

# **AWARD MODERNISATION SUBMISSIONS AND DRAFT AWARD PROVISIONS**

## **Stage 1 - Priority Industries**



**1 August 2008**

# ARRANGEMENT

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# AWARD MODERNISATION SUBMISSIONS AND DRAFT AWARD PROVISIONS

## Stage 1 - Priority Industries

### Chapter 1 – Introduction

1. The award modernisation process presents huge challenges for the Australian Industrial Relations Commission (AIRC) given the massive scope and complexity of the exercise. The process also presents huge challenges for Ai Group and other registered organisations given the resources required to ensure that members' interests are well-represented. Ai Group is a party in its own right to more than one hundred pre-reform awards and has an interest in more than 500 awards. Notwithstanding the challenges, the award modernisation process is essential to bring Australia's safety net of minimum award conditions in line with the needs of contemporary Australian employment relationships and workplaces.
2. On 20 June 2008 the AIRC handed down an important decision in relation to award modernisation, as prescribed by Part 10A of the *Workplace Relations Act 1996* ("the Act").
3. The decision related to four matters:
  - Priority industries / occupations;
  - The Model Flexibility Clause;
  - The timetable for completion of various stages of the modernisation process; and
  - Provisions for apprentices, trainees and those eligible to receive the supported wage.

4. The AIRC identified fourteen priority industries / occupations as follows:

- Coal mining industry;
- Glue and gelatine industry;
- Higher education industry;
- Hospitality industry;
- Metal and associated industries;
- Mining industry;
- Private sector clerical occupation;
- Racing industry;
- Rail industry;
- Retail industry;
- Rubber, plastic and cablemaking industry;
- Security industry;
- Textile, clothing and footwear industry; and
- Vehicle manufacturing industry.

5. The Decision also identified a four stage timetable for the completion of award modernisation. The first stage of this timetable pertains to the process to be undertaken in relation to the priority industries / occupations. Specifically, it identified that any party with an interest in any of the priority industries / occupations was required to file by no later than 25 July 2008 any *“written submissions, drafts of modern awards and other proposals concerning scope, content and transitional arrangements for each of the priority modern awards.”*<sup>1</sup>

6. The Commission, in an amended statement dated 22 July 2008, revised its original timetable for the priority industries / occupations providing interested parties with an opportunity to file their materials by no later than 1 August

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<sup>1</sup> Request from the Minister for Employment and Workplace Relations – 28 March 2008 – Award Modernisation [Print PR062008; at Pg 81.]

2008. This submission and its attachments represent Ai Group's materials in this regard.

2. Ai Group has an interest in the following priority industries/occupations:
  - Coal mining industry;
  - Glue and gelatine industry;
  - Hospitality industry;
  - Metal and associated industries;
  - Mining industry;
  - Private sector clerical occupation;
  - Rail industry;
  - Retail industry;
  - Rubber, plastic and cabling industry;
  - Security industry;
  - Textile, clothing and footwear industry; and
  - Vehicle manufacturing industry.
  
3. At this stage, Ai Group has not identified an interest in the Higher Education or Racing Industries, but this may change depending upon the scope of the modern awards which are drafted for those industries.
  
4. Ai Group has carried out an extensive amount of work in several of the industries / occupations in which it has an interest. That said, even after revision, the ambitious timetable established by the Commission, has meant that it has been impossible to complete the negotiation and drafting of modern awards for priority industries / occupations with relevant unions and other employer organisations by 1 August.
  
5. These comments are not intended to be in any way critical of the Commission. Ai Group is well aware that the timetable established by the Commission is

one that flows primarily from explicit deadlines within the Minister for Employment and Workplace Relations' ("the Minister") Award Modernisation Request of 28 March 2008 ("the Initial Modernisation Request") and the Minister's amended Award Modernisation Request of 16 June 2008 ("the Modernisation Request"). Instead, the observations made, merely seek to contextualize the work that Ai Group has undertaken within the timeframe.

6. In drafting modern awards, Ai Group has given priority to drafting the scope and machinery clauses, and modernising the core award entitlements. Where a complete version of an award has not been drafted, Ai Group has attempted to draft those aspects of the award that it believes are most significant for the Commission's consideration or, alternatively, Ai Group's position has been identified in relation to various matters of substance within the specific industry / occupation.
7. Ai Group has reached agreement with the ACTU on the following important issues which both parties have agreed to incorporate within their submissions:
  - (a) *"With regard to the Award Modernisation Timetable, Ai Group and the ACTU seek that parties have the right to file draft award provisions and supporting materials after 1 August 2008, and up to 31 August 2008. In all of the priority industries negotiations are taking place between relevant unions and employer organisations and substantial progress is being made towards reaching an agreed position. It would assist the award modernisation process to allow such negotiations to continue after 1 August 2008. Registered organisations of employers and employees are devoting substantial resources to the modernisation exercise."*
  - (b) *"With regard to the exposure drafts of modern awards to be issued by 12 September, Ai Group and the ACTU seek that the Commission not finally determine the scope at the time when the exposure drafts are*

*issued. It is vital that the parties have the opportunity to make detailed submissions in respect of the scope set out in the exposure drafts.”*

8. Ai Group submits that it would not be in the public interest to prevent registered organisations continuing their negotiations over the weeks ahead and providing updated materials to the Commission up to 31 August. For example, in respect of the Metal, Engineering and Associated Industries Ai Group and the AMWU, AWU, CEPU, CFMEU, NUW and LHMU have been engaged in a very extensive negotiation process since mid-April. Good progress has been made and agreed positions have been reached in numerous areas but there is a huge amount of work still to be done, for example, in considering the approach that should be taken to deal with the differences in conditions in a very large number of relevant federal awards and NAPSAs.
9. Given the relatively complex nature of these proceedings, Ai Group has attempted to structure its submissions as succinctly and effectively as possible. To that end, ***Chapter 2 – Legislative provisions, allowable award matters and the Award Modernisation Request, Chapter 3 – Matters of relevance across all priority industries, and Chapter 4 – Relationship of modern awards to the NES*** seek to crystallize those matters of principle, legislation and drafting that we submit are common to all industries / occupations.
10. By comparison, ***Chapter 5 – Matters of relevance within specific priority industries*** focuses on matters identified by Ai Group to be primarily of relevance to one priority industry / occupation. In some instances there is commonality across a number of industries.
11. Ai Group will seek to elaborate on various aspects of these submissions during the public consultations for the priority industries / occupations

commencing on 4 August. However, Ai Group will not unnecessarily traverse those matters covered in these materials.

12. This submission is made on behalf of Ai Group and its affiliated organisation, the Engineering Employers Association, South Australia.

