expire at a common time.

Union pattern bargaining campaigns ignore the needs of employers and employees at the enterprise and impose centrally determined outcomes.

The unions' pattern bargaining strategy involves the following steps:

1. Force companies to have a common expiry date for their agreements;
2. Create a template agreement, ideally with a compliant employer association and, if not, with a group of companies in the industry;

¹² In 2003, 55 per cent of all certified agreements operated in the construction industry and 19 per cent operated in the manufacturing industry (*Agreement making in Australia under the Workplace Relations Act – 2002 and 2003*, p.20)

3. Establish bargaining periods;
4. Use protected action to apply pressure;
5. Develop a pattern of outcomes;
6. Let market forces work from there.

Ai Group has devoted vast resources to prevent pattern bargaining becoming established in the manufacturing industry, but legislative change is needed to give employers more protection.

The right to take protected action in pursuit of pattern bargaining needs to be stamped out for the following reasons:

1. Protected action was introduced into the Act exclusively for bargaining at the enterprise level;
2. Pattern bargaining is inconsistent with the objects of the Act which provide that, as far as possible, wages and conditions of employment should be determined at the enterprise level;
3. It significantly increases union power;
4. It significantly reduces the bargaining power of employers during enterprise agreement negotiations;
5. It denies employers the capacity to use the enterprise bargaining process to increase productivity, efficiency and flexibility;
6. It prevents companies negotiating outcomes which are tailored to suit the needs of their enterprise;
7. It assumes that all businesses and their employees operate in the same manner and have the same objectives;
8. It denies employees the opportunity to reach agreement with their employer regarding their own employment conditions;
9. It typically leads to excessive improvements in wages and conditions of employment;
10. It typically leads to a significant industry-wide industrial confrontation at the time when the pattern agreement expires;
11. It assumes that third parties understand better than the employer and employees what their needs are; and

12. It inhibits the development of mature workplace relations between employers and employees at the enterprise level.

During union pattern bargaining campaigns, companies have often been faced with industry-wide strikes which are purported to be organised in pursuit of enterprise bargaining. Unions such as the Australian Manufacturing Workers Union (AMWU) and the Construction, Forestry, Mining and Energy Union (CFMEU) regularly misuse the protected action provisions of the Act in this way. Once common expiry dates have been established across an industry, such expiry dates are used to facilitate the organisation of industry-wide strikes.

Typically, 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.

In 2003, the AMWU organised an industry-wide stoppage in Victoria on 12 June, involving some 700 employers who received s.170MO notices of protected industrial action 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. Ai Group and individual employers had only three days notice of the stoppage so there was insufficient time to gather detailed evidence relating to the circumstances of the bargaining taking place at each of the hundreds of companies involved, in time for a hearing which necessarily took place prior to the date of the stoppage.

It was clear 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 between the union and the employees of the company. The first time that many employees heard about the stoppage was when their employer queried whether they had decided to go on strike.

In a decision of 13 June 2003¹³ (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

¹³ PR932959

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* decision¹⁴, 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* as it is currently drafted. This deficiency in the legislation needs to be addressed without delay.

The following legislative amendments are needed to address the above problems:

(a) “Pattern bargaining” should be defined in the Act

The *Workplace Relations Amendment Bill 2000* and the *Building and Construction Industry Improvement Bill* both attempt to define “pattern bargaining” but the definitions in both Bills are problematic¹⁵. Ai Group prefers the following definition of “pattern bargaining”:

“Pattern bargaining’ means a course of conduct by a negotiating party during the negotiation of agreements under Part VIB of the Workplace Relations Act, that:

- *Involves seeking common wages or other conditions of employment; and*
- *Extends beyond a single business.”*

¹⁴ *Australian Industry Group v AFMEPKIU*, Print T1982

¹⁵ Ai Group’s concerns about the definition contained within the BCII Bill are set out in Chapter 12 of this submission.

(b) Industrial action taken in pursuit of pattern bargaining should be outlawed

Protected industrial action in pursuit of pattern bargaining should be outlawed through the following legislative amendments, which are based on proposals contained within the *Workplace Relations Amendment Bill 2000*:

- Insert a new subsection 170MP(1A), as follows:

“(1A) For the purposes of subsection (1), an organisation of employees is taken to not have genuinely tried to reach an agreement with the employer if it was engaged in pattern bargaining in respect of the proposed agreement”.

- Insert a new s.170MWB - Commission must Terminate Bargaining Period if Organisation of Employees Engages in Pattern Bargaining – worded as set out in the *Workplace Relations Amendment Bill 2000*.

(c) S.170MM should be amended to provide that industrial action taken at a common time across more than one enterprise in pursuit of common claims which form part of a common union campaign, is not protected

This legislative reform proposal is dealt with in the *Workplace Relations Amendment (Better Bargaining) Bill*. Ai Group, however, is concerned about the current wording of the Bill.

Relevant Courts could interpret the phrases “in concert” and “engaged in other than solely by”, in the Bill as currently drafted, too narrowly¹⁶. It may be very difficult to establish that the employees in two or more companies have acted in concert, if it is necessary to demonstrate that communication has taken place between the employees in the different companies.

¹⁶ For example, see *Tillman Butcheries Pty Ltd v AMIEU* (1979) 42 FLR331 per Bowen CJ at p.373, where it was held that acting “in concert” involves “..knowing conduct, the result of communication between the parties and not simply simultaneous actions occurring spontaneously”.

It is important that industrial action taken at a common time across more than one enterprise in pursuit of common claims which form part of a common union campaign is not protected. This needs to be made very clear in the drafting of the Bill and in the Explanatory Memorandum.

(d) S.170ML should be amended to ensure that protected action is not available where it is pursued against two or more employers which are related corporations

During the manufacturing unions' *Campaign 2003* a tactic, which is inconsistent with the objects of the *Workplace Relations Act* and damaging to the community, was pursued by the AMWU. The union sent a letter to the head offices of a large number of company groups seeking that the group of related companies enter into a single agreement with the AMWU over the following claims: protection of entitlements via the unions' National Entitlements Security Trust (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.

In March 2003, a Full Bench of the AIRC upheld the right of unions to target groups of related companies with industrial action in pursuit of a single certified agreement across the whole company group, regardless of how diverse the operations within the group were or whether or not the various companies in the group already had separate enterprise agreements¹⁷. This decision demonstrates the need for the Act to be amended to reinforce the important principle that industrial action should only be available for the pursuit of enterprise bargaining – not where action is pursued across more than one enterprise, including enterprises which are related corporations.

¹⁷ *APN Newspapers Case*, PR928033,

The legislative amendments set out in the *Workplace Relations Amendment (Better Bargaining) Bill* address this issue in an appropriate way.

7.11 Measures to address inappropriate coercion and hidden interests during bargaining

The Royal Commission into the Building and Construction Industry uncovered the fact that the Electrical Trades Union (ETU) in Victoria is receiving huge sums (understood to be approximately \$1,000,000 per annum) in commission from an income protection insurance provider. This income is derived because the ETU has forced a very large number of employers in the construction, manufacturing and electrical contracting industries to provide income protection insurance to their employees via the provider which the union has entered into a commercial arrangement with.

It is highly inappropriate that:

- Employers faced with claims to pay income protection insurance to employees were not aware that a large percentage of the premium paid was being redirected to the ETU through the payment of very substantial commissions; and
- The employees being urged by the ETU to pursue income protection insurance during bargaining (with threats of or actual industrial action) were unaware that a large percentage of the premium which would be paid by their employer would not be used to fund income protection insurance benefits for them, but rather would be paid to a third party.

Were it not for the Royal Commission, the huge sums being transferred to the ETU, may never have been uncovered. There are several other unions which vigorously pursue income protection insurance claims and endeavour to force employers to pay for the insurance through the union's preferred provider. Accordingly, the situation which exists regarding the ETU may not be an isolated occurrence.

To address such inappropriate behaviour, a provision along the lines of the following should be incorporated within the Act, firstly, as a precondition for the taking of industrial action under s.170MP and, secondly, as a ground for suspension or termination of the bargaining period under s.170MW(2) of the Act:

“An organisation of employees is taken to have not “genuinely tried to reach an agreement” with the employer unless it has disclosed 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.

For the purposes of this section, “disclosure” shall include details of:

- *The source of all such commissions and benefits; and*
- *The reason for receipt of all such commissions and benefits.”*

The above approach is consistent with Recommendations 171 and 172 of the Royal Commission into the Building and Construction Industry.

In addition to the above disclosure requirement, the following forms of coercion by unions should be outlawed:

- Coercion to force an employer to pay for insurance in circumstances where the insurance provider pays commission or provides other benefit/s to the union;
- Coercion to force employers to contribute to a particular employee entitlement fund in which the union has an interest or where the fund pays commission or provides other benefit/s to the union;
- Coercion to force an employer to contribute to a particular superannuation fund in which the union has an interest or where the fund pays commission or provides other benefit/s to the union.

The outlawing of the inappropriate coercion described above could be achieved via the inclusion of the following provision in the Act which is broadly based on Recommendation 175 of the Cole Royal Commission (and which should apply across all industries):

“A person shall not, by threat of industrial action, coercion or other form of intimidation, persuade or attempt to persuade an employer to:

- Pay for insurance on behalf of an employee, where that person is paid a commission or provided with a direct or indirect financial benefit relating to the provision of the insurance;*
- Make contributions to a particular superannuation fund or scheme on behalf of an employee, where that person has an interest in the fund or scheme or is provided with a direct or indirect financial benefit relating to contributions to the fund or scheme;*
- Make contributions to a particular employee entitlements fund or scheme on behalf of an employee, where that person has an interest in the fund or scheme or is provided with a direct or indirect financial benefit relating to contributions to the fund or scheme.*

An “employee entitlements fund or scheme” includes but is not limited to funds relating to redundancy, long service leave, annual leave, personal leave or parental leave.”

There should be no exemptions for protected industrial action with regard to the above forms of coercion. However, employers should remain free to agree to pay for insurance or agree to make contributions to a particular superannuation or employee entitlement fund as part of an enterprise bargain.

Given the enormous costs which have been inflicted upon industry by unions which have attempted to force employers to contribute to particular employee entitlement funds which they have established and in which they have a significant interest (eg.

the AMWU's Manusafe / NEST scheme)¹⁸, it is appropriate that such coercion become unlawful.

Trust funds to protect employee entitlements are very costly and they are unnecessary given that the General Employee Entitlement and Redundancy Scheme (GEERS) operates to provide compensation to employees who have lost their entitlements. Now that GEERS has been in operation for a number of years, it is appropriate that the scheme be enshrined within legislation.

7.12 Preventing “objectionable provisions” being included in certified agreements

Under s.298Z(5) of the Act, the following provisions in certified agreements are defined as "objectionable provisions":

- Provisions which require or permit conduct that contravenes the freedom of association provisions of the Act;
- Provisions that require payment of a bargaining services fee.

Objectionable provisions are deemed by the Act to be void and certain parties (eg. the Employment Advocate) can apply to the AIRC to have these provisions removed from certified agreements.

In addition to the above certified agreement provisions, there are a further two provisions which Ai Group submits are highly objectionable and should be added to those listed in s.298Z(5) of the Act:

- Provisions that prevent employers entering into AWAs (as set out in section 7.3 of this submission); and

¹⁸ For example, the Productivity Commission reported that the cost of the Tristar and Walker disputes in 2001 were estimated to have cost up to \$500 million. Both of these disputes stopped the car industry and related to attempts by the AMWU to establish its Manusafe (now renamed NEST) employee entitlement scheme. See *Review of Automotive Assistance*, Inquiry Report, August 2002, p.53.

- Provisions that prohibit the engagement of contractors or labour hire or impose unreasonable restrictions on such engagements (eg. a requirement that the contractor pay “site rates”, or that the contractor have an enterprise agreement with the relevant union, or that the company provide a list of all contractors being used to the union)¹⁹.

Given that the above provisions do not directly relate to freedom of association issues, consideration should be given to relocating the sections of the Act dealing with “objectionable provisions”, out of Part XA - Freedom of Association, and into another appropriate part of the Act.

7.13 Reinforcing the need for parties to “genuinely try to reach agreement” before industrial action is taken

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 the requirement that parties “genuinely try to reach agreement” as a mechanism to outlaw industrial action being taken in pursuit of pattern bargaining²⁰.

¹⁹ In some decisions of the AIRC and Federal Court it has been held that these provisions do not pertain to the employment relationship and, hence, cannot be included in certified agreements (eg. *Schefenacker Vision Systems Australia Pty Ltd AWU / AMWU Certified Agreement 2004* [PR952801] and *Wesfarmers Premier Coal Limited v The Automotive Food Metals Engineering, Printing and Kindred Industries Union* (No 2) [2004] FCA 1737. However, in many other decision of the AIRC it has been held that these provisions do pertain to the employment relationship and can be included in a certified agreement.

²⁰ 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”.

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 agreement between the employer and its employees at the workplace or enterprise level;*
- *Not engaging in “pattern bargaining”²¹;*
- *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.*

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:

²¹ See section 7.10 of this submission for Ai Group’s proposed definition of “pattern bargaining”.

- *Demonstrating a preparedness to negotiate an agreement which takes into account the need for ongoing productivity and efficiency improvements at the relevant enterprise²².*

To deal with the inappropriate union behaviour referred to in section 7.11 above, 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.*

Finally, the following additional indicator would assist in preventing misleading and deceptive conduct being engaged in by a negotiating party during bargaining:

- *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* principle²³ 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.