## Chapter 2 – Legislative provisions, allowable award matters and the Award Modernisation Request

13. In seeking to frame the terms of modern awards all parties and the Commission must comply with the terms of the Act and the Award Modernisation Request.
14. To that end, this Chapter identifies key considerations arising from the Act and the Award Modernisation Request that dictate, or provide guidance on, the form and content of modern awards.
15. Prime considerations in determining the form and content of modern awards are the objectives set out in the Act for modern awards and the award modernisation process.
16. The criteria which modern awards are required to meet are set out in s.576A of the Act and Paragraph 1 of the Award Modernisation Request, which provide that modern awards:
  - (a) **must** be simple to understand and easy to apply, and **must** reduce the regulatory burden on business; and
  - (b) together with any legislated standards, **must** provide a fair minimum safety net of enforceable terms and conditions of employment for employees; and
  - (c) **must** be economically sustainable, and promote flexible modern work practices and the efficient and productive performance of work; and
  - (d) **must** be in a form that is appropriate for a fair and productive workplace relations system that promotes collective enterprise bargaining but does not provide for statutory individual employment agreements; and
  - (e) **must** result in a certain, stable and sustainable modern award system for Australia.

17. The use of the word **must** throughout s.578A of the Act and Paragraph 1 of the Request shows that modern awards are required to meet the above criteria – the provisions are not framed in an aspirational manner and the criteria are not discretionary.
18. In performing its functions in modernising awards, s.576B of the Act and Paragraph 3 of the Award Modernisation Request require that the Commission have regard to the following factors:
- (a) *the creation of jobs and the promotion of high levels of productivity, low inflation, high levels of employment and labour force participation, national and international competitiveness, the development of skills and a fair labour market,<sup>2</sup>*
  - (b) *protecting the position in the labour market of young people, employees with a disability and employees to whom training arrangements apply;*
  - (c) *the needs of the low-paid;*
  - (d) *the desirability of reducing the number of awards operating in the workplace relations system;*
  - (e) *the need to help prevent and eliminate discrimination on the grounds of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin, and to promote the principle of equal remuneration for work of equal value;*
  - (f) *the need to assist employees to balance their work and family responsibilities effectively, and to improve retention and participation of employees in the workforce;*
  - (g) *the safety, health and welfare of employees;*
  - (h) *relevant rates of pay in Australian Pay and Classification Scales and transitional awards;*

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<sup>2</sup> Paragraph (a) is worded slightly differently in the Request, apparently to improve the grammar used in the equivalent section of the Act which was drafted at an earlier stage.

- (i) *minimum wage decisions of the Australian Fair Pay Commission;*
- (j) *the representation rights, under the Act or the Registration and Accountability of Organisations Schedule, of organisations and transitionally registered associations.*

19. Paragraph 2 of the Award Modernisation Request provides some additional guidance on the form and content of modern awards, stating that modern awards are not intended to:

- Extend award coverage to those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have traditionally been award free;
- Result in high-income employees being covered by modern awards;
- Disadvantage employees;
- Increase costs for employers;
- Result in the modification of enterprise awards.

20. On Ai Group's analysis, the terms of modern awards can be grouped within four categories:

- Allowable award matters set out in the Act (*ss.576J(1), 576K and 576M*);
- Additional allowable matters set out in the Award Modernisation Request (*ss.576C and 576J(2)*);
- Mandatory award terms (*ss.576C(3)(c) and 576N*); and
- Prohibited award terms (*ss. 576P, 576Q, 576R and 576T*).

21. Whilst these characterisations do not necessarily find parallel with terminology used within either the Act or the Modernisation Request, we submit that such identification is useful as it contextualises not only the source of the provision but also the criteria that will dictate the inclusion or exclusion of terms within a modern award.

## **Allowable award matters set out in the Act**

22. The notion of ‘allowable award matters’ insofar as the concept represents the articulation of a list of specific subject matters that may be contained within an award is one that had its genesis in the amendments made to the Act in 1996-97.
23. Within the Act there are two sections that identify allowable award matters however their application is distinct in that the list which is featured in Part 10 of the Act applies to current awards, with the list of matters reflected in Part 10A applying to modern awards. The specific term “allowable award matter” is only used in Part 10 but the term is an equally convenient and accurate label for the list of matters in Part 10A.
24. Specifically, section 576J sets out the list of 10 allowable award matters for modern awards.
25. In addition to those matters listed in section 576J, Part 10A, Division 3, Subdivision A of the Act articulates two other categories of subject matter which a modern award may contain. These matters are expressed at sections 576K and 576M and deal with outworkers and incidental and machinery terms respectively.
26. Ai Group submits that whilst these allowable award matters establish the framework for the content of awards, the ultimate decision on whether a provision should be reflected within the terms of a modern award is dependent on whether its inclusion accords with the aims and directives for award modernisation.
27. In each of the provisions of 576J, 576K and 576M, the word ‘may’ is used in reference to the ability for modern awards to reflect the subject matter referred to. Such an expression reveals that whilst they are capable of being included,

determining whether they will be reflected in a particular modern award is contingent on more than their representation within a list.

28. One such factor that is relevant to that determination is the notion of whether a particular award provision is necessary to provide a safety net of minimum conditions. The concept of modern awards operating as a safety net is one that is interweaved within the fabric of the Act. In identifying the manner in which this concept informs the drafting of modern awards section 576L provides that a “*modern award may include terms about the matters referred to in subsection 576J(1) or (2) or section 576K only to the extent that the terms provide a fair safety net.*”
29. Fairness is a concept that needs to be considered from the point of view of employees as well as employers.
30. In addition to the notion of a ‘fair safety net’, we submit that the objects of Part 10A, together with more broadly the objects of the Act, and the terms of the Award Modernisation Request all provide critical guidance in relation to whether an allowable award matter should be reflected within a modern award, and if yes, in what terms.
31. With respect to our contention in relation to the relevance of the broader objects of the Act we say that such a proposition is supported by the fact that the objects of the Act were amended by the *Workplace Relations Amendment (Forward with Fairness) Bill 2008* to take into account award modernisation.<sup>3</sup>

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<sup>3</sup> See section 3(ga) of the Act

## **Additional allowable matters set out in the Award Modernisation Request**

32. The Award Modernisation Request identifies a range of further matters, not reflected within the Act, which may be included within a modern Award.
33. The legislative mechanism that allows the Award Modernisation Request to provide such direction is found within ss.576C(3)(b) and 576J(3).
34. The focus of these 'additional matters' is primarily in relation to the manner in which modern awards will interact with the National Employment Standards, although relevantly there is also expressed provision made for the Commission to give consideration to the appropriateness of including transitional arrangements within awards to ensure that the objectives of modernisation are achieved.
35. The allowable award matters dealt with in the Award Modernisation Request include:
  - Rules to deal with award overlap – para 9;
  - The award flexibility clause – paras 10 and 11;
  - Dispute settlement provisions – para 11A;
  - Transitional arrangements – para 12;
  - Minimum wages – para 25;
  - Allowances and a formula for adjustment – para 27;
  - Interaction with NES entitlements – paras 28-46.