²² **Note:** 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*".

²³ 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.

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

The Full Federal Court's *Emwest* decision²⁴ 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.

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 Kenny²⁵, her Honour conceded that the interpretation of the Act which she favoured was not the most obvious one.

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 new claims which were not pursued during the original enterprise bargaining negotiations;
- 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 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.

²⁴ *Australian Industry Group v AFMEPKIU*, [2003] FCAFC 183

²⁵ *Emwest Products Pty Ltd v AFMEPKIU* (2002) FCA 61

While the effects of the *Emwest* decision can be overcome by inserting 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.

The *Workplace Relations Amendment (Better Bargaining) Bill* addresses the problems caused by the *Emwest* decision in an appropriate way.

7.15 Cooling-off periods

Where protected industrial action is taken during enterprise agreement negotiations, the Act should enable the Commission to suspend a bargaining period and establish a cooling-off period.

Justice Munro expressed support for cooling-off periods in his *Campaign 2000* decision²⁶ which is recognised in the Act within s.170MW(2). Munro J 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. In that case, however, 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

²⁶ Print T1982

hearings which continued over several weeks. This highlights the need for an effective cooling-off mechanism to be introduced into the Act.

Over recent years, the Government has introduced a number of Bills which contain essentially two different models for cooling-off periods:

Model 1 Under this model, a limit of 14 days would be imposed on protected industrial action at which time a compulsory 21-day cooling off period would apply. Any further protected action would only be permitted with leave of the AIRC. This model was recommended by Commissioner Cole and is set out in the BCII Bill.

Model 2 Under this model, the AIRC would have the power to suspend a bargaining period and establish a cooling-off period after hearing from the parties, if the Commission decided that a cooling-off period would be beneficial. This model is set out in the *Workplace Relations Amendment Bill 2000*, the *Workplace Relations Amendment (Genuine Bargaining) Bill 2002* and the *Workplace Relations Amendment (Better Bargaining) Bill 2003*. There are some minor differences in the proposals set out in these bills but the essential features are similar.

In the Final Report of the Royal Commission into the Building and Construction Industry, Commissioner Cole expressed the view that Model 2 does not sufficiently protect the public interest given the enormous harm that can be caused by industrial action.

Ai Group supports Model 1 being implemented for the building and construction industry but Model 2 applying in other industries, with one modification. The following factor needs to be added to the list of factors which the AIRC would be required to take into account, under Model 2, in deciding whether to suspend the bargaining period.²⁷

²⁷ 170MWB(1)(c) of the *Workplace Relations Amendment (Better Bargaining) Bill*

- “The harm to the enterprise that may be caused if the industrial action continues”.

7.16 Suspension of a bargaining period 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, significant harm should not be able to be inflicted upon third parties, without such parties having access to a mechanism to argue for relief.

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 legislative reform proposals set out in the *Workplace Relations Amendment (Better Bargaining) Bill* would not allow the Commission to intervene in all circumstances where harm is inflicted upon third parties, but rather only 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 deals with industrial action which is threatening to damage the economy.

7.17 Measures to ensure that parties faced with industrial action are given effective notice

At the present time, with three working days notice given in accordance with s.170MO of the Act, protected industrial action is able to be taken indefinitely with virtually no ability for the AIRC to intervene in most circumstances.

As highlighted by the Full Federal Court in the *Dauids Distribution* case,²⁸ s.170MO of the Act is designed to ensure that the party to whom protected industrial action is directed is “able to take appropriate defensive action”. To better balance the interests of all of the negotiating parties and to provide a realistic opportunity for defensive action to be taken the following amendments should be made to s.170MO:

- The three working day notice period should be extended to five working days;
- The notice period required under s.170MO should not be permitted to overlap with the seven day period set out in s.170MK regarding the commencement of a bargaining period²⁹;
- The Act should be varied to require that s.170MO notices clearly specify:
 - The specific date and time when industrial action will commence (and industrial action should only be protected if it actually commences at that specified time);
 - That the use of vague terminology such as “rolling stoppages” does not meet the requirements of s.170MO;
 - The intended duration of the industrial action;
 - The specific nature of the industrial action (eg. a strike, an overtime ban etc).

There is a great deal of inconsistency amongst Federal Court and AIRC decisions regarding the degree of specificity required in s.170MO notices³⁰. The scope for inconsistency would be substantially reduced if the above amendments were made to the Act, which would make it clear that a high degree of specificity is required.

²⁸ *Dauids Distribution Pty Ltd v NUW* [1999] FCA 1108

²⁹ At the present time, unions sometimes serve s.170MO notices within the 7 day period referred to in s.170MK thereby depriving the employer of the full amount of notice which the Act provides for.

³⁰ For example, the following decisions deal with this issue: *Dauids Distribution Pty Ltd v NUW* [1999] FCA 1108, *PWB Anchor Ltd v AFMEPKIU* [2000] FCA 1482, *PWB Anchor Pty Ltd v AFMEPKIU* (No 2) [2000] FCA 1491, *Adelaide Brighton Cement v AWU*, [2002] FCA 601, and *Air International Interior Systems v AFMEPKIU*, 6 September 2004, PR951697.

The decision of SDP Marsh of the AIRC in *Air International Interior Systems v AFMEPKIU*³¹ highlights why the current provisions are open to abuse by unions seeking to use vague terms such as “rolling stoppages” to avoid specifying the intended time when industrial action will commence.

There is also inconsistency amongst AIRC and Federal Court decisions regarding whether or not s.170MO notices are required to be served formally in accordance with AIRC Rule 72 – Service of Documents, or can be served via fax³². This issue needs to be clarified. It is an important issue because at the present time, some unions (eg. the CFMEU and AMWU) are adopting the practice of distributing thousands of identical s.170MO notices at the same time via facsimile during pattern bargaining campaigns.

7.18 Secret ballots to authorise the taking of protected action

There is significant merit in the legislative reform proposal that a secret ballot be held before protected industrial action is taken. Such a proposal is inherently fair and democratic. This proposal is contained within the *Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002*. The key features of the secret ballot scheme are as follows:

- All protected action must be authorised by a secret ballot (unless it is response to a lockout by the employer);
- An organisation of employees may apply to the AIRC for a protected action ballot;
- The AIRC must grant an application for a secret ballot order if, and must not grant an application unless, the applicant has genuinely tried to reach agreement with the employer;

³¹ PR951697, 6 September 2004,

³² SDP Lacy in the *Transfield Worley* case (PR946739) held that s.170MO notices cannot be served via fax. However, Commissioner Harrison in a decision handed down a few days later (PR947808) held that s.170MO notices can be served via fax. More recently, Heerey J of the Federal Court held that s.170MO notices can be faxed (*Bluescope Steel v CEPU* [2005] FCA 3, 7 January 2005).

- If the AIRC grants the application, the AIRC must issue a secret ballot order specifying:
 - The types of employees to be balloted, the voting method and timetable;
 - The name of the person authorised to conduct the ballot;
 - The question/s to be put to employees in the ballot;
 - The nature of the proposed industrial action³³;
 - The voting method (which is required to be a postal ballot unless the AIRC is satisfied that another voting method would be more efficient and expeditious. Note: if the voting method is to be an attendance ballot, the ballot must be conducted during meal times or outside of working hours);
- The ballot paper must be in the prescribed form;
- As soon as practicable after the end of the voting, the authorised ballot agent must, in writing, make a declaration of the results of the ballot and inform the Industrial Registrar and the parties;
- Industrial action is authorised if at least 40 per cent of the employees on the roll voted and at least 50 per cent of the votes validly cast approved the action;
- The authorised ballot agent may be the Australian Electoral Commission or another authorised person;
- The AIRC must not name the applicant as the authorised ballot agent unless the AIRC has named an authorised independent adviser for the ballot;
- The Commonwealth is liable to pay to the authorised ballot agent, 80 per cent of the reasonable ballot cost (as determined by the Industrial Registrar).

³³ The Bill does not set out the degree of specificity required regarding the nature of proposed industrial action. This should be clarified in the Bill because there have been ongoing significant problems regarding this issue as it relates to s.170MO notices. See section 7.17 of this submission.

A requirement that a secret ballot be held before industrial action is taken applies in the UK and the introduction of this requirement has led to positive outcomes as highlighted by Commissioner Cole in the following extract from his Final Report:

“In the United Kingdom, compulsory pre-strike ballots are well established, and were retained in the Labour Government’s Employment Relations Act 1999 (UK). Union leaders within the United Kingdom have acknowledged that requirements for secret ballots for elections and for authorisation of industrial action have assisted in improving democracy within unions. Research commissioned by the Trade Union Congress in 1994 found that:

‘In recent years there have been encouraging internal democratic reforms...which have ensured that [union] leaders have to become more sensitive and directly accountable to their own members, through the introduction of postal ballots for their own elections and before calling of strikes and other forms of industrial disputation.

Despite changes to the industrial legislation in the UK which require that unions meet the full cost of conducting ballots, balloting has become far more widespread in the UK than the law requires. In addition to balloting before industrial action, union positions on proposed settlements and employers’ last offers are often determined through secret ballots.”³⁴

Ai Group supports the secret ballot proposals set out in the *Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002*.

Importantly, the proposed process is to be overseen by the AIRC – that is, unions and employees wishing to take protected industrial action would be required to apply to the Commission for an order which authorises that a secret ballot be held and which specifies how the ballot is to be conducted.

³⁴ Royal Commission into the Building and Construction Sector, Final Report, Volume Five, p.71

8.0 Improved compliance and enforcement

8.1 Background

The reasons why it is essential that workplace relations laws be complied with are obvious. Such reasons are succinctly set out in the following extract from a May 2000 decision of Merkel J of the Federal Court in finding that three officials of the AMWU, the ETU and the Australian Workers Union (AWU) had wilfully breached a Federal Court order, in response to an application pursued by Ai Group:

“Plainly, the protection of legal rights is severely undermined if parties to a dispute act on the basis that they can apply for court orders to protect their rights, but ignore court orders which protect the rights of other parties to the dispute, simply because compliance with such orders is seen to be adverse to their interests or objectives, or that of their members.

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

If the individual respondents believed that the orders of Whitlam J were wrongly made, then it was open to them to appeal, or apply for leave to appeal, against those orders. Instead, they breached them. The fact that the breaches are by union leaders holding important offices in a federation of national trade unions makes them more, rather than less serious...

If such breaches are treated as no more than “technical” breaches, then the carefully prescribed processes provided for under the Act, available to, or to be observed by, unions, employees, employers and employer organisations alike, will quickly erode. Also, if aspects of the statutory scheme or of the orders made by Whitlam J were seen to be contentious, the political and legal processes of our democratic society provide remedies other than those chosen by the individual respondents.”³⁵

The maintenance of a strong and respected Industrial Commission and Court are essential components of Australia’s federal workplace relations system. If parties are permitted to breach AIRC and Federal Court orders, the objects of the Act will not be achieved.

In the sections which follow, a series of legislative reform initiatives are proposed which are designed to improve compliance and enforcement mechanisms.

8.2 The creation of a specific penalty for taking or organising unlawful industrial action

There are penalties in the Act for breaching certified agreements and orders of the AIRC but there is no general penalty for taking unlawful industrial action. The Cole Royal Commission identified this significant deficiency in the Act and recommended that a penalty apply for taking or organising unlawful action.³⁶

Numerous employers have been faced with 24 or 48 hour unlawful stoppages which occur with little or no notice, and inflict damage upon the employer’s operations. In such circumstances there is little that the employer can do to seek redress. There is no utility in making an application for an order to stop or prevent industrial action in circumstances where the industrial action will be over before the AIRC hearing can take place to consider the application. Also, bringing an action in tort in such circumstances is ineffective because if the industrial action stops within the 72 hour

³⁵ *Australian Industry Group v AFMEPKIU* [2000] FCA 629, 12 May 2000, Merkel J, p.18.

³⁶ Recommendation 204 which has been adopted within s.74 of the *Building and Construction Industry Improvement Bill*

period provided for in s.166A, there is no obligation for the Commission to issue a certificate.³⁷

Ai Group proposes that a new penalty be created applicable to those who take or organise unlawful industrial action and that the level of this penalty be \$100,000 (maximum) as recommended by Commissioner Cole for the building and construction industry.

8.3 Time limit for dealing with s.127 orders to stop or prevent industrial action

The original version of the *Workplace Relations Amendment (Improved Remedies for Unprotected Action) Bill* contained a very worthwhile legislative reform proposal that was removed from the Bill before it was passed by Parliament. That is, a time limit for the AIRC to deal with applications for orders under s.127 of the Act.

The original version of the Bill required that the AIRC hear and determine an application for a s.127 order, as far as practicable, within 48 hours. If an application was not able to be heard and determined within this period, the Bill gave the Commission the discretion to issue an interim order. Various factors were set out in the Bill to guide the AIRC's discretion.

Applications for s.127 orders are nearly always made in circumstances where unlawful industrial action is happening or threatened. Accordingly, it is vital that the AIRC act quickly and decisively whenever an application under s.127 of the Act is made.

The issuing of s.127 orders by the Commission is discretionary and, on occasions, delays have been experienced in having applications heard or decisions issued by the AIRC. Such delays can be very costly, particularly when further delays of several days are typically experienced in having s.127 orders enforced in the Federal Court.

³⁷ *Re. Sommer & Staff Construction Pty Ltd*, AIRC Full Bench, 25 November 2003, PR940965

Accordingly, the *Workplace Relations Act* should be amended to adopt the legislative reform proposal in the original version of the *Workplace Relations Amendment (Improved Remedies for Unprotected Action) Bill*.

8.4 Outlawing the misuse of OHS as an industrial weapon against employers

In some industries, notably the building and construction industry, occupational health and safety (OHS) is often misused by unions as an industrial weapon against employers. It is essential that this highly inappropriate and damaging tactic be addressed. The misuse of OHS by unions as an industrial weapon fosters an attitude of cynicism amongst employers towards safety concerns raised by union officials and delegates. This, in turn, negatively impacts upon OHS.

As stated by Commissioner Cole in the Final Report of the Royal Commission into the Building and Construction Industry:

*“It was put to me, and I agree, that ‘mutual trust and cooperation is compromised by a perception by the employer that union officials sometimes have a vested interest in finding safety breaches. This practice is potentially harmful to employees as it merely serves to devalue OH and S’. Safety is simply too important a matter to be degraded by this process. Time and time again I received compelling evidence of alleged safety issues being raised in circumstances where there was no genuine safety issue to be resolved or where the alleged safety issue was able to be resolved by the entering into of an EBA, the payment of increased rates or site allowances or membership of a union”.*³⁸

The misuse of OHS as an industrial weapon should be outlawed across all industries. However, the right of employees to refuse to perform duties which are genuinely unsafe needs to be preserved.

³⁸ Final Report, Volume 6, p.107

S.187AA of the *Workplace Relations Act* prohibits employers making any payment to an employee for a period during which the employee engaged in industrial action, and prohibits employees from accepting such a payment. However, the definition of industrial action in s.4 of the Act excludes action taken by an employee based on a reasonable concern by the employee about an imminent risk to his or her health and safety, and where the employee does not unreasonably fail to comply with a direction of the employer to perform other work that is safe and appropriate.

Ai Group proposes that the following amendments be made to the *Workplace Relations Act* to address the misuse of OHS as an industrial weapon against employers:

- It should be unlawful for an employer to make any payment to an employee for any period where an employee refuses to perform work based upon a reasonable concern about an imminent risk to his or her health and safety, unless the employee has complied with the relevant dispute resolution procedure;
- It should be unlawful for an employee to accept payment for any period where an employee refuses to perform work based upon a reasonable concern about an imminent risk to his or her health and safety, unless the employee has complied with the relevant dispute resolution procedure.

The above proposed approach is broadly consistent with that recommended by Commissioner Cole³⁹ and the approach set out in the *Building and Construction Industry Improvement Bill 2003*.⁴⁰

The “relevant dispute resolution procedure” referred to above could either be the procedure set out in the relevant award or certified agreement or, alternatively, consideration should be given to setting out an OHS issue resolution procedure in the Act or in the Regulations, as recommended by Commissioner Cole (Rec. 35) for the building and construction industry.

³⁹ Recommendation 35

⁴⁰ Sections 46 and 47.

9.0 Ensuring that registered organisations operate responsibly

9.1 Freedom of association

Freedom of choice is a fundamental tenet of our democracy. All employers and employees should be free to decide whether or not they wish to belong to a union or employer association. The *Workplace Relations Act* contains strong freedom of association laws which are generally working effectively. However, the following amendments would further reinforce freedom of association principles:

- The Act should be amended to extend the existing prohibition on the inclusion of bargaining agents' fee clauses in Federal certified agreements to State enterprise agreements to which a Constitutional Corporation is a party. The amendments proposed in the *Workplace Relations Amendment (Extended Prohibition of Compulsory Union Fees) Bill 2005* would achieve this.
- As set out in section 7.12 of this submission, the list of “objectionable provisions” in s.298Z(5) of the Act should be expanded to include:
 - Provisions that prevent employers entering into AWAs; and
 - Provisions that prohibit the engagement of contractors or labour hire or impose unreasonable restrictions on such engagements (eg. a requirement that the contractor pay “site rates”, or that the contractor have an enterprise agreement with the relevant union, or that the company provide a list of all contractors being used to the union).
- The “prohibited reason” in s.298L(h) of the *Workplace Relations Act* should be deleted. This provision is regularly being used by unions to frustrate company proposals to outsource work to reduce costs and improve efficiencies⁴¹. It is vital that companies retain the flexibility to organise work in the most efficient

⁴¹ For example, see the decision of the Full Federal Court in *Greater Dandenong City Council v ASU* [2001] FCA 349 and the recent decision of Moore J in *AFMEPKIU v Eaton Electrical Systems Pty Ltd* [2005] FCA 2 (7 January 2005)

manner, including the freedom to outsource to reduce costs and remain competitive.

- Coercion of employers to employ specific persons nominated by unions or to assign particular duties to persons, should be outlawed across all industries via amendments to the *Workplace Relations Act*. It is essential that employers have the ability to employ the most appropriately qualified person for each job – not the persons forced upon them by unions for industrial purposes. A provision similar to s.172 of the BCII Bill (amended to extend its operation) should be incorporated within the *Workplace Relations Act*.

9.2 Right of entry

Registered organisations have an important representative role to play which is recognised within the *Workplace Relations Act*. It is an object of the Act that registered employee and employer bodies be able to operate effectively (s.3(g)). Accordingly, an appropriate balance needs to be struck between protecting employers from the misuse by unions of right of entry powers and retaining a right of entry regime which enables unions to represent their members effectively.

To obtain an appropriate balance, the Act should be amended to:

- Prevent certified agreements containing right of entry provisions (given that a comprehensive right of entry regime is set out in the Act);
- Exclude the operation of State right of entry laws where employees are covered under Federal industrial instruments;
- Prevent union officials applying for a Federal entry permit during a time when the official has been disqualified under a State industrial law from holding a State entry permit;
- Require the Industrial Registrar to revoke or suspend a union official's Federal entry permit if the official has been disqualified under a State industrial law from holding a State entry permit;
- Require the Industrial Registrar to be satisfied that a union official applying for an entry permit is a "fit and proper person" to hold a permit; and

- Give the AIRC powers to revoke or suspend permits, impose conditions on permits, or ban the issue of permits for a specified period, where a union official or union has abused entry rights.

With regard to a union's right of entry to investigate suspected breaches, the Act should be amended to:

- Require union officials to set out the particulars of suspected breaches on the entry notice required to be given to the employer under the Act and have reasonable grounds for suspecting a breach;
- Entitle the employer to specify a "reasonable" room or area for the union official to interview employees about the suspected breach, with the AIRC having the power to make an order if the proposed location is unreasonable; and
- Require union officials to apply to the AIRC if they wish to view non-member employment records.

In respect of a union's right to enter to hold discussions with union members and those eligible to be members, the Act should be amended to:

- Entitle the employer to specify a "reasonable" room or area for the union official to have discussions with employees, with the AIRC having the power to make an order if the proposed location was unreasonable; and
- Impose some reasonable limits on entry rights for union recruitment purposes.

The *Workplace Relations Amendment (Right of Entry) Bill 2004* deals with all of the above issues.

9.3 Enterprise associations

Clause 20 of Schedule 1B of the *Workplace Relations Act* sets out the criteria which applies to the establishment of an enterprise association. Amendments were made to the criteria in May 2003 but, despite the amendments, very few employees have sought to establish an enterprise association. To ensure that an enterprise

association is able to be established by employees in an enterprise, in appropriate circumstances, the following measures should be taken:

- The Department of Employment and Workplace Relations should produce a fact sheet and/or other educational material setting out the criteria for establishing an enterprise association and providing a step-by-step guide to the process involved.
- Section 20(1)(g) of Schedule 1B of the Act (which requires that a majority of the persons eligible to be members of the enterprise association support its registration) is unduly restrictive and should be amended. Flexibility should be provided to enable the Commission to consider all of the circumstances surrounding an application for registration of an enterprise association, and determine whether it is appropriate that the enterprise association be registered, even if those supporting the association are in the minority in the workforce.

10.0 More effective termination of employment laws

10.1 A unitary system of Federal unfair dismissal and unfair contract laws for corporations

Numerous problems arise for employers and employees due to the existing highly complex system of intertwined Federal and State unfair dismissal laws.

The Federal Government should amend the *Workplace Relations Act* to extend the coverage of the federal unfair dismissal laws to all employees of Constitutional Corporations. This would not achieve a totally unitary unfair dismissal system, as currently applies in Victoria, because it would only extend the federal unfair dismissal system to employees of Constitutional Corporations in other States. It would, however, move a long way down the path towards the eventual achievement of a unitary unfair dismissal system. An estimated 85 per cent of Australian employees would immediately be brought within the federal unfair dismissal system and encouragement would be provided to State Governments to refer the necessary powers to enable the federal unfair dismissal laws to apply to the remaining employees.

Victorian workers have been covered under a unitary system of federal unfair dismissal laws since 1996 and Ai Group has seen no evidence that they are disadvantaged by this situation.

There are considerable differences between the existing Federal and State unfair dismissal laws in the areas of:

- Exempt categories of employees;
- Timeframes for filing of claims;
- Access for award-free employees;
- The criteria against which applications for unfair dismissal are required to be assessed.

Significant differences not only exist in the relevant State and Federal industrial relations statutes, but in the State and Federal unfair dismissal case law. It is almost impossible for employers and employees to fully comprehend and completely apply all of the requirements of the relevant legislation and case law.

Many larger companies employ specialised human resources and/or industrial relations staff to assist them to identify the laws which apply and to comply with the requirements of the legislation. Even where specialised staff are employed, it is a significant challenge for any organisation to fully understand their obligations. It is much harder for smaller companies without specialised personnel.

Evidence of the confusion can be found in the large number of applications which are filed in the wrong jurisdiction. When this occurs, significant additional costs can be incurred by both employers and employees.

Schedule 1 of the *Workplace Relations Amendment (Termination of Employment) Bill 2002* would extend the Federal unfair dismissal laws to all Constitutional Corporations, the merits of which are set out above. Accordingly, Ai Group strongly supports the Bill.

Further, as argued by Ai Group in its submissions to the Senate Committee which inquired into the provisions of the Bill, the *Workplace Relations Act* should be amended to bring unfair contracts arrangements relating to Constitutional Corporations under the exclusive jurisdiction of the federal system. The unfair contract provisions in the NSW *Industrial Relations Act 1996* have proved to be highly problematic. The provisions have become a de facto unfair dismissal system, particularly for senior managers wishing to challenge the quantum of their termination payments. In several cases, multi-million dollar compensation payments have been awarded. Despite several attempts by the NSW Government to amend the legislation to address the problems, the provisions remain a significant and unreasonable burden on New South Wales employers. The Queensland provisions have been in operation for a shorter period of time than the NSW provisions and it is still unclear whether or not they will prove to be as damaging to employers as those in NSW.

Unfair contracts legislation already exists in the *Workplace Relations Act* in sections 127A, 127B and 127C. These provisions have been in the Act for many years and are operating effectively.

Amending the *Workplace Relations Act* to bring unfair contracts arrangements relating to Constitutional Corporations under the exclusive jurisdiction of the federal system will assist in preventing the NSW unfair contracts jurisdiction (and the unfair contracts jurisdictions in other States) being used to undermine the intention of the legislative amendments to create a unitary Federal unfair dismissal system for Corporations.

10.2 Striking an appropriate balance between the interests of employers and employees

The existing unfair dismissal laws do not strike an appropriate balance between the interests of employers and employees.

Support for this view is contained within the AIRC's 2004 annual report which shows that 75 per cent of unfair dismissal claims during 2003/04 were settled at the Conciliation stage. This contrasts starkly with 1995/96 when only 53 per cent were settled at the Conciliation stage. In Ai Group's experience, a very large proportion of the matters settled at the Conciliation stage are settled because the company involved makes a commercial decision to offer the applicant an amount of money to avoid the company incurring the considerable time and expense of defending the unfair dismissal case in formal proceedings. A further factor which encourages employers to settle claims regardless of the merits is a view amongst employers that even though there may be a compelling reason for a dismissal, the AIRC focuses too heavily on issues of procedural fairness and it is extremely difficult to comply with every "letter of the law" in this area.

To ensure that a more appropriate balance is struck, the following amendments should be made to the Act:

- Some of the major constraints of procedural fairness should be removed by simply requiring that businesses:
 - Have a valid reason for terminating the employment of an employee;
 - Notify the employee of the reason for the dismissal; and
 - Give the employee an opportunity to respond to any reason related to his or her capacity or conduct before terminating his or her employment.

This approach meets the standard of procedural fairness prescribed by Article 7 of the *ILO Convention Concerning Termination of Employment at the Initiative of the Employer* (Schedule 10 of the Act). The Act, in s.170CG(3), currently incorporates a much higher standard.

- Unfair dismissal actions should only be permitted in exceptional circumstances where termination of employment arises from the operational requirements of a business (as proposed in Schedule 3 of the *Workplace Relations Amendment (Termination of Employment) Bill 2002*);
- Before making a reinstatement order, the Commission should be required to take into account any earnings of a dismissed employee from other employment following their dismissal (as proposed in Schedule 3 of the *Workplace Relations Amendment (Termination of Employment) Bill 2002*).