## Mandatory award terms

36. As already stated, the general proposition that is evident from the terms of the Act in relation to the concept of allowable award matters is that whilst the list identifies a range of matters capable of inclusion, their actual inclusion is not mandatory and instead is contingent on a range of other factors.
37. This general notion however must be qualified in the context of s.576N of the Act which states that a modern award *“must include a term about a matter referred to in subsection 576J(1) or (2) or section 576K or 576M if the award modernisation request to which the modern award relates requires the modern award to include a term about that matter”*.
38. The matters that are required to be included within modern awards, in accordance with s.576N, are: the inclusion of a dispute settlement procedure (para 11A), a mechanism for the calculation of any increases to allowances (para 27), and provisions specifying the ordinary hours of work that apply under the modern Award (para 46).
39. In addition to the s.576N matters, the Award Modernisation Request as allowed by section 576C(3)(c) of the Act, also identifies a number of other mandatory elements for modern awards. Specifically, the insertion of provisions within each modern award that identify rules in relation to overlapping coverage of awards (para 9), and the adoption of a model flexibility clause for each modern award (paras 10 and 11).

## Prohibited award terms

40. The notions of (1) Allowable award matters set out in the Act, (2) Additional allowable matters set out in the Award Modernisation Request, and (3) Mandatory award terms, are significant propositions, for not only do they guide the Commission in its drafting, but additionally, the subject matter within each category stand as gatekeepers to the award system. Section 576P makes it clear that any matter which is not capable of fitting within these categories cannot be included within a modern award where it states:

***“576P Terms not permitted by Subdivision A***

*A modern award must not include terms other than those permitted or required by Subdivision A.”*

41. Beyond those terms which are not permitted or required by Subdivision A, the Act also identifies four other broad categories of matters for which there is a prohibition on inclusion within modern awards. These matters are reflected in the following sections of the Act:

- 576Q – Terms that breach freedom of association provisions;
- 576R – Terms about right of entry;
- 576S – Terms that are discriminatory;
- 576T – Terms that contain State-based differences.

42. Of the above propositions, three of the four represent concepts that are reflected in the terms of the Act applying to pre-reform and transitional awards, namely prohibitions on terms that are discriminatory, terms that breach freedom of association and terms that pertain to right of entry. To a large extent they are concepts that have been a feature of Australia’s industrial relations system for over a decade and the reflection of these notions in modern awards should not create any significant complications.

43. However, the requirement to remove provisions based upon State or Territory boundaries is a different concept and one that Ai Group envisages will create significant challenges during the award modernisation process. To that end, further within this submission we will seek to explore the manner in which the difficulties presented by this proposition may be resolved.

## Chapter 3 – Matters of Relevance across all Priority Industries

### Format for modern awards

44. In its statement of 29 April 2008 the Commission identified that it would develop a modern award drafting guide incorporating a standard format and style for the drafting of modern awards.<sup>4</sup>
45. On 11 July, the Commission issued its *Interim Guide to Drafting Modern Awards*.
46. Prior to receipt of the Commission's *Interim Guide*, Ai Group, ACCI and the ACTU reached agreement on a model format and structure for modern awards which the ACTU has provided to the Commission on behalf of the major parties. We seek that the Commission adopt the agreed model format when drafting modern awards and that appropriate amendments be made to the *Interim Guide* to reflect the model format. In the main, it appears that industrial parties have been using the agreed model format when negotiating and drafting awards across the priority industries / occupations.
47. Ai Group has considered the various objectives, considerations and allowable award matters that are reflected within the Award Modernisation Request and the Act and we believe that the agreed model award format aligns with all of these matters.
48. Time constraints prevented more detail being inserted into the model award format. However, the format has been "fleshed out" considerably in negotiations with the manufacturing unions over the terms of the *Manufacturing and Associated Industries / Employees Award 2010*.

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<sup>4</sup> President's Statement regarding Award Modernisation 29 April 2008; at [23]

49. The format that Ai Group proposes for modern awards is set out below. The model award flexibility clause is included, plus various other award provisions which either form part of the model format agreed upon between the major parties or represent additional detail agreed upon between Ai Group and the manufacturing unions:

**[INSERT TITLE] Award 2010**

**TABLE OF PROVISIONS**

Division 1 –	Application and operation
Section 1.1 –	Title
Section 1.2 –	Commencement date
Section 1.3 –	Coverage of award and parties bound
...	etc
Division 2 –	Award flexibility clause
Division 3 –	Consultation, representation and dispute resolution
Division 4 –	Types of employment and termination of employment
Section 4.1 -	Employer and employee duties
Section 4.2 –	Employment categories
Section 4.3 -	etc
Division 5 –	Rates of pay and related matters
Section 5.1 –	rates of pay
Section 5.2 –	classifications
Section 5.3 –	allowances
Section 5.4 -	etc
Division 6 –	Hours of work and related matters
Division 7 –	Leave and public holidays
Division 8 –	Industry Specific Provisions
Division 9 –	Transitional arrangements

SCHEDULES

**DIVISION 1 – APPLICANT AND OPERATION OF AWARD**

**1.1 TITLE**

This award shall be known as the [INSERT TITLE] Award 2010.

**1.2 COMMENCEMENT DATE**

This award operates from 1 January 2010.

**1.3 COVERAGE OF THIS AWARD AND PARTIES BOUND**

**1.3.1 Employers**

This award has application to and is binding upon all employers engaged in the [INSERT INDUSTRY], as defined in clause [INSERT], except those who are exempt as set out in clause [INSERT].

**1.3.2 Employees**

This part of the award has application to and is binding upon the employees of the employers in 1.3.1 for whom classifications appear in the award.

### **1.3.3 Registered organisations**

#### **1.3.3(a) Employer organisations**

This award is binding upon the following registered organisations of employers:

- (i) [INSERT]

#### **1.3.3(b) Employee organisations**

This award is binding upon the following registered organisations of employees:

- (i) [INSERT]

### **1.4 EXEMPTIONS**

The following employers, employees, industries and occupations are exempted from coverage under this award:

**1.4.1** an employer who is bound by an enterprise award in respect of an employee to whom the enterprise award applies;

**1.4.2** (add)

### **1.5 RULE TO DEAL WITH OVERLAPPING AWARD COVERAGE**

**1.5.1** In the event that more than one award applies to work carried out by an employee, prima facie an employer is entitled to apply the award:

**1.5.1(a)** which it has legitimately and appropriately been applying to the work, or

**1.5.2(b)** which has superseded the award which it has legitimately and appropriately been applying.

**1.5.2** In the event of a dispute about which award will apply, the parties may jointly or individually refer the matter to the Australian Industrial Relations Commission for assistance in resolving the matter.

### **1.6 SUPERSEDED AWARDS**

This award wholly supersedes the awards set out in Schedule [INSERT] but no right obligation or liability accrued or incurred under that award or variations to it shall be affected by such supersession.