10.3 Exemption of small business from redundancy pay requirements

Legislating to preserve a redundancy pay exemption for small business is consistent with 20 years of settled workplace relations practice. The March 2004 *Redundancy Case* decision of the AIRC which removed the small business exemption has dealt a body blow to jobs. Small business is the largest employer of full-time labour in Australia. There are approximately half a million businesses with less than 15 employees. These businesses employ around two million Australians.

Courts and tribunals operate within the framework of laws created by Parliament. The Parliamentary power to override court and tribunal decisions should be used sparingly and only in exceptional circumstances. The AIRC's *Redundancy Case* decision has created such circumstances.

A supplementary decision handed down in June 2004 in the *Redundancy Case*, in effect, has delayed the imposition of severance pay obligations upon small businesses until 8 June 2005⁴². Therefore, the negative consequences of the decision have not yet been felt.

There are many powerful reasons for legislating to preserve the small business redundancy pay exemption, including:

- Small businesses play a vital role in the Australian economy and are the largest employer of Australian workers;
- There are important characteristics of small businesses which warrant such businesses being treated differently for severance pay purposes;
- Small businesses cannot bear the cost of redundancy pay;
- The additional contingent liability will increase lending costs for small businesses;
- A requirement to make redundancy payments will lead to reduced employment and firm closures;
- The small business exemption is supported by arbitral precedent;
- The Bill removes jurisdictional conflict;
- The small business exemption is consistent with international practice;
- Employees of small businesses can obtain severance pay via enterprise bargaining when it is affordable.

There were a large number of small businesspeople who were called by Ai Group to give evidence to the AIRC in the *Redundancy Case*. They were all prepared to open

⁴² The AIRC decided that, in calculating service, small businesses are not required to take into account service rendered prior to the date of the award variation. The awards which were used as vehicles for the *Redundancy Case* were the first to be varied, with such variations becoming operative from 8 June 2004. Under the standard award clause, redundancy pay obligations arise after 12 months of service.

up their books to the Commission's and the ACTU's scrutiny. Their lack of financial resilience was obvious. Many of the businesses were operating with marginal or negative profitability with the proprietors in some cases earning less than their employees. Many of the owners had been forced to give guarantees to the banks over their personal assets, particularly their family homes. Many were very worried about the impact of any redundancy pay obligations upon their ability to obtain further finance.

Extraordinarily, the AIRC's *Redundancy Case* overlapped with hearings in a separate case before a Full Bench of the Queensland Industrial Relations Commission (QIRC), relating to state awards. In both cases, significant arguments and evidence were presented about the detrimental impact on small business if the exemption was removed. In both cases, State ALP Governments argued strongly in support of retaining the exemption.

The Queensland *State Termination and Redundancy Test Case* decision was handed down in August 2003 - before the federal decision. The Full Bench of the QIRC decided to retain the exemption on the following grounds:⁴³

- Many small businesses operate in marginal circumstances;
- Severance has the very real potential to result in the insolvency of a number of small businesses;
- The lack of financial resilience in small businesses has not changed since the exemption was first created;
- Small business would generally have smaller cash reserves to meet severance pay requirements;
- Redundancy costs would represent a greater proportion of the overall labour costs within small business;
- It is likely that a small business facing a downturn or restructure sufficient to generate redundancies would not have sufficient cash reserves to launch a case in the Commission against a union (with perhaps greater access to financial resources) seeking an exemption from the application of severance pay provisions;

⁴³ *QCU v QCCI*, 18 August 2003 at para 100

- The majority of other States and the federal jurisdiction (at that stage) had retained a small business exemption.

Following the handing down by the AIRC of its *Redundancy Case* decision and the consequent removal of the small business exemption in Federal awards, the Queensland Council of Unions (QCU) lodged an application with the QIRC seeking a review of the Queensland decision and the removal of the exemption. After hearing from the parties, the QIRC declined to do so and re-stated the reasons why it had declined to remove the exemption during the Test Case:

“In our view, the small business exemption should be retained. Many small businesses operate in marginal circumstances. An obligation to make severance payments has the very real potential to result in the insolvency of a number of small businesses. The lack of financial resilience previously referred to has not changed since 1994. We accept the Queensland Government’s submission that small business would generally have smaller cash reserves to meet severance pay requirements and redundancies occurring would represent a greater proportion of the overall labour costs of the business...”⁴⁴

The Queensland decision followed an earlier NSW Industrial Relations Commission decision in the mid-1990s which also decided to retain the small business exemption.

The lengthy nature of the arbitral precedent was acknowledged in the *Redundancy Case* decision:

“We acknowledge that the weight of arbitral authority supports the retention of the existing exemption. In most state jurisdictions small businesses are exempt from the obligation to pay severance pay and that is clearly a factor which supports the retention of the exemption in federal awards.”⁴⁵

⁴⁴ QCU v QCCI , 17 December 2004 at para 100

⁴⁵ [PR32004] at para 274

The need to address the current jurisdictional conflict

The AIRC's decision to remove the small business exemption in the *Redundancy Case* has created conflict between Federal and State jurisdictions. Different small businesses in the same area now have vastly different redundancy obligations on the basis of whether or not they are covered by a Federal award.

Given the importance of the current exemption for small business employers, the inconsistency which now exists between the Federal and State jurisdictions will have undesirable consequences. Small employers covered by Federal awards will have a significant incentive to exodus the jurisdiction and seek refuge under State systems if legislation is not passed to reinstate the exemption.

The small business exemption is consistent with international practice

To assist the Full Bench in its deliberations in the *Redundancy Case*, Ai Group commissioned Mr Mark Roberts, a researcher with Melbourne University, to carry out an international comparative study of redundancy pay obligations across jurisdictions. The study showed that relatively few advanced countries provide for employer-funded severance payments to be made to employees upon redundancy. Nevertheless, exemptions for small business from employment protection legislation are relatively common amongst other OECD countries. The study highlighted that even in countries like France and Germany with relatively strict employment protection legislation, small businesses are treated differently from larger firms.⁴⁶

⁴⁶ The report prepared by Roberts notes the following:

- **United States** - firms employing less than 100 employees are not required to give advance notice of lay-offs (p.42);
- **Austria** – firms employing less than 5 employees are exempt from making notice and severance payments. In addition, firms engaging 20 employees are exempt from negotiating a “social plan” designed to ease the impact of redundancy on employees (p.56);
- **Finland** – firms employing less than 10 employees are not required to consult with employees prior to redundancies (p.63);
- **Japan** – firms employing less than 10 employees are exempt from consulting with a union (p.70);
- **Netherlands** – firms employing 35 employees or less are exempt from consultation obligations dealing with redundancy (p.76);
- **France** – a threshold system applied whereby employee rights and employer obligations are adjusted according to the size of the firm's workforce (p.97);

Therefore, the small business exemption is not out of step with international regulatory practice.

The Workplace Relation Amendment (Small Business Employment Protection) Bill 2004

The *Workplace Relation Amendment (Small Business Employment Protection) Bill 2004*, has been introduced into Parliament. The Bill seeks to exempt businesses employing fewer than 15 employees from redundancy pay obligations through:

- Limiting the allowable award matter of “redundancy pay” (s.89A(2)(m)) to businesses with 15 or more employees;
- Ensuring that the Commission would not be able to make an exceptional matters order (s.89A(7A)) or an order under s.170FA of the Act, imposing a redundancy pay obligation on an employer with fewer than 15 employees;
- Invalidating State and Territory laws, State awards and State authority orders to the extent that they require employers of fewer than 15 employees, which are Constitutional Corporations, to pay redundancy pay.

The Bill requires the inclusion in the calculation of the number of employees, casuals who have been engaged on a regular and systematic basis for at least twelve months, but other casual employees would not be included. The Bill also protects redundancy payments to which an employee became entitled prior to the commencement of the Bill. These are fair and appropriate provisions.

The exemption of businesses employing less than 15 employees from redundancy pay obligations is a sensible and necessary legislative change. Ai Group strongly supports the provisions of the Bill.

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- **Germany** – firms with less than 10 employees are exempt from consultation requirements and firms with less than 5 employees are exempt from unfair dismissal laws (pp.102-103). The report also notes that “*considerable effort has recently been directed toward easing the restrictions placed on small business by EP legislation in the context of a problematic labour market [in Germany]*” (p.104);
 - **Italy** – employees dismissed from firms employing 15 persons or less cannot pursue reinstatement claims (p.109).
-

10.4 Exemption of small businesses from unfair dismissal laws

The *Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004*, which was recently introduced into Parliament, would exclude employers with less than 20 employees from the operation of the unfair dismissal laws.

Small businesses are vitally important to the Australian economy. According to recent statistical and other information:

- Small business, by employing well over three million people, is the largest employer in Australia, and accounts for 47% of all private sector non-agricultural employment.⁴⁷
- Small business accounts for 96% of all business in the private sector (excluding agriculture), thereby playing a very significant role in the Australian economy.⁴⁸
- Small businesses are a major contributor to employment growth in Australia and are an important source of new jobs in the economy.⁴⁹
- There is enormous diversity within the small business sector. The sector is relatively fragmented, isolated and unorganised.⁵⁰

In the manufacturing sector, small businesses dominate the number of enterprises. 47 per cent of manufacturing sector enterprises are non-employing businesses and a further 46 per cent employ less than 20 persons.⁵¹

In its 2002 report, the Senate Committee inquiring into Small Business Employment stated that “*there are some common features to small business that justify a special focus.*”⁵² Further, the report observes:⁵³

⁴⁷ *Small Business Employment: Research Note*, Department of Parliamentary Library, September 2002

⁴⁸ Australian Bureau of Statistics (ABS) *Small Business in Australia 2001*, Cat No 1321.0

⁴⁹ Report on Small Business Employment, Senate Employment, Workplace Relations and Education References Committee at p.27

⁵⁰ *Ibid*, at p.6

⁵¹ Productivity Commission 2003, *Trends in Australian Manufacturing*, Research Paper, Ausinfo, Canberra at p.111 – available at <http://www.pc.gov.au/research/crp/tiam/tiam.pdf>

⁵² *Ibid*, p.25

⁵³ *Ibid*, p.51

“4.2 Small business is also seen as deserving of support because of its distinctive economic and social contributions. The OECD made the following argument for appropriate government support for small business:

SMEs [Small and Medium Enterprises] are at the core of future economic growth in OECD countries. Productivity growth is fuelled by competitive processes in industry, which, to a large extent, build on the birth and death, entry and exit, of smaller firms. Over 95 per cent of enterprises in the OECD are SMEs, which account for 60-70 per cent of jobs in most countries. They are the source of most new jobs and make significant contributions to innovation and high-technology employment. In addition, they are of considerable importance for regional developments and social cohesion. However, less than one-half of small business start-ups survive for more than five years and only a fraction develop into high-performance firms. Governments need new and improved approaches for maximising the small firm contribution to economic and social well-being.”

There is strong support from small business for an unfair dismissal exemption. Small business members of Ai Group consistently express the view that the existing unfair dismissal laws operate as a disincentive for them to employ new staff.

The *Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004* proposes special arrangements for small businesses only in respect of the unfair dismissal laws (Subdivision B of Division 3 of Part VIA of the Act) – not the unlawful termination laws (Subdivision C). Therefore, it would continue to be unlawful for a business of any size to terminate an employee for reasons such as their membership of a trade union or their temporary absence from work because of illness or injury. Ai Group supports this approach.

10.5 Exclusion of seasonal employees from the operation of the unfair dismissal laws

Section 170CBA of the Act sets out various categories of employees who are excluded from pursuing an unfair dismissal application. These categories include, but are not limited to: an employee engaged under a contract of employment for a specified period of time, an employee engaged under a contract of employment for a specified task; and a casual employee engaged for a short period.

In the food industry a large number of seasonal employees are engaged. It is not unusual for food manufacturers to increase their workforce three or four-fold during particular seasons. The industry needs the ability to terminate seasonal employees at the end of a season, without the risk of unfair dismissal claims.

In a recent decision⁵⁴, Commissioner Grainger of the AIRC held that two seasonal employees at SPC Ardmona Operations Ltd (a member of Ai Group) were not employees engaged for a specific period of time or a specific task, Further, he held that the seasonal employees were not casuals.

Accordingly, Grainger C decided that the employees were free to pursue unfair dismissal claims against the company, despite the fact that they were specifically engaged as seasonal employees and terminated at the end of the season. This decision is of great concern to SPC Ardmona, which engages more than 2500 seasonal employees each year, and is of great concern to other companies in the food industry.

SPC Ardmona has filed an appeal against the decision and Ai Group and the National Farmers Federation have intervened in the proceedings in support of SPC Ardmona's arguments. Regardless of the outcome of the appeal, s.170CBA of the Act should be amended to exclude seasonal employees from the operation of the unfair dismissal laws.

⁵⁴ PR953151

10.6 Notice of termination

The notice of termination which an employer is required to give to an employee is set out in s.170CM of the Act. Given that notice of termination is adequately dealt with in the Act, as set out in section 4.2 of this submission it is appropriate that this issue be removed as an allowable award matter.

It is important, however, that the Act be amended to ensure that employees have an obligation to provide notice of termination to their employer, and that employers have the right to withhold monies due to employees if notice is not given.

11.0 Enabling businesses to engage the forms of labour they need to operate efficiently

To remain efficient and globally competitive, businesses need to have the flexibility to engage the forms of labour which they need, regardless of the industry that they work in.

The following forms of labour (amongst others) are all legitimately deployed by organisations: full-time employees, casual employees, part-time employees, fixed term employees, fixed task employees, seasonal employees, labour hire and contractors. In all industries, productivity and efficiency depends upon the flexible use of different forms of labour. It is essential that employers retain the ability to determine the most suitable form of labour for the work which needs to be performed.

Many unions pursue a strategy of endeavouring to force companies to agree to restrict their use of casuals, labour hire and contractors. Such a strategy is short-sighted because if industry is unable to maintain sufficient labour flexibility, the effect is simply to drive lower employment levels, more companies out of business and more decisions to shift company operations off-shore.

Ai Group submits that the following steps need to be taken to assist companies to maintain a sufficient degree of labour flexibility:

- Provisions relating to different forms of employment should be removed from awards (except casual loadings and relevant exemptions, eg. from redundancy pay and notice of termination) allowing flexibility for these issues to be determined at the enterprise level – as set out in Chapter 4;
- The AIRC should not have the power to issue orders or make or vary awards which restrict the engagement of different forms of employment, or of contractors or labour hire. This would, for example, ensure that part-time work options became available in the building and construction industry.

- Certified agreement provisions which prohibit the engagement of contractors or labour hire or impose unreasonable restrictions on such engagements (eg. a requirement that the contractor pay “site rates”, or that the contractor have an enterprise agreement with the relevant union, or that the company provide a list of all contractors being used to the union) should be “objectionable provisions” and unable to be contained within agreements. This issue is dealt with in section 7.12.

12.0 Reforming workplace relations in the building and construction industry

This Chapter has been jointly developed by the Australian Industry Group and the Australian Constructors Association (ACA). The content has been endorsed by the National Executive of Ai Group and the Board of the ACA.



Workplace Relations Reform in the Building and Construction Industry

Since the Final Report of the Royal Commission into the Building and Construction Industry was released, Ai Group and the ACA have forwarded a number of comprehensive submissions to the Federal Government on the need for workplace relations reform in the building and construction industry and the approach which should be taken to reform, including:

- Ai Group's submission of July 2003 on the Final Report of the Royal Commission and its Recommendations;
- Ai Group's submission of October 2003 on the *Building and Construction Industry Improvement Bill 2003* ("the BCII Bill"); and
- A joint Ai Group / ACA submission of 18 May 2004 which arose from a meeting with you on 5 May 2004 at which you asked Ai Group and the ACA to identify the issues in the BCII Bill which are the most important if lasting reform is to be achieved.

In addition to the above submissions, during the course of the Royal Commission, Ai Group and the ACA made submissions in response to all 18 discussion papers, together with three comprehensive general submissions.

Given the Government's recent re-election and prospective changes to the balance of power in the Senate, it is timely that Ai Group and the ACA restate their views on these matters. Such views are set out below.

Key Objectives

It is vital that the reforms to be implemented in the building and construction industry achieve the following key objectives:

1. Maintenance of the rule of law in the industry;
2. Adherence by all parties to agreements which they have entered into and immediate access to effective remedies when industrial agreements are breached or unlawful industrial action is taken;
3. Ensuring that effective dispute avoidance and settlement mechanisms are in place;
4. The outlawing of industrial action in pursuit of pattern bargaining;
5. The establishment of an effective mechanism for the certification of project agreements;
6. Maintenance of high standards of occupational health and safety (OHS);
7. The outlawing of the misuse of OHS as an industrial weapon against employers;
8. Preservation of strong freedom of association principles; and
9. The outlawing of inappropriate coercion.

Approach to Reform and Important Timing Considerations

It is essential that legislative reforms to address the significant workplace relations problems which exist in the building and construction industry be enacted and operational by no later than **30 September 2005**, given that some 4000 construction

and electrical contracting certified agreements expire between October and December 2005.

The BCII Bill has already been the subject of an extensive consultation process and a lengthy Senate Committee inquiry. Therefore, a further lengthy consultation process regarding this Bill is unnecessary.

In contrast, any general workplace relations reform legislation would need to be the subject of a robust consultation process to ensure that the impacts upon industry and employees are fully evaluated before the legislation comes into effect. The time required for such consultation and the Parliamentary process would appear to make it unlikely that any general workplace relations reform legislation would be operative before late 2005.

Given the vital timing issues, Ai Group and the ACA support the BCII Bill being enacted at the earliest possible time (with the amendments set out below) and prior to the enactment of the general workplace relations reform legislation which the Government has announced its intention to introduce.

In the event that there is duplication in the content of the BCII legislation and the general workplace relations reform legislation, once both pieces of legislation are in operation, consideration should be given to amending the BCII legislation at that time to remove the provisions which are duplicated in the general workplace relations reform legislation.

Amendments which need to be made to the BCII Bill

Key amendments which Ai Group and the ACA believe need to be made to the BCII Bill are set out in the sections which follow.

Chapter 1 – Preliminary

On pages 1 to 37 of Ai Group’s October 2003 submission on the BCII Bill a series of changes were proposed to the definition of “building work” and some other key definitions which determine the coverage of the Bill. In response to Ai Group’s submission, the Government made some amendments to the definition of “building work” before the Bill was introduced into Parliament. However, Ai Group and the ACA believe that further important amendments need to be made, as set out in **Annexure A**.

Ai Group and the ACA support industry-specific legislation being enacted to deliver a reform package for the building and construction industry, but the coverage of the legislation needs to be appropriate and limited to those activities which are typically recognised within Australia’s workplace relations system as being part of the building and construction industry (eg. those activities that fall within the scope clauses of the major construction industry awards). These are the activities which were the subject of the Royal Commission’s investigations.

The Bill’s very broad definition of “building work” could lead to construction industry terms and conditions flowing into other industry sectors (eg. fabrication and supply of building materials and products) which, in turn, would drive up the cost of construction through higher input costs. Claims are regularly pursued by unions such as the Construction, Forestry, Mining and Energy Union (CFMEU), the Australian Manufacturing Workers Union (AMWU) and the Communications, Electrical and Plumbing Union (CEPU) to extend construction industry terms and conditions (eg. construction industry severance funds and long service leave schemes) to areas outside of the commonly accepted boundaries of the building and construction industry. The legislation, as drafted, would increase the risk of these union claims succeeding because the most important piece of legislation governing workplace relations in the industry would define the boundaries of the construction industry as extending far beyond the existing boundaries.

Chapter 2 - Australian Building and Construction Commissioner

Ai Group and the ACA support the appointment of an ABC Commissioner, as proposed in the Bill.

However, an Advisory Board should be established which includes representatives of key construction industry bodies such as Ai Group and the ACA. This is consistent with the approach taken by the Australian Taxation Office (ATO) and the Australian Competition and Consumer Commission (ACCC) which have established advisory bodies containing industry and other representatives.

Further, Ai Group and the ACA do not support the ABC Commissioner having the following functions and powers relating to the Building Code:

- The function of monitoring and ensuring compliance with the Building Code;
- The function of investigating suspected contraventions by building industry participants of the Building Code;
- The requirement to report to the Minister periodically on the extent to which the Building Code is being complied with;
- The power to publicise details of non-compliance with the Building Code;
- The power to direct persons to provide a written report detailing compliance with the Building Code, with a penalty applying for failing to provide the report.

The investigative and enforcement powers of the ABC Commissioner should apply only to the provisions of relevant legislation and regulations – not the provisions of a Code which is not subject to Parliamentary or judicial scrutiny.

Chapter 3 - The Building Code

Ai Group and the ACA support the right of the Commonwealth as a client to clearly articulate the standards expected of its service providers and to promote reform in the building and construction industry via its role as a client. To date, the centrepiece of the Federal Government's strategy in this regard has been the National Code of Practice for the Construction Industry and the supporting Implementation Guidelines.

The BCII Bill extends the role of the National Code far beyond standard-setting for contractors engaged on projects funded by the Commonwealth. By using the Corporations Power under the Constitution, the Code's role extends to the regulation of all incorporated building contractors. Under the provisions of the BCII Bill, the Code would regulate significant sections of the construction industry, using an instrument that would not be subjected to Parliamentary or judicial scrutiny. There are virtually no constraints placed upon the Minister, under the terms of the Bill, with regard to the content of the Code. Further, the exercise of Section 241 – Delegation by Minister, of the Bill allows the Minister to delegate the power to issue or amend the Building Code to the ABC Commissioner, a Deputy ABC Commissioner, the Federal Safety Commissioner and various other persons.

There are no protections within the Bill to ensure that the content of the Building Code remains appropriate over time. For example, different Governments or Ministers could have very different views about what provisions should be incorporated within the Code.

Ai Group and the ACA do not support the broad regulatory role assigned to the Code under the BCII Bill. The Code should remain a standard-setting document applicable to projects which are funded by the Commonwealth. Any necessary regulatory provisions for the whole industry should be incorporated within the BCII Bill or set out in Regulations made under the legislation.

Chapter 4 – Occupational Health and Safety

The safe performance of work should be a prerequisite to the completion of work on time and within budget. Whilst the incidence of injuries and fatalities in the construction industry remains unacceptably high, the Royal Commission acknowledged that the trend is one of improvement.

At the present time, OHS is almost entirely regulated through State and Territory laws. Employers are required to comply with onerous legislation, regulations, codes of practice and standards which differ from State to State, and very substantial

penalties apply where the requirements are breached. It is essential that the Commonwealth, States and Territories continue to strive to achieve consistency amongst OHS laws. It is also vital that any reforms implemented to improve occupational health and safety in the construction industry do not simply result in the imposition of another layer of regulation which would lead to further confusion about which of the various federal and state laws, regulations, codes and standards apply. Rather than contributing to better OHS performance, the creation of further complexity and confusion could compromise the safety of employees because employers would be unlikely to understand what is required of them.

Federal Safety Commissioner

Ai Group and the ACA support the appointment of a Federal Safety Commissioner and the Commissioner having the roles of:

- Promoting OHS in the building and construction industry; and
- Managing an OHS accreditation scheme.

However, Ai Group and the ACA do not support the Federal Safety Commissioner having the following roles and powers:

- The role of monitoring and promoting compliance with the Building Code, insofar as the Code deals with OHS;
- The requirement to report to the Minister on the extent to which the Building Code is being complied with.

As set out above, with regard to Chapter 3 of the Bill, Ai Group and the ACA do not support the broad regulatory role assigned to the Code under the BCII Bill. The Code should remain a standard-setting document with application to projects which are funded by the Commonwealth. Any necessary regulatory provisions for the whole industry should be incorporated within the BCII Bill or set out in Regulations made under the legislation.

With regard to the proposed Federal OHS accreditation scheme, various State and Territory Governments already have OHS pre-qualification schemes in place and most significant employers in the building and construction industry are accredited under such schemes. It is important that the Commonwealth, States and Territories work together to ensure that a high level of uniformity and consistency occurs in the development and implementation of OHS pre-qualification schemes, and that unnecessary duplication does not occur. The Australian Procurement and Construction Council (APCC) would be an appropriate organisation to consult in the development of a federal accreditation scheme as the APCC represents each of the State and Territory departments which are already operating OHS accreditation schemes. Significant industry representative bodies such as Ai Group and the ACA should also be involved in the development of the accreditation scheme.

Misuse of OHS as an industrial weapon

In the building and construction industry, occupational health and safety (OHS) is often misused by unions as an industrial weapon against employers. It is essential that this highly inappropriate and damaging tactic be addressed. Ai Group and the ACA strongly support the provisions of the Bill which address the misuse of occupational health and safety issues in an industrial relations context.

Chapter 5 – Awards, Certified Agreements and Other Provisions about Employment Conditions

Part 1 - Awards

With regard to the provisions of the BCII Bill relating to the further simplification of construction industry awards, the majority of these proposals were not recommended by the Cole Royal Commission. Also, the provisions of certified agreements are a much greater barrier to the implementation of flexible work practices in the construction industry than the provisions of awards. Notwithstanding this, further simplification and rationalisation of awards in all industries, including construction, is important. Ai Group and the ACA are of the view that this issue is best progressed through general workplace relations reform legislation rather than via the BCII Bill.

Part 2 - Certified Agreements

Ai Group and the ACA agree with the Royal Commission's view that pattern bargaining in the construction industry must be addressed. However, whilst supporting the thrust behind the proposed reforms set out in the Bill, Ai Group and the ACA cannot support the provisions as they are currently drafted. The Bill fails to deal with several of the most damaging aspects of union behaviour which constitute pattern bargaining, whilst outlawing many legitimate forms of bargaining and other conduct.

It is essential that industrial relations risks are able to be managed on projects. If they cannot be effectively managed, it is unlikely that investors will be prepared to commit capital to major Australian projects. Owners of major construction projects are usually multi-national organisations and the level of investment can extend to billions of dollars. In many cases, there is competition with overseas operations when investment decisions are made.