### **1.7 INTERACTION WITH THE NATIONAL EMPLOYMENT STANDARDS**

**1.7.1** This Award must be read in conjunction with the National Employment Standards (NES) which are a set of 10 legislated minimum conditions of employment specified in the Act. The NES along with this award combine to form the minimum conditions of employment with respect to employees bound by this award. The NES cover the following areas:

- Maximum weekly hours of work
- Requests for flexible working arrangements
- Parental leave and related entitlements
- Annual leave
- Personal / carer's leave and compassionate leave
- Community services leave

- Long service leave
- Public holidays
- Notice of termination and redundancy pay
- Fair Work Information Statement

**1.7.2** This award may include provisions:

- that are ancillary or incidental to the operation of an entitlement of an employee under the NES; and/or
- that supplement the NES;

but only if the effect of those provisions is not detrimental to an employee in any respect, when compared to the NES.

**1.7.3** This award may include industry-specific detail about matters in the NES.

**1.7.4** This award has no effect to the extent to which it contravenes 1.7.2.

## **1.8 DEFINITIONS**

### **DIVISION 2 – AWARD FLEXIBILITY CLAUSE**

#### **2.1 AWARD FLEXIBILITY CLAUSE**

**2.1.1** An employer and an individual employee may agree to vary the application of certain terms of this award to meet the genuine individual needs of the employer and the individual employee. The terms the employer and the individual employee may agree to vary the application of are those concerning:

- 2.1.1(a)** arrangements for when work is performed;
- 2.1.1(b)** overtime rates;
- 2.1.1(c)** penalty rates;
- 2.1.1(d)** allowances; and
- 2.1.1(e)** leave loading.

**2.1.2** The employer and the individual employee must have genuinely made the agreement without coercion or duress.

**2.1.3** The agreement between the employer and the individual employee must:

- 2.1.3(a)** be confined to a variation in the application of one or more of the terms listed in 2.1.1; and
- 2.1.3(b)** not disadvantage the individual employee in relation to the individual employee's terms and conditions of employment.

**2.1.4** For the purposes of sub-clause 2.1.3(b) the agreement will be taken not to disadvantage the individual employee in relation to the individual employee's terms and conditions of employment if:

- 2.1.4(a)** the agreement does not result, on balance, in a reduction in the overall terms and conditions of employment of the individual employee under this award and any applicable agreement made under the Workplace Relations Act 1996 (Cth), as those instruments applied as at the date the agreement commences to operate; and
- 2.1.4(b)** the agreement does not result in a reduction in the terms and conditions of employment of the individual employee under any other relevant laws of the Commonwealth or any relevant laws of a State or Territory.

- 2.1.5** The Agreement between the employer and the individual employee must also:
- 2.1.5(a)** be in writing, name the parties to the agreement and be signed by the employer and the individual employee and, if the employee is under 18 years of age, the employee's parent or guardian;
  - 2.1.5(b)** state each term of this award that the employer and the individual employee have agreed to vary;
  - 2.1.5(c)** detail how the application of each term has been varied by agreement between the employer and the individual employee;
  - 2.1.5(d)** detail how the agreement does not disadvantage the individual employee in relation to the individual employee's terms and conditions of employment; and
  - 2.5.5(e)** state the date the agreement commences to operate.
- 2.1.6** The employer must give the individual employee a copy of the agreement and keep the agreement as a time and wages record.
- 2.1.7** The agreement may be terminated:
- 2.1.7(a)** by the employer or the individual employee giving four weeks' notice of termination, in writing, to the other party and the agreement ceasing to operate at the end of the notice period; or
  - 2.1.7(b)** at any time, by written agreement between the employer and the individual employee.
- 2.1.8** The right to make an agreement pursuant to this clause is in addition to, and is not intended to otherwise affect, any provision for an agreement between an employer and an individual employee contained in any other term of this award.

### **DIVISION 3 – CONSULTATION, REPRESENTATION AND DISPUTE RESOLUTION**

etc

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50. Ai Group submits that the above format is a suitable model for all modern awards. Where it is logical for an award to be broken into different Parts the format can be modified as set out in the draft *Manufacturing and Associated Industries / Employees Award 2010* which is included within a later section of these submissions. In the draft Manufacturing Award, Part 1 deals with conditions that apply to all employees under the award with the other Parts applying to specific sectors and/or occupations in the industry.
51. Various clauses set out in the proposed model award format are discussed in the following section, together with various other model award clauses.

## Standard award clauses

52. It is apparent to Ai Group through a number of propositions within the Award Modernisation Request, and also as a result of a number of statements from the Commission, that the notion of attempting to create some uniformity, where possible, across modern awards is appropriate.
53. Whilst absolute uniformity will not be able to be achieved due to the peculiarities of certain industries and occupations, Ai Group believes that where consistency can be achieved for modern awards it should be sought.
54. The model structure that is detailed above is a reflection of this notion. However, Ai Group contends that matters of format and style are not the only area where the Commission should have regard to a 'model' approach. Rather there are a range of matters which should be approached with the objective of creating a template provision for insertion into each modern award. This general proposition could then be subject to the ability for an interested party to make submissions in relation to the omission or modification of the model provision based upon industry or occupational specific considerations.
55. We submit, that such a process aligns with a range of objectives found within the Award Modernisation Request and the Act including:
- Requiring that modern awards are simple to understand and easy to apply;<sup>5</sup>
  - Ensuring that modern awards provide a fair minimum safety net of enforceable terms and conditions;<sup>6</sup> and
  - Creating a certain and stable modern award system.<sup>7</sup>

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<sup>5</sup> Section 576A(2)(a) of the *Workplace Relations Act 1996*

<sup>6</sup> Section 576A(2)(b) of the *Workplace Relations Act 1996*

<sup>7</sup> Section 576A(2)(e) of the *Workplace Relations Act 1996*

56. The following sub-sections seek to identify those matters which Ai Group contends should appropriately be drafted pursuant to a model clause.

### **Rules to deal with overlapping coverage**

57. Paragraph 9 of the Modernisation Request requires the Commission to have regard to the desirability of avoiding overlap of awards.

*“9. ... Where there is any overlap or potential overlap in the coverage of modern awards, the Commission will as far as possible include clear rules that identify which award applies.”*

58. Ai Group submits that in devising the ‘rules’ to determine which award shall apply, there is logic in utilising a consistent rule or set of rules within each modern award.

59. The problems associated with overlapping coverage of different federal industry awards were very apparent to Ai Group when the Victorian common rule award system was being developed.

60. In the *Victorian Common Rule Award Case*, Ai Group’s efforts in pressing for the problem to be addressed led to agreement being reached between the employer associations involved in the case and the Victorian Trades Hall Council on an approach to dealing with overlapping award coverage.