Having carefully studied the provisions of the BCII Bill relating to the outlawing of pattern bargaining, Ai Group and the ACA are of the view that the approach taken within the Bill, as currently drafted, is unworkable and would cause significant problems for industry. Ai Group and the ACA have set out below two alternative approaches to amending the Bill to make the provisions workable and to address the problems caused by pattern bargaining in the industry:

- **Option 1** – Prohibiting the act of pattern bargaining, amending the Bill's provisions to overcome several definitional and other problems, and creating a genuine mechanism for the certification of project agreements on major projects;
- **Option 2** – Outlawing protected industrial action in pursuit of pattern bargaining, amending the Bill's provisions to overcome several definitional and other problems, and creating a genuine mechanism for the certification of project agreements on major projects

Option 1 – Prohibiting the act of pattern bargaining, amending the Bill’s provisions to overcome several definitional and other problems, and creating a genuine mechanism for the certification of project agreements on major projects

If this option is adopted, the following amendments should be made to the Bill:

(a) Definition of “pattern bargaining”

The definition of “pattern bargaining” in s.8(1) of the Bill should be amended as follows:

“Pattern bargaining’ means a course of conduct by a negotiating party during the negotiation of agreements under Part VIB of the Workplace Relations Act, that:

- *Involves seeking common wages or other conditions of employment; and*
- *Extends beyond a single business.”*

The Bill’s definition as currently drafted, is inappropriate because it could restrain registered organisations such as Ai Group (together with a wide range of other parties) from carrying out many of their central functions. An important function of virtually all registered organisations (together with many law firms, consultants and a wide range of other parties) is to give advice to employers and/or employees regarding the content of enterprise agreements.

For example, following the Court’s *Emwest*⁵⁵ decision, Ai Group procured legal advice regarding the appropriate form of wording for No Extra Claims Clauses in certified agreements that would overcome the adverse effects of the decision, and circulated this advice to its member companies. In addition, following the Full Federal Court’s *Ancor*⁵⁶ decision, Ai Group sought legal advice regarding what form of wording would be appropriate for transmission of business clauses in certified agreements, and circulated this advice to members. Ai Group regularly gives advice

⁵⁵ *Emwest, Ai Group v AFMEPKIU* [2003] FCAFC 183

⁵⁶ *CFMEU v Ancor Limited* [2002] FCA 610

to its member companies about union claims and provides assistance to companies to resist union claims.

The definition of “pattern bargaining” in the Bill could be interpreted as outlawing the giving of advice to more than one company in similar terms, if such advice was seen as “a course of conduct” that involves “seeking common wages or other common conditions of employment”. Such a result would be inappropriate, unfair and unworkable. In addition, the definition could be interpreted as outlawing numerous publications dealing with enterprise bargaining. This would include various publications of the Office of the Employment Advocate (OEA) and a large proportion of the content of the OEA’s website, which gives advice regarding the content of clauses in Australian Workplace Agreements.

The definition of “pattern bargaining” under the Bill should be limited to conduct which occurs by a negotiating party during the negotiation of certified agreements under Part VIB of the *Workplace Relations Act*. The definition should not extend to the extremely broad concepts captured by the provisions as currently drafted.

(b) The requirement to “genuinely try to reach agreement”

S.8(2) of the BCII Bill states that:

“Conduct by a person is not pattern bargaining to the extent to which the person is genuinely trying to reach agreement on the matters that are the subject of the conduct”.

“Genuinely trying to reach agreement” has the same meaning as in s.170MW of the *Workplace Relations Act*, as affected by s.62 of the Bill. [s.8(5)].

Ai Group and the ACA support the approach of defining “pattern bargaining” with reference to whether or not a party is “genuinely trying to reach agreement”. As a set of indicators of whether an individual negotiating party is “genuinely trying to reach agreement” with another individual negotiating party, the provisions of s.62 are uncontroversial and consistent with various decisions of the AIRC and Federal Court.

However, as a set of indicators of whether or not a party is “genuinely trying to reach agreement” in a pattern bargaining context, the indicators are highly inappropriate and miss the point.

As set out in a legal opinion obtained from Cutler Hughes and Harris Lawyers regarding the interrelationship between the definition of “*pattern bargaining*” in s.8 of the Bill and the indicators of “*genuinely trying to reach agreement*” in s.62 of the Bill:

“the Bill appears to treat the advocating of particular common standards, coupled with the refusal to engage in technical acts of bargaining at the workplace level, as being the evil of pattern bargaining. This is not a correct assumption”.

Consider the very realistic example of the CFMEU endeavouring to impose its building industry pattern agreement on an employer. The union could readily comply with all of the elements in s.62 without demonstrating any preparedness to negotiate any change in any term of the pattern agreement. Given that the union was complying with s.62, it could argue that it is not “pattern bargaining”, as defined in s.8(a) of the Bill - particularly given the wording of s.8(2) of the Bill, as set out above.

It could also be argued that s.170MW(2) of the *Workplace Relations Act*, is largely overridden by s.62 of the Bill. Such an outcome would not be desirable because s.170MW(2) of the Act was varied in 2003 via the *Workplace Relations Amendment (Genuine Bargaining) Act* to give employers more protection against pattern bargaining and to achieve more clarity regarding the meaning of the term “genuinely trying to reach agreement”, in a pattern bargaining context. S.170MW(2) of the Act was varied to insert a note which refers to the decision of Justice Munro in *Australian Industry Group v AFMEPKIU*⁵⁷ in which the AIRC dealt with this issue in some detail.

To better ensure that enterprise bargaining negotiations are focused on the relevant enterprise, the following indicators should be added to the list in s.62 of the Bill:

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

⁵⁷ Print T1982

its employees at the workplace or enterprise level;

- *Not engaging in “pattern bargaining”;*
- *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.*

To address the widespread current problem in the construction industry 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 enterprise⁵⁸.*

To deal with the inappropriate union behaviour referred to later in this submission, 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.*

Finally, the following additional indicator would assist in preventing misleading and deceptive conduct being engaged in by a negotiating party during bargaining:

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

In addition to the above amendments to s.62 of the Bill, amendments need to be made to s.83. Section 83 of the Bill is a modified version of s.170MP of the *Workplace Relations Act*, except that the requirement in s.170MP that a party must

⁵⁸ Note: This 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*”.

“genuinely try to reach agreement” before taking industrial action, has been removed. S.83 specifically states that s.170MP(1) and (2) of the *Workplace Relations Act* do not apply to building industrial action. Ai Group and the ACA can see no logical reason for this approach. The requirement to “genuinely try to reach agreement” before industrial action is taken is an essential requirement that needs to be preserved within the BCII Bill. Further, the following provisions should be incorporated within the BCII Bill (both were proposals contained within the *Workplace Relations Amendment Bill 2000*):

- After a provision has been inserted into s.83 of the BCII Bill to require that parties “genuinely try to reach an agreement” before taking protected action (as set out above), the following further provision should be inserted into s.83:

“An organisation of employees is taken to have not genuinely tried to reach an agreement with the employer if it was engaged in pattern bargaining in respect of the proposed agreement”.

- Insert a provision in the Bill which requires that the AIRC terminate a bargaining period if an organisation of employees engages in pattern bargaining.

(c) Exclusions from the definition of “pattern bargaining”

S.8(4) of the Bill states that:

“Conduct by a person (the first person) is not “pattern bargaining” if:

- *The conduct occurs in relation to a proposed agreement between the first person and a second person under which the second person would carry out building work or arrange for building work to be carried out; and*
- *The conduct is engaged in solely for the purpose of encouraging the second person to have particular “eligible conditions” in an agreement that covers employees of the second person. [s.8(4)].*

“Eligible condition” means a condition relating to:

- *The times or days when work is to be performed;*
- *Inclement weather procedures; or*
- *Any other matter prescribed by the regulations for the purposes of this definition. [s.4]”.*

This provision is unduly restrictive. The provision would severely restrict the ability of head contractors to manage projects efficiently.

Whilst Ai Group and the ACA accept that it is inappropriate (and unlawful under s.170NC of the *Workplace Relations Act*) for head contractors to coerce subcontractors to have a particular form of agreement, it is inappropriate and unworkable to prevent head contractors giving advice to subcontractors on the content of their agreements, other than advice about the inclusion of *“eligible conditions”* as defined. The Bill, as drafted, could be interpreted as imposing such restrictions.

It is also inappropriate and unworkable to prevent head contractors and subcontractors entering into project agreements for major projects. The definition of *“pattern bargaining”* in the BCII Bill and the very narrow exclusions set out above could be interpreted as even preventing head contractors and subcontractors entering into multiple-business agreements under s.170LC of the *Workplace Relations Act*, unless such agreements dealt exclusively with *“eligible conditions”* as defined in the Act. This is unworkable and would prevent head contractors managing industrial relations risks on projects. This in turn would act as a significant barrier to investment in Australian projects – particularly major projects.

In addition to the amendments to the definition of *“pattern bargaining”* as set out in paragraph (a) above, the following exclusions from the definition need to apply:

- Conduct relating to the negotiation of a multi-business agreement in accordance with s.170LC of the *Workplace Relations Act*; and

- Conduct relating to the negotiation of a “project agreement”. (Refer to paragraph (f) below and Annexure B).

(d) Prohibition on the certification of agreements which have resulted from “pattern bargaining”

S.56 of the Bill would prevent the AIRC from certifying agreements which resulted from “pattern bargaining”. Such a provision would undoubtedly cause great difficulties for the Commission and the parties to agreements. It would be extremely difficult to identify whether agreements had resulted from “pattern bargaining”, given that many agreements contain relatively similar provisions. The emphasis should be on addressing unacceptable conduct which occurs during the bargaining process, not unduly complicating the certification process once agreement has been reached.

(e) Requirement that all certified agreements in the construction industry have a three year term, or a shorter term if special circumstances exist

The apparent intent of s.55 of the Bill is to spread the expiry dates of certified agreements in the industry. However, Ai Group and the ACA are concerned that the provision will have the opposite effect and operate to ensure the ongoing close alignment of expiry dates. If s.62 of the Bill is amended in the manner proposed in section (b) above, this provision will not be necessary as the refusal by a union to enter into agreements which do not have a common expiry date would constitute “not genuinely trying to reach agreement”.

The AIRC should have the discretion to certify agreements with terms of up to five years. For major projects, a four or five year construction period is not uncommon. Employers working on construction projects generally prefer that their certified agreements not expire during the life of the project.

(f) Project agreements

If pattern bargaining is to be outlawed, it is essential that the BCII Bill be amended to establish a genuine mechanism for the certification of project agreements. This is necessary to enable clients, head contractors and subcontractors to retain their ability to implement effective risk management strategies on major projects.

Major projects can be viewed as enterprises that bring together parties with the relevant skills and expertise in pursuit of a common goal.

Commissioner Cole did not recommend that project agreements be outlawed completely but expressed support for some forms of project agreement - in particular, agreements certified under s.170LC and s.170LL of the *Workplace Relations Act*. This can be contrasted with his views on industry-wide pattern bargaining which he regarded as highly inappropriate and damaging.

However, Ai Group and the ACA do not agree that either s.170LC or s.170LL provide a suitable mechanism for the certification of project agreements for major projects. S.170LC agreements are difficult to implement in the construction context because all of the organisations to be bound by the agreement need to be identified at the time when the agreement is certified. All such organisations need to sign the agreement and their employees need to vote in favour of the agreement. It is impossible to identify all employers that will work on a major project at the commencement of the project. The other mechanism - S.170LL – provides even less utility because such agreements can only apply to single businesses.

The *National Code of Practice for the Construction Industry* recognises that project agreements are often appropriate for major projects (see page 8 of the Code). The potential for project agreements to improve time and/or cost performance is recognised in the *Implementation Guidelines* (see page 11 of the Guidelines).

A proposed structure for certified project agreements is set out in **Annexure B** to this submission. The proposed mechanism contains stringent controls to avoid project agreements undermining the objects of the Bill.

The mechanism currently being used on many major construction projects to manage the significant risks associated with industrial relations is the use of common enterprise agreements. Establishing common enterprise agreements for all employers across a project is complex and far less efficient than the mechanism proposed above which would enable genuine project agreements to be reached and certified. Further, the BCII Bill, as currently drafted, would appear to outlaw the use of common enterprise agreements on projects as well as outlawing the use of project agreements – except for multiple-business agreements under s.170LC of the *Workplace Relations Act* which are limited entirely to “eligible conditions”, as defined in the BCII Bill. This is totally unworkable and would act as a significant barrier to investment in Australian projects – particularly major projects.

Option 2 – Outlawing protected industrial action in pursuit of pattern bargaining, amending the Bill’s provisions to overcome several definitional and other problems, and creating a genuine mechanism for the certification of project agreements on major projects

In Volume 5 of Commissioner Cole’s Final Report, the approaches to bargaining that are common in the building and construction industry were analysed. Commissioner Cole rejected the contentions of those who argue that pattern bargaining is justified in the building and construction industry:

In its submissions to the Royal Commission, Ai Group argued that the *Workplace Relations Act* should be amended to outlaw protected action in pursuit of any form of multiple employer or pattern bargaining⁵⁹. Such an amendment would minimise coercion of employers by unions to sign pattern agreements against their will.

In response to Ai Group’s proposal, Commissioner Cole said: *“I agree that these reforms would be necessary if pattern bargaining is to continue. However, if my recommendation that engaging in pattern bargaining be prohibited in the building and*

⁵⁹ Final Report, Volume 5, p.30

*construction industry is adopted, there will be no requirement for reforms as suggested above*⁶⁰.

Prohibiting pattern bargaining which is freely entered into by parties - as the BCII Bill does - as opposed to prohibiting industrial action in pursuit of pattern bargaining, would be a very significant step because the vast majority of current enterprise agreements in the industry are pattern agreements.

Ai Group and the ACA believe that the most important issue is to outlaw industrial action in pursuit of pattern bargaining. It needs to be abundantly clear in the legislation that protected action is not available in support of any form of multiple employer or pattern bargaining. Such an approach would minimise coercion of employers by unions to sign pattern agreements against their will.