61. It was agreed that the following undertaking would be given by unions when applying to the Commission to have an award declared to operate on a common rule basis and that such undertaking would be referred to by the Commission in decisions relating to the Victorian common rule declarations:

*“It is not the intention of (insert relevant union/s) to seek to retrospectively enforce the common rule declaration in circumstances where an employer has*

*been legitimately and appropriately applying another award which also covers the work performed by the employees. This position is advanced without prejudice to the rights of the parties to seek the making of “roping-in” awards, irrespective of the common rule declaration by an employer or any rights under Part IX of the Act.”*

62. The above undertaking secured from the unions enabled an employer in Victoria to continue to use the federal award that it was applying prior to the introduction of the common rule award system and protected the employer from union claims for another more generous common rule award to be applied.
63. Pursuant to the terms of section 576V of the Act the Commission is required to define the boundaries of who may be bound by a modern award. In relation to employers, this may be done by either name or inclusion within a specified class or classes.<sup>8</sup>
64. Ai Group contends that a provision in the terms agreed upon with the manufacturing unions is appropriate for modern awards. The clause is set out at 1.5 in the model award format reproduced above. We understand that the ACTU also agrees to the principles which underpin the clause.
65. Ai Group submits that the experience derived from the Victorian common rule declaration process, in particular the absence of disputes as to the appropriate instrument to cover an employer and their employees, is evidence of the merits of a clause in similar terms being included within modern awards.
66. In addition, by establishing the prima facie position with reference to the award that was legitimately and appropriately being applied by the employer prior to the creation of the modern award, it is unlikely that either employers or employees could seek to extract an advantage from award modernisation

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<sup>8</sup> Section 576V(7)(a) of the *Workplace Relations Act 1996*

through attempting to “shop around” for a more favourable award that could apply.

67. In this regard, Ai Group submits that the proposed clause aligns with and furthers the difficult to achieve modernisation objectives of:
- Not disadvantaging employees;<sup>9</sup> and
  - Not increasing costs for employers.<sup>10</sup>

### **Cashing out of annual leave**

68. As identified in Chapter 2 of this submission, the terms of the Act and the Award Modernisation Request set out a range of matters that are ‘allowable’ within modern awards. Where these allowable award matters reflect new allowable terms, Ai Group believes that a common approach should be adopted in the drafting of these terms. One such example is the cashing out of annual leave.
69. Clause 36 of the NES identifies that modern awards may include provisions in relation to the cashing out of paid annual leave in the following terms:

**“36 Modern Awards may include certain kinds of provisions**

(1) *A modern award may include provisions of any of the following kinds:*

*(a) provisions for the cashing out of paid annual leave;*

... ..

(2) *Provisions in a modern award for the cashing out of paid annual leave must:*

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<sup>9</sup> Award Modernisation Request (Consolidated Version) – 16 June 2008; at paragraph 2(c)

<sup>10</sup> Award Modernisation Request (Consolidated Version) – 16 June 2008; at paragraph 2(d)

- (a) *prohibit the employer from exerting undue influence or undue pressure on the employee to cash out the employee's leave; and*
- (b) *provide that the employee must be paid the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone."*

70. This is supported by the Award Modernisation Request which states:

**"33.** *The NES provides that particular types of provisions are able to be included in modern awards even though they might otherwise be inconsistent with the NES. The Commission may include provisions dealing with these issues in a modern award. The NES allows, but does not require, modern awards to deal with, among other things:*

...

- *Cashing out of paid annual leave – provided that modern awards contain a prohibition on undue influence or undue pressure and require payment of cashed out leave at full value;"*

71. Whilst the inclusion of annual leave cashing out provisions is not a mandatory award term, Ai Group contends that it is an important provision and seeks its inclusion within all modern awards.

72. Although the notion of cashing out of annual leave has not historically been a feature of the award system, it is a provision that has over the past 15 years been increasingly dealt with in workplace agreements, both individual and collective.

73. There are a large number of workplace agreements which permit cashing-out of annual leave. These include both collective and individual agreements, agreements applying to large national companies and to small organisations, and agreements with unions and directly with employees. Indeed there are a large number of "single-issue" workplace agreements which have been

entered into by employees and employers to address employee requests for the cashing-out of annual leave. Ai Group has drafted many such agreements.

74. Prior to the introduction of the *Workchoices* amendments to the Act, annual leave was a matter dealt with by federal awards, state awards and State Legislation,<sup>11</sup> federal workplace agreements were therefore able to include provisions for the cashing out of annual leave which prevailed over the terms of federal or state instruments and laws dealing with annual leave.
75. Under *Workchoices*, annual leave for constitutional corporations became a matter that was regulated by the Act forming part of the legislated minimum conditions for employees. Whilst cashing out of annual leave was available, it was only available in accordance with the terms of the Act which required a provision in a registered workplace agreement enabling the cashing out, and also required a range of safeguards to be abided by in relation to the cashing out.<sup>12</sup>
76. The entitlement to annual leave is a matter that the present Government has decided to retain as a legislated minimum condition. The Government has also decided that the cashing out of annual leave is a matter appropriately dealt with in modern awards, rather than in the NES itself.
77. Ai Group submits that the absence of a stand alone legislative mechanism for the cashing out of annual leave makes the inclusion of such a provision within modern awards imperative. Without such a provision there would be no mechanism for employers and employees to maintain an existing practice that many have enjoyed via workplace agreements for many years.

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<sup>11</sup> See for example *Annual Holidays Act 1944 (NSW)*

<sup>12</sup> Section 233 of the *Workplace Relations Act 1996*

78. The interaction between the NES and awards and workplace agreements is an important consideration for the Commission in considering the need for awards to include cashing-out provisions. It appears that each and every specific provision within the NES will be required to be complied with and unable to be varied by a workplace agreement. In contrast, award provisions will be able to be varied via a workplace agreement, subject to a “no disadvantage test” (or the announced “better-off test”). Unless awards contain cashing-out provisions, it appears that workplace agreements will be unable to contain cashing-out provisions, because the NES requires that leave be taken (subject to any award provisions to the contrary).
79. Given the fact that Ai Group contends that a provision for the cashing out of annual leave should be included in all modern awards, we also submit that there should be a standard form of drafting for such a provision. This will assist in ensuring that adequate and consistent protections are in place for all employees and that employers understand the parameters around which they can provide for cashing out. Ai Group proposes an annual leave cashing-out clause in the following terms:

***“X.X.1 Cashing out of leave***

***X.X.1(a)*** *An employee is entitled to forgo an entitlement to take a period of annual leave accrued by the employee and instead receive payments for that amount of leave if:*

- (i) The employee gives the employer a written election to forgo the amount of annual leave;*
- (ii) The employer authorises the employee to forgo the amount of annual leave; and*

**X.X.1(b)** *If, under this clause, an employee forgoes an entitlement to take a period of annual leave, the employee's employer may deduct that period from the employee's accrued annual leave.*

**X.X.1(c)** *The rate of pay that an employee shall receive for the leave forgone shall be no less than the rate calculated in accordance with [INSERT RELEVANT CLAUSE FROM AWARD OR NES]*

**X.X.1(d)** *During each 12 month period, an employee is not entitled to forgo more than 50% of the annual leave that they have accrued in the period.*

**X.X.1(e)** *An employer must not:*

*(i) Require an employee to forgo an entitlement to take an amount of annual leave; or*

*(ii) Exert undue influence or undue pressure on an employee in relation to the making of a decision by the employee whether or not to forgo an entitlement to take an amount of annual leave.*

**X.X.1(f)** *The employer shall retain a copy of the employee's written election to forgo a period of annual leave."*

80. To ensure that employees are adequately protected in relation to any cashing-out of their leave Ai Group's proposed clause reproduces the key safeguards that are a feature of the *Workchoices* provisions of the Act. These include a maximum amount of leave that may be cashed out in a 12 month period and the requirement to receive a written election from the employee.

81. Additionally, the clause also protects employees from *'undue influence'* and requires *'payment of cashed out leave at its full value'*, as specified in the NES.
82. Ai Group believes that these safeguards are important and adequate. Whilst historically the cashing out of annual leave has only been available via a workplace agreement, it is appropriate that modern awards require only a written election from the employee and retention of that written election from the employer. Australian Workplace Agreements have most commonly been used to address requests by an employee to cash-out annual leave. Given the abolition of statutory individual agreements the use of written agreements will provide a viable alternative. It is noteworthy that under the legislation in place in some States employees are permitted to cash-out long service leave via a written agreement. The provisions appear to have worked effectively.
83. We further submit that such an approach aligns with that which was adopted by the Commission in relation to the model flexibility clause and that it would allow for the retention of what has become a modern work practice in accordance with the objects of Part 10A of the Act.

### **Cashing out of personal / carer's leave**

84. The rationale that underpins our submissions in relation to the inclusion of a consistent cashing out of annual leave provision within all modern awards applies equally in relation to provisions pertaining to personal / carer's leave cashing out.
85. In Ai Group's experience, personal / carer's leave cashing-out provisions are not an uncommon feature of workplace agreements and a matter that employers and employees would be precluded from accessing if it were omitted from modern awards.

86. The terms of the NES at Clause 42 allows for modern awards to contain provisions in relation to the cashing out of paid personal / carer's leave providing that particular safeguards are ensured as follows:

***“42. Modern awards may include provisions dealing with cashing out of paid personal / carer's leave***

(1) *A modern award may include provisions for the cashing out of paid personal / carer's leave.*

(2) *Provisions in a modern award for the cashing out of paid personal / carer's leave must:*

(a) *prohibit the employer from exerting undue influence or undue pressure on the employee to cash out the employee's leave; and*

(b) *provide that the employee must be paid the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone.”*

87. These propositions are also reflected in the Award Modernisation Request in parallel terms to those articulated above in relation to cashing out of annual leave.

88. Ai Group has sought to draft a provision that reflects the current safeguards that exist within the Act and also any additional safeguards required by the NES in the following terms:

***“X.X.1 Cashing out of paid personal/carer's leave***

***X.X.1(a)*** *An employee is entitled to forgo an entitlement to take any or all of the amount of paid personal/carer's leave accrued by the employee that exceeds 15 days of paid personal/carer's leave if:*

- (i) *The employee has accrued more than 15 days of paid personal/carer's leave;*
- (ii) *The employee gives the employer a written election to forgo the amount of paid personal/carer's leave; and*
- (iii) *The employer authorises the employee to forgo the amount of paid personal/carer's leave.*

**X.X.1(b)** *An employer must not exert undue influence or undue pressure on the employee to cash out the employee's leave.*

**X.X.1(c)** *The employee must be paid the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone."*

89. As with the annual leave cashing-out clause, Ai Group does not believe that there is a necessity to only allow for the cashing out of personal / carer's leave through the creation of a workplace agreement, and that the nature of this decision is one that more appropriately rests with initiation from an individual employee and consideration by an employer on a case by case basis.

### **Annualised wage and salary arrangements**

90. The allowable award matters expressed by section 576J of the Act identify the subject of '*annualised wage or salary arrangements*' as a matter that may be included within a modern award.<sup>13</sup>

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<sup>13</sup> Section 576J(1)(f) of the *Workplace Relations Act 1996*

91. In framing this allowable award matter, however, the Act provides additional guidance in relation to the content of any such provision stating:

***“576J Matters that may be dealt with by modern awards***

*General*

- (1) *A modern award may include terms about any of the following matters:*

...

- (f) *annualised wage or salary arrangements that:*
- (i) *have regard to the patterns of work in an occupation, industry or enterprise; and*
  - (ii) *provide an alternative to the separate payment of wages, salaries, and other monetary entitlements; and*
  - (iii) *include appropriate safeguards to ensure that individual employees are not disadvantaged.”*

92. Ai Group interprets the sub-paragraphs within this provision to represent mandatory elements of any annualised wage or salary clause within a modern award. Accordingly, there is already a framework around which the Commission is required to operate when drafting a clause of this nature.

93. Ai Group has drafted the following model annualised salary clause:

***“X.1 ANNUALISED SALARY ARRANGEMENT***

***X.X.1*** *An employer and an individual employee may agree to implement an annual salary arrangement for that employee. The terms the employer and the individual employee may agree to incorporate within the annualised salary arrangement are:*

- *Rates of pay*

- *Mixed functions*
- *Allowances*
- *Casual loading*
- *Payment of wages*
- *Loadings and penalties relating to when work is performed (eg. shift allowances, weekend penalties, public holiday penalties, overtime)*
- *Annual leave loading*

**X.X.2     *Salary review***

*An employee's salary will be reviewed by the employer at least annually to ensure that the compensation is appropriate having regard to the factors in X.X.1.*

**X.X.3**     *The employer and the individual employee must have genuinely made the annualised salary agreement without coercion or duress.*

**X.X.4**     *The agreement between the employer and the individual employee must:*

**X.X.4(a)**     *be confined to an annualised salary arrangement incorporating any or all of the factors in X.X.1; and*

**X.X.4(b)**     *not disadvantage the individual employee in relation to the individual employee's terms and conditions of employment.*

**X.X.5**     *For the purposes of X.X.4(b) the annualised salary agreement will be taken not to disadvantage the individual employee in relation to the individual employee's terms and conditions of employment if:*

**X.X.5(a)** *the agreement does not result, on balance, in a reduction in the overall terms and conditions of employment of the individual employee under this award and any applicable agreement made under the Workplace Relations Act 1996 (Cth), as those instruments applied as at the date the agreement commences to operate; and*