The following amendments to Part 2 of Chapter 5 of the Bill, and associated provisions, are proposed if this option is adopted:

- Amending the Bill as set out in sections (a), (b), (c), (d), (e) and (f) above regarding Option 1;
- Removing s.83(4) of the Bill. It is essential that s.170MP of the *Workplace Relations Act* continue to apply in relation to building industrial action. S.170MP provides that industrial action is not protected if a party has not “genuinely tried to reach agreement” with the other negotiating parties;
- Inserting a provision in the Bill specifying that the Commission must terminate a bargaining period if an organisation of employees takes industrial action in pursuit of “pattern bargaining”. (NB. A similar provision was contained within the *Workplace Relations Amendment Bill 2000*);
- Inserting a provision in the BCII Bill which provides that if a party takes industrial action in concert with a second party then the industrial action is unprotected – regardless of whether the second party is “protected” or

⁶⁰ Final Report, Volume 5, p.73

“unprotected”. The definition of “in concert” needs to include industrial action taken at a common time across more than one enterprise in pursuit of common claims which form part of a common union campaign. This needs to be made very clear in the drafting of the Bill and in the Explanatory Memorandum.⁶¹

Other amendments which should be made to Chapter 5 of the Bill

The following amendments should be made to Chapter 5 of the Bill regardless of which of the above two options is adopted:

(a) Measures to address inappropriate coercion and hidden interests during bargaining

The Royal Commission into the Building and Construction Industry uncovered the fact that the Electrical Trades Union (ETU) in Victoria is receiving huge sums (understood to be approximately \$1,000,000 per annum) in commission from an income protection insurance provider. This income is derived because the ETU has forced a very large number of employers in the construction and electrical contracting industries to provide income protection insurance to their employees via the provider which the union has entered into a commercial arrangement with.

As stated by Commissioner Cole, it is highly inappropriate that:

- Employers faced with claims to pay income protection insurance to employees were not aware that a large percentage of the premium paid was being redirected to the ETU through the payment of very substantial commissions; and
- The employees being urged by the ETU to pursue income protection insurance during bargaining (with threats of or actual industrial action) were

⁶¹ Relevant Courts could interpret the phrases “in concert” and “engaged in other than solely by”, in the bill, as currently drafted, too narrowly. It may be very difficult to establish that the employees in two or more companies have acted in concert, if it is necessary to demonstrate that communication has taken place between the employees in the different companies. For example, see *Tillman Butcherries Pty Ltd v AMIEU* (1979) 42 FLR331 per Bowen CJ at p.373, where it was held that acting “in concert” involves “..knowing conduct, the result of communication between the parties and not simply simultaneous actions occurring spontaneously”.

unaware that a large percentage of the premium which would be paid by their employer would not be used to fund income protection insurance benefits for them, but rather would be paid to a third party.

A provision along the lines of the following should be incorporated within the Bill:

“An organisation of employees is taken to have not “genuinely tried to reach an agreement” with the employer unless it has disclosed 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.

For the purposes of this section, “disclosure” shall include details of:

- *The source of all such commissions and benefits; and*
- *The reason for receipt of all such commissions and benefits.”*

The above approach is consistent with Recommendations 171 and 172 of the Royal Commission. Despite the importance of these Recommendations, the BCII Bill inexplicably fails to address them.

In addition to the above disclosure requirement, the following forms of coercion by unions should be outlawed:

- Coercion to force an employer to pay for insurance in circumstances where the insurance provider pays commission or provides other benefit/s to the union;
- Coercion to force employers to contribute to a particular employee entitlement fund in which the union has an interest or where the fund pays commission or provides other benefit/s to the union;
- Coercion to force an employer to contribute to a particular superannuation fund in which the union has an interest or where the fund pays commission or provides other benefit/s to the union.

The outlawing of the inappropriate coercion described above could be achieved via the inclusion of the following provision in the BCII Bill which is broadly based on Recommendation 175 of the Cole Royal Commission:

“A person shall not, by threat of industrial action, coercion or other form of intimidation, persuade or attempt to persuade an employer to:

- Pay for insurance on behalf of an employee, where that person is paid a commission or provided with a direct or indirect financial benefit relating to the provision of the insurance;*
- Make contributions to a particular superannuation fund or scheme on behalf of an employee, where that person has an interest in the fund or scheme or is provided with a direct or indirect financial benefit relating to contributions to the fund or scheme;*
- Make contributions to a particular employee entitlements fund or scheme on behalf of an employee, where that person has an interest in the fund or scheme or is provided with a direct or indirect financial benefit relating to contributions to the fund or scheme.*

An “employee entitlements fund or scheme” includes but is not limited to funds relating to redundancy, long service leave, annual leave, personal leave or parental leave.”

The above provision could be incorporated within s.175 of the Bill.

There should be no exemptions for protected industrial action with regard to the above forms of coercion. However, employers should remain free to agree to pay for insurance or agree to make contributions to a particular superannuation or employee entitlement fund as part of an enterprise bargain.

(b) Penalties

Under s.71 of the Bill, the penalties for breaching awards and certified agreements would increase dramatically. Maximum penalties of \$110,000 for a breach of a certified agreement and \$55,000 for a breach of an award are excessive. It would be unfair for employers in the construction industry (most of which are small businesses without specialised workplace relations staff) to be exposed to such substantial penalties for what may be an inadvertent breach of an award or certified agreement provision. There are some 2200 federal awards and 2000 State awards, most of which are lengthy and complex. There are a large number of construction industry awards that are particularly complex. The penalties in the *Workplace Relations Act* for breaches of industrial instruments were recently tripled. The current level of such penalties is appropriate for all industries, including construction.

However, given the enormous costs of industrial action in the construction industry, a maximum penalty of \$110,000 is appropriate for breaches of AIRC orders or directions that industrial action stop or not occur.

Chapter 6 – Industrial Action etc

Industrial action taken in the building and construction industry can be extremely costly and Ai Group and the ACA support the strong approach taken within the BCII Bill to stamp out unlawful industrial action. However, Ai Group and the ACA believe that the following amendments need to be made to the provisions of Chapter 6 of the Bill:

- With regard to s.135 of the Bill, there should only be a requirement upon employers to notify the ABCC within 72 hours in circumstances where actual industrial action occurs, not where threats of industrial action occur.
- The proposed maximum penalty of \$110,000 in s.137 of the Bill for employers who fail to notify the ABCC within 72 hours of any claims made for the payment of strike pay is excessive, given the very short timeframe. The timeframe should be extended to seven days and the penalty reduced to a

more reasonable level, say, \$11,000 for a body corporate and \$2,200 for an individual. (Consider the example of a claim made by a delegate on a remote site on a Friday night. Under the provisions of the Bill, as currently drafted, the details would need to be relayed from the remote site to the company's head office, then verified, then the relevant forms completed and delivered to the ABCC by no later than Monday. Such a timeframe is unrealistic and unreasonable).

- The proposed maximum penalty under s.121 of the Bill, of imprisonment for 12 months, for persons who disclose the identity of various persons involved in a secret ballot is excessive. Also, the penalty should only apply to Registry officials or authorised ballot agents in a consistent manner to the approach adopted in s.170WHB of the *Workplace Relations Act* regarding the disclosure of confidential information about AWAs.

Chapter 7 – Freedom of Association

Freedom of choice is a fundamental tenet of our democracy. All employers and employees should be free to decide whether or not they wish to belong to a union or employer association. Chapter 7 of the Bill reinforces these freedoms in the building and construction industry and Ai Group and the ACA support the provisions, with one exception. The “prohibited reason” in s.155(1)(i) should be deleted. A similar provision in the *Workplace Relations Act* which prohibits termination of employment on the basis that an employee “is entitled to the benefit of an industrial instrument or an order of an industrial body” is regularly being used by unions to frustrate company proposals to outsource work to reduce costs and improve efficiencies⁶².

Chapter 8 – Discrimination, Coercion and Unfair Contracts

One of the most significant workplace relations problems in the construction industry relates to the coercion of employers to employ specific persons nominated by unions. The coercion typically takes the form of the relevant union refusing to sign an

⁶² For example, see the decision of the Full Federal Court in *Greater Dandenong City Council v ASU* [2001] FCA 349 and the recent decision of Moore J in *AFMEPKIU v Eaton Electrical Systems Pty Ltd* [2005] FCA 2 (7 January 2005)

industrial agreement with the head contractor or major subcontractor on a project, and refusing to allow work to commence, until agreement has been reached that the employer will hire specific persons nominated by the union (and agreement reached on the assignment of key roles, such as that of OHS representatives, to such persons). Many of the individuals nominated are highly militant and have a history of contributing to poor workplace relations on previous construction projects. It is essential that employers have the ability to employ the most appropriately qualified person for each job. Employers carry the risk for OHS on a project and must be able to employ the persons who are best qualified to assist in achieving a high level of OHS performance – not the persons forced upon them by unions for industrial purposes. Section 172 of the Bill adopts proposals that Ai Group and the ACA argued strongly for in their submissions to the Royal Commission and which were recommended by Commissioner Cole in his Final Report.

However, Ai Group and the ACA are concerned about the wording of s.174 of the Bill which extends beyond the concept of “coercion”. As identified by the Royal Commission, the present state of the law defines coercion as “an application of pressure which has the practical effect of negating choice, by conduct which is unlawful, illegitimate or unconscionable. Conduct which merely influences, persuades or induces, or which amounts to an incentive to do something is not coercion”⁶³.

It is appropriate that the Bill prohibit coercion to enter into a particular form of enterprise agreement. Such a prohibition is covered by s.173 of the Bill and s.170NC of the *Workplace Relations Act*.

Ai Group is concerned about the potential breadth of the term “discrimination” in s.174 of the Bill and the very narrow exclusions.

In his Final Report, Commissioner Cole endorsed the practice of head contractors discriminating against sub-contractors at the point of awarding contracts, if a sub-contractor does not have a workplace agreement with sufficiently flexible terms to enable the head contractor to efficiently manage the site.⁶⁴ For example, a head contractor may wish to give preference when awarding a contract (all others aspects

⁶³ Final Report, Volume 5, p.90.

⁶⁴ Final Report, Volume 5, p.123

being equal) to a sub-contractor whose enterprise agreement enables casuals or part-time employees to be employed to cope with work fluctuations, or permits staff to carry out a wide range of different tasks, etc. It is appropriate that head contractors retain their right to select sub-contractors with agreements that contain provisions which are suited to the needs of the project.

The prohibition in s.174 of the Bill should not extend beyond the concept of coercion.

Chapter 9 – Union Right of Entry

Unions have an important representative role to play which is recognised within the *Workplace Relations Act*. It is an object of the Act that registered employee and employer bodies be able to operate effectively (s.3(g)). Accordingly, an appropriate balance needs to be struck between protecting employers from the misuse by unions of right of entry and inspection powers (which the Royal Commission held to be highly prevalent in the industry) and retaining an entry and inspection regime which enables unions to represent their members effectively. The provisions of the Bill strike an appropriate balance.

Chapter 10 – Accountability of Organisations

Representative bodies, by definition, are established to represent their members and should be accountable to their members. Commissioner Cole found that clients and contractors often seek to secure peace by paying money to or at the direction of unions - typically after a union representative threatens to organise industrial action. Clients and head contractors cannot afford delays to their projects because liquidated damages typically apply when a project is not completed on time, of up to \$250,000 per day.

The Royal Commission found that such circumstances have contributed to a culture where there is a tendency to seek “short-term, quick-fix solutions which are justified on the basis of commercial reality or pragmatism”⁶⁵. The BCII Bill addresses these issues in an appropriate way.

⁶⁵ Final Report, Volume 9, p.221.

Chapter 11 – Demarcation Orders

Demarcation disputes occur much less frequently these days than has historically been the case. However, some problems still arise from time to time. Ai Group and the ACA support the provisions of Chapter 11 of the Bill. The provisions are practical and balanced.

Chapter 12 - Enforcement

Ai Group and the ACA support strong compliance and enforcement powers. The Bill provides appropriate powers and enforcement mechanisms except in the following areas. With regard to Division 2 (Powers of ABC Inspectors) and Part 3 (Powers of Federal Safety Officers) of Part 2 of Chapter 12 of the Bill, it is not appropriate that ABC Inspectors and Federal Safety Officers have a role in monitoring and promoting “compliance” with the Building Code - a document that is not subject to any Parliamentary or judicial scrutiny. These issues are covered in more detail above, in the sections of this submission which relate to Chapters 3 and 4 of the Bill.

Chapter 13 – Miscellaneous

Under s.247 of the Bill, registered organisations would be liable for the conduct of an “*officer*” of the association (defined much more broadly than under s.4 of the *Workplace Relations Act*, to include an employee of the association). As the Bill is currently drafted, such responsibility would apply even if the association has taken reasonable steps to prevent the action. Such an approach is inappropriate and unfair on registered organisations such as Ai Group. Paragraph 242(2) should be amended to include reference to the persons referred to in (1)(b) of the Bill – not just those referred to in (1)(c) and (d). This will have the effect of preventing conduct by an employee of a registered organisation being deemed to be conduct of the organisation, where the organisation has taken reasonable steps to prevent the action.