**X.X.5(b)** *the agreement does not result in a reduction in the terms and conditions of employment of the individual employee under any other relevant laws of the Commonwealth or any relevant laws of a State or Territory.*

**X.X.6** *The annualised salary agreement between the employer and the individual employee must also:*

**X.X.6(a)** *be in writing, name the parties to the agreement and be signed by the employer and the individual employee and, if the employee is under 18 years of age, the employee's parent or guardian;*

**X.X.6(b)** *state each term of this award that the employer and the individual employee have agreed to incorporate within the annualised salary agreement;*

**X.X.6(c)** *detail how the annualised salary agreement does not disadvantage the individual employee in relation to the individual employee's terms and conditions of employment; and*

**X.X.6(d)** *state the date the agreement commences to operate.*

**X.X.7** *The employer must give the individual employee a copy of the annualised salary agreement and keep the agreement as a time and wages record.*

**X.X.8** *The annualised salary agreement may be terminated:*

**X.X.8(a)** *by the employer or the individual employee giving 12 months' notice of termination, in writing, to the other party and the agreement ceasing to operate at the end of the notice period; or*

**X.X.8(b)** *at any time, by written agreement between the employer and the individual employee."*

94. If the Commission issues a model annualised salary clause this will ensure a consistent approach and one that will be easy to understand and apply for employers and employees.

95. Ai Group's proposed model clause draws heavily on the safeguards that the Full Bench decided were appropriate for the model award flexibility clause. A notice of termination provision has been included but given the nature of annualised salaries (under which monetary amounts are typically averaged over a 12 month period) it is appropriate that 12 months' notice be given to unilaterally terminate an arrangement once implemented by agreement.

96. As required by the Act, Ai Group's clause:

- Provides an alternative to the separate payment of wages, salaries, and other monetary entitlements; and
- Includes appropriate safeguards to ensure that individual employees are not disadvantaged.

97. With regard to the other legislative requirement – that is, that the clause have “regard to the patterns of work in an occupation, industry or enterprise” – this is best done at the time that consideration is given to including the model clause in a modern award. Ai Group’s proposed clause is fair and flexible and, we submit, suitable for adoption in most modern awards.
98. A relatively small number of modern awards currently contain annualised salary provisions.<sup>14</sup> Commonly these provisions have been negotiated by the industrial parties to those awards to reflect the needs of the particular industry or occupation. In such circumstances, Ai Group submits that regard should be had to the maintenance of the existing provisions within the modern awards where the existing provision satisfies the requirements identified in 576J(1)(f) of the Act.

### **Superannuation**

99. Given the huge number of issues involved in modernising awards and the tight-timeframes, Ai Group has not yet given full consideration to the important task of modernising the superannuation provisions in awards.
100. As the Commission is aware, award superannuation provisions were not updated to take account of the Choice of Funds legislation, even though a Practice Note was developed with the involvement of Ai Group, ACCI and the ACTU. Award modernisation presents an ideal opportunity to reflect the Choice of Funds legislation in awards.
101. In addition, the Superannuation Guarantee legislation was amended, with effect from 1 July 2008, to prevent employers using less generous earnings bases in awards than the definition of Ordinary Time Earnings (OTE), as defined under the Superannuation Guarantee legislation. Awards commonly

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<sup>14</sup> See the Technical Services Engineers, Scientists and IT Professional Employees (consulting services) Award 1998 (Clause 16), the Hospitality Industry – Accommodation, Hotels, Resorts and Gaming Award 1998 (Clause 22), and the Contract Call Centre Industry Award 2003 (Clause 8).

have earning bases that are less generous than the OTE definition. For example, the earnings base under the *Metal, Engineering and Associated Industries (Superannuation) Award Metals Award* and many other awards does not require superannuation contributions to be made on performance bonuses, commissions and most allowances, unlike the definition of OTE under the superannuation legislation. Superannuation clauses in awards now need to be updated to take account of this legislative change.

102. Further, Minister Sherry's submission to the Commission relating to default funds raises challenges for all of the parties involved in award modernization.
103. As an initial step, Ai Group has drafted the following superannuation clause for the modern *Manufacturing and Associated Industries / Employees Award 2010*. The clause is being discussed with the ACTU and the manufacturing unions and is likely to require some modification, for example, to deal more directly with the issue of default funds.

#### **4.10 SUPERANNUATION**

##### **4.10.1 Superannuation legislation**

The subject of superannuation is dealt with extensively by legislation including the Superannuation Guarantee (Administration) Act 1992, the Superannuation Guarantee Charge Act 1992, the Superannuation Industry (Supervision) Act 1993, the Superannuation (Resolution of Complaints) Act 1993 and the Superannuation Legislation Amended (Choice of Superannuation Fund) Act 2005 (collectively the superannuation legislation). This legislation, as varied from time to time, governs the superannuation rights and obligations of the parties.

The Superannuation Legislation Amended (Choice of Superannuation Fund) Act 2005 established that individual employees generally have the opportunity to choose their own superannuation funds. This legislation overrides federal awards, to the extent that they prescribe specific funds or limit employees' choices. If an employee does not choose a superannuation fund, the superannuation fund nominated in the employee's award will apply.

##### **4.10.2 Definitions**

For the purposes of this award:

- 4.10.2(a)** "Fund" means a complying superannuation fund as that term is used in the superannuation legislation.
- 4.10.2(b)** "Ordinary time earnings" has the meaning which applies under the superannuation legislation.

#### **4.10.3 Employer contributions**

An employer must, in accordance with the governing rules of the relevant Fund, make such superannuation contributions for the benefit of an employee as will avoid the employer being required to pay the superannuation guarantee charge under the superannuation legislation with respect to that employee. For the purposes of the superannuation legislation, an employee's ordinary time earnings are intended to provide that employee's notional earnings base.

#### **4.10.4 Voluntary employee contributions**

**4.10.4(a)** Subject to the governing rules of the relevant Fund, an employee who wishes to make contributions to the Fund may either forward his or her own contribution directly to the Fund administrators or authorise the employer to pay into the Fund from the employee's wages, amounts specified by the employee.

**4.10.4(b)** Employee contributions to the Fund deducted by the employer at an employee's request shall be held on the employee's behalf and subject to individual agreement shall meet the following conditions:

- (i) The amount of contributions shall be expressed in whole dollars.
- (ii) An employee shall have the right to adjust the level of contribution made on his or her own behalf from the first of the month following the giving of three months' written notice to the employer.

**4.10.4(c)** Contributions deducted under this clause shall be forwarded to the Fund at the same time as contributions under 4.10.3.