National Code of Practice for the Construction Industry and Implementation Guidelines

It is essential that employers in the construction industry understand the Government's intentions regarding the National Code of Practice for the Construction Industry and the supporting Implementation Guidelines. Companies are currently planning and pricing projects that will be constructed over the next five years. Also employers are constantly developing and negotiating workplace agreements that operate for up to three years. Given these issues, it is vital that the Government confirm its intentions regarding the following issues:

- Will the Government accept the arguments of Ai Group and the ACA that the Code should remain a standard-setting instrument for projects funded by the Commonwealth, rather than being used as a device to regulate the whole industry?
- Does the Government intend to amend the Code or Implementation Guidelines when the BCII Bill is enacted and, if so, what amendments will be made?

It is critical to the success of the building and construction industry reform program that the industry have certainty regarding these issues at the earliest possible time.

Again we stress the importance of the BCII Bill being enacted and operational by no later than **30 September 2005**.

Annexure A

Proposed Amendments to Definitions in the BCII Bill

Definitions in the <i>Building and Construction Industry Improvement Bill</i>	Comments	Proposed Amended Definitions
<p>Definition of “building work”:</p> <p>(1) Subject to subsections (2), (3) and (4), “building work” means any of the following activities:</p>		<p>Definition of “building work”:</p> <p>(1) Subject to subsections (2), (3) and (4), “building work” means any of the following activities:</p>
<p>(a) the construction, alteration, extension, restoration, repair, demolition or dismantling of buildings, structures or works that form, or are to form, part of land, whether or not the buildings, structures or works are permanent;</p> <p>(b) the construction, alteration, extension, restoration, repair, demolition or dismantling of railways (not including rolling stock) or docks;</p>	<p>“Repair” work should not be included in the definition of “building work”, as such work is not generally regarded as falling within the construction industry.</p> <p>In addition, the term “alteration” is too vague to be used in the definition. Forms of “alteration” that are appropriately covered by the Bill are covered by other terms in the definition, eg. “construction”, “extension” and “restoration”.</p> <p>This part of the definition should only cover work carried out <u>on</u> a construction site.</p>	<p>(a) the construction, <u>extension, restoration, demolition or dismantling of buildings, structures or works that form, or are to form, part of land, at the site where such buildings, structures or works are to be located, whether or not the buildings, structures or works are permanent;</u></p> <p>(b) the construction, <u>extension, restoration, demolition or dismantling of railways (not including rolling stock) or docks;</u></p>
<p>(c) the installation in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems.</p>	<p>Only installation work carried out on a construction site should be included in the definition of “building work”. Installation work relating to existing buildings and structures should not be included.</p> <p>Further, the activities in paragraph (h) below of the redrafted definition should be excluded.</p>	<p>(c) <u>the installation of fittings forming part of buildings, structures or works which are being constructed, extended, restored, demolished or dismantled, including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems.</u></p>

Definitions in the <i>Building and Construction Industry Improvement Bill</i>	Comments	Proposed Amended Definitions
<p>(d) any operation that is part of, or is preparatory to, or is for rendering complete, work covered by paragraph (a), (b) or (c), for example:</p> <ul style="list-style-type: none"> (i) site clearance, earth-moving, excavation, tunnelling and boring; (ii) the laying of foundations; (iii) the erection, maintenance or dismantling of scaffolding; (iv) the prefabrication of made-to-order components to form part of any building, structure or works, whether carried out on-site or off-site; (v) site restoration, landscaping and the provision of roadways and other access works; 	<p>Paragraph (d)(iv) of the definition is far too broad and would include a large number of companies which fabricate building materials and products (eg. manufacturers of windows and doors). Many of these companies have fought to keep construction industry terms and conditions out of their businesses.</p> <p>Also, many companies (eg. manufacturers of lifts and air-conditioning equipment) have structured their businesses into different divisions to stop construction industry terms and conditions flowing into their manufacturing and service operations.</p>	<p>(d) any operation that is part of, or is preparatory to, or is for rendering complete, work covered by paragraph (a), (b) or (c), for example:</p> <ul style="list-style-type: none"> (i) site clearance, earth-moving, excavation, tunnelling and boring; (ii) the laying of foundations; (iii) the erection, maintenance or dismantling of scaffolding; (iv) <u>the prefabrication of major parts of buildings, structures and works (eg. pre-castings) carried out on-site or in a temporary facility or yard established for the purposes of carrying out such prefabrication work for the project.</u> (v) site restoration, landscaping and the provision of roadways and other access works;
<p>but does not include any of the following:</p> <ul style="list-style-type: none"> (e) the drilling for, or extraction of, oil or natural gas; (f) the extraction (whether by underground or surface working) of minerals, including tunnelling or boring, or constructing underground works, for that purpose; (g) any work that is part of a project for: <ul style="list-style-type: none"> (i) the construction, repair or restoration of a single-dwelling house; or (ii) the construction, repair or restoration of any building, structure or work associated with a single dwelling house; or (iii) the alteration or extension of a single-dwelling house, if it remains a single-dwelling house after the alteration or extension. 		<p>but does not include any of the following:</p> <ul style="list-style-type: none"> (e) the drilling for, or extraction of, oil or natural gas; (f) the extraction (whether by underground or surface working) of minerals, including tunnelling or boring, or constructing underground works, for that purpose; (g) any work that is part of a project for: <ul style="list-style-type: none"> (i) the construction, repair or restoration of a single-dwelling house; or (ii) the construction, repair or restoration of any building, structure or work associated with a single dwelling house; or (iii) the alteration or extension of a single-dwelling house, if it remains a single-dwelling house after the alteration or extension.

Definitions in the <i>Building and Construction Industry Improvement Bill</i>	Comments	Proposed Amended Definitions
	<p>There are a large number of companies involved in installing and repairing equipment in existing buildings (eg. lifts, air-conditioning equipment, refrigeration equipment). It is inappropriate to deem these activities to be part of the construction industry.</p> <p>There are also many companies which install equipment (eg. industrial machinery) in buildings but the equipment does not form part of the building. It is inappropriate to deem these activities to be part of the construction industry.</p> <p>The redrafted definition addresses these issue in (h)(i) and (ii).</p>	<p>(h) <u>The installation and repair of equipment or machinery:</u></p> <p>(i) <u>in existing buildings, structures or works; or</u></p> <p>(ii) <u>which does not form part of the building, structure or works, for example, industrial machinery.</u></p>
<p>(2) Paragraph (1)(g) does not apply if the project is part of a multi-dwelling development that consists of, or includes, the construction of at least 5 single-dwelling houses.</p> <p>(3) Subject to subsection (4), “building work” includes any activity that is prescribed by the regulations for the purposes of this subsection.</p> <p>(4) “Building work” does not include any activity which is prescribed by the regulations for the purposes of this subsection.</p> <p>(5) In this section: “land” includes land beneath water.</p>		<p>(2) Paragraph (1)(g) does not apply if the project is part of a multi-dwelling development that consists of, or includes, the construction of at least 5 single-dwelling houses.</p> <p>(3) Subject to subsection (4), “building work” includes any activity that is prescribed by the regulations for the purposes of this subsection.</p> <p>(4) “Building work” does not include any activity which is prescribed by the regulations for the purposes of this subsection.</p> <p>(5) In this section: “land” includes land beneath water.</p>

Definitions in the <i>Building and Construction Industry Improvement Bill</i>	Comments	Proposed Amended Definitions
<p>Other Definitions:</p> <p>“building agreement” means an agreement that applies to building work (whether or not it also applies to other work).</p> <p>“building award” means an award that applies to building work (whether or not it also applies to other work).</p> <p>“building certified agreement” means a certified agreement that applies to building work (whether or not it also applies to other work).</p>	<p>The definitions of “building agreement”, “building award” and “building certified agreement” incorporate agreements and awards which apply to “building work” even if such work is a relatively insignificant part of the overall coverage of the agreement or award. This is not appropriate.</p> <p>For example, Schedule A of the <i>Metal, Engineering and Associated Industry Award 1998</i> provides that the award applies to “Making, manufacture, installation, construction, maintenance, repair and reconditioning of plant, equipment, buildings and services (including power supply) in establishments connected with industries and callings described herein and maintenance work generally”. The Metals Award is a major manufacturing industry award – not a construction industry award and it would be inappropriate to deem such award as a “building award” for the purposes of the Bill.</p>	<p>Other Definitions:</p> <p>“building agreement” means an agreement that <u>primarily</u> applies to building work.</p> <p>“building award” means an award that <u>primarily</u> applies to building work.</p> <p>“building certified agreement” means a certified agreement that <u>primarily</u> applies to building work.</p>

Annexure B

Proposed Model for Project Agreements

The merits of projects agreements are analysed in Commissioner Cole’s Final Report (Vol. 5, Ch. 14). Commissioner Cole accepted that head contractors need to maintain control over building sites in order to coordinate and plan work.⁶⁶

Ai Group and the ACA submit that:

- The federal workplace relations legislation should enable genuine project agreements to be certified for “major construction projects” given the size, nature, location and complexity of such projects and the complex chain of contractual relationships involved;
- Owners, head contractors and subcontractors all support the establishment of project agreements on major projects;
- Subcontractors generally accept that project agreements provide the best environment for them but seek that project agreements be established in advance of tendering and only apply to the subcontractor’s employees while they are engaged on the project;
- Project agreements have delivered many best practice outcomes for major construction projects;
- Protected action must not be available during the negotiation of project agreements because it is a fundamental tenet of the Act that protected action apply exclusively for enterprise bargaining – not bargaining involving more than one employer.

The use of project agreements on major projects is a legitimate risk-management practice adopted by stakeholders in the building and construction industry. Preventing such practices would lead to investors becoming far more reluctant to commit funds to major projects. This would not be in the public interest.

⁶⁶ Final Report, Chapter 5, p.106

The National Code of Practice for the Construction Industry and the Implementation Guidelines recognise that project agreements are sometimes appropriate for major projects.

Commissioner Cole recommended that the forms of project agreement which should have force and effect in the building and construction industry are those made under ss.170LC or 170LL of the *Workplace Relations Act*. However, neither s.170LC nor s.170LL provide a suitable mechanism for the certification of project agreements for major projects. S.170LC agreements are difficult to implement in the construction context because all of the organisations to be bound by the agreement need to be identified at the time when the agreement is certified. All such organisations need to sign the agreement and their employees need to vote in favour of the agreement. It is impossible to identify all employers that will work on a major project at the commencement of the project. Contracts for packages of work are typically established progressively as the project progresses. The other mechanism - S.170LL – provides even less utility because such agreements can only apply to single businesses.

The BCII Bill should be amended to create a genuine mechanism for the certification of project agreements for major projects, subject to stringent controls. A project agreement should be able to be certified if it meets the following criteria:

- The agreement applies to a major project - to be defined. (Note: The definition of a “major project” needs to be carefully drafted to ensure that such agreements are only available in exceptional and appropriate circumstances. Factors which may be relevant in determining whether such exceptional circumstances exist include: the size of the project; the complexity of the project; the location of the project (eg. remote area); the construction programme; and whether any special demarcation problems exist.)
- It is reached between an employer or group of employers and a union or unions;
- It is certified by a Presidential Member of the AIRC;

- The Presidential Member is satisfied that it is in the public interest to certify the agreement, having regard to:
 - Whether the matters dealt with by the agreement could be more appropriately dealt with by agreements at the enterprise level;
 - Whether the agreement contains provisions which are likely to lead to productivity and efficiency improvements on the project and a consequent reduction in the period of construction and/or a lower construction cost;
 - Whether the client supports the project agreement; and
 - Any other matters that the Commission considers relevant.

- The Presidential Member is satisfied that, in addition to the involvement of the specific parties to the agreement, the negotiation process has, to the extent that is practicable, taken into account the views and interests of the subcontractors who will subsequently become bound by the agreement. This could be achieved via the involvement in the negotiations of an agent (eg. an employer association or other body or person) appointed by a representative group of sub-contractors.

Upon certification, the project agreement should become binding on all Constitutional Corporations that work on the project. This could be achieved through reliance on the Corporations Power under the Australian Constitution. (Note: The overwhelming majority of employers that perform work on major projects are corporations).

Consistent with the existing multiple-business agreement provisions of the *Workplace Relations Act* (s.170LC), protected industrial action should not be available during the negotiation of project agreements. It is a fundamental tenet of the Act that protected action apply exclusively for enterprise bargaining – not bargaining across an industry, a sector, a geographic area or more than one employer.

Further, industrial action taken by employees working on a project and covered by a certified project agreement should not be protected regardless of whether an enterprise agreement which is also applicable to such employees expires during the life of the project. This proposal is consistent with the commonly accepted interpretation of s.170MN of the Act which provides that parties covered by a certified agreement cannot take protected industrial action before the nominal expiry date of the certified agreement (regardless of whether another certified agreement which binds the parties expires).

At the present time project agreements are not producing certainty of project costs because the periodic review of enterprise agreements (which are almost invariably pattern agreements) during the life of a long term project often results in “a project becoming the front line battleground of a general campaign for the next generation of enterprise agreements, especially if it is identified by the unions as being in a vulnerable stage of its development”⁶⁷. This proposal overcomes that problem because there would be no right to take protected action during the life of the certified project agreement even where a subcontractor’s enterprise agreement expired during such period. Of course, even though the employees on the project would be unable to take protected action, the other employees of the subcontractor would retain their right to take industrial action during the renegotiation of the enterprise agreement.

⁶⁷ Final Report, Volume 5, p.109

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