#### **4.10.5 Superannuation fund**

An employer must, in accordance with the governing rules of the relevant Fund, make superannuation contributions to any of the following Funds:

**4.10.5(a)** AustralianSuper;

**4.10.5(b)** TasPlan;

**4.10.5(c)** Any Fund agreed between an employer and an employee. If the employee is a member of a union bound by this award, the employee may be represented by that union in meeting and conferring with the employer about the matter and the employer must give the union a reasonable opportunity to meet and confer about the matter. (Note: the consent of the union is not required to any agreement between the employer and the employee). The agreement must be recorded in the time and wages records kept by the employer in accordance with Part 19 of the Workplace Relations Regulations. If a dispute or difficulty arises over the implementation or continued operation of this provision, it must be handled in accordance with dispute resolution procedure in clause 3.2.

**4.10.5(d)** Any Fund which has application to employees in the principal business of an employer, where employees covered by this award are a minority of award-covered employees.

**4.10.5(e)** The funds specified in Schedule *[INSERT]* but only in respect of the geographic areas, parts of industries or occupations specified in that Schedule.

#### **4.10.6 Absence from work**

**4.10.6(a)** Contributions shall continue whilst a member of a Fund is absent on paid annual leave, personal / carer's leave, long service leave, public holidays, jury service, compassionate leave or other paid leave.

**4.10.6(b)** Contributions shall not be required to be made in respect of absences from work with out pay.

#### **4.10.6(c) Work related injury or illness**

In the event of an employee's absence from work being due to work-related injury or work-related illness, contributions at the normal rate shall continue for the period of the absence (subject to a maximum of 52 weeks total) provided that:

- (i) the member of the Fund is receiving workers' compensation payments or is receiving regular payments directly from the employer in accordance with statutory requirements; and
- (ii) the person remains an employee of the employer.

## **Matters pertaining to scope, parties bound, application and Registered Organisations**

### **Application of modern awards to registered organisations**

104. The terms of the Act identify that modern awards must bind employers either by name, or by inclusion within a specific class or classes.<sup>15</sup> In respect of employees, modern awards must be expressed to bind employees of the employer in relation to the work that is regulated by the modern award.<sup>16</sup>

105. In relation to registered organisations, the Act also provides that they are capable of being bound to modern awards, where at section 576V(4) it states:

*“(4) A modern award may be expressed to bind one or more specified organizations in respect of all or specified employees or employers who are bound by the modern award.”*

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<sup>15</sup> See paragraphs 57 – 58 of this submission

<sup>16</sup> Section 576V(2)(b) of the *Workplace Relations Act 1996*

106. Within the federal system, registered organisations of employers and employees have long been central to the creation and maintenance of the award system. Although the terms of the Act do not require mandatory binding of an organisation to a modern award we would respectfully contend that the historical connection to the award system that registered organisations have and the important role that they play in maintaining awards and representing employers and employees should be maintained.
107. Ai Group submits that beyond any historical connection a particular organisation of employers or employees may have to the award system, there are practical and important reasons for the retention of registered organisations as parties to awards.
108. In *Jumbunna Coal Mine, No Liability and Another v The Victorian Coal Miners Association*<sup>17</sup> the High Court identified the important representative role played by registered organisations in relation to industrial disputes:

*“An industrial dispute is something more than a dispute between an employer and his individual workmen. It is a dispute between a combination of workmen and their employer or employers. The questions involved generally affect the whole trade, and a settlement is seldom adequate unless it binds the whole trade. It is not practicable to bring all employees in a trade before the Court, nor all the masters. Some method of representation of the disputants is therefore essential for the purpose of dealing with the dispute in its initial stages, of bringing the parties before the Court, and of enforcing observance of the award.”<sup>18</sup>*

109. Whilst the Constitutional basis for the current Act no longer rests with notion of “prevention and settlement of industrial disputes extending beyond the limits of any one State”<sup>19</sup>, we submit that the observations made by the High Court in

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<sup>17</sup> (1908) 6 CLR 309

<sup>18</sup> (1908) 6 CLR 309, at 350-351

<sup>19</sup> *Commonwealth of Australia Constitution Act* s51(xxxv)

*Jumbunna Coal Mine* are no less relevant. The retention of registered organisations as parties to modern awards is the most effective means of ensuring that employees' and employers' rights are represented.

110. Ai Group has had an extensive and active role in participating in the administration of the award system and representing the rights of employers over its long history, so too have the unions in representing and advocating for employees.

111. Indeed, this current award modernization process perhaps most appropriately encapsulates the substantial role that registered organisations, as parties to awards, play in relation to maintenance of the system. It would be both ironic and detrimental if as a result of this process the role of registered organisations was diluted in modern awards.

112. In addition to the pragmatic justifications that underlie our submissions in this regard, the mechanics of the Act also warrant the inclusion of registered organisations within modern awards. Within the current Act a range of provisions are intertwined with the proposition of organisational 'responency' to an award. These include:

- Variation of an award;<sup>20</sup>
- Revocation of an award;<sup>21</sup> and
- Right of entry to hold discussions with employees.<sup>22</sup>

113. It is anticipated that these matters will be dealt with in the Government's substantive workplace relations legislation but at this time it is unclear in what manner these matters will be reflected. Ai Group submits that the terms of any modern award should be drafted with a presumption that these matters within

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<sup>20</sup> Section 553 of the *Workplace Relations Act 1996*

<sup>21</sup> Section 556 of the *Workplace Relations Act 1996*

<sup>22</sup> Section 760 of the *Workplace Relations Act 1996*

the substantive legislation will continue to hinge off the resendency of registered organisations to modern awards.

114. The Government has made no announcements to the contrary and indeed some of the statements that it made in announcing its policy position in relation to these matters clearly reflects an intention to maintain the status quo.<sup>23</sup>

115. Accordingly, should the notion of binding registered organisations to modern awards be removed, it may preclude access to many provisions of the substantive legislation for those entities. We would submit that such an outcome, would also clearly be at odds with the terms of section 576B(2)(j) of the Act which requires the Commission to have regard to:

*“(j) the representation rights, under the Act or the Registration and Accountability of Organisations Schedule, of organisations and transitionally registered associations.”*

116. This objective is also repeated at paragraph 3(j) of the Award Modernisation Request.

117. In performing its Award Modernisation functions in accordance with this objective, Ai Group submits that the Commission must have regard to the **existing** representation rights of registered organisations as these rights are reflected within the terms of current awards and NAPSAs.

118. The Award Modernisation process is one that, due to the objective of reducing the number of awards that operate in the award system,<sup>24</sup> will ultimately see the scopes of many awards and NAPSAs absorbed into a single award. This has the potential to re-open old disputes in relation to union demarcation.

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<sup>23</sup> *Forward with Fairness – Policy Implementation Plan – August 2007*; at p.23.

<sup>24</sup> Section 576B(2)(d) of the *Workplace Relations Act 1996*

Such a notion is particularly apparent in relation to transitionally registered associations whose interest in the modern award may derive from their residency to a NAPSA in one state.

119. Ai Group submits that such a result could have very negative results for employers, with the possibility for demarcation disputes to arise between unions impacting significantly on an employer's operations. Such an outcome would also in our view not represent a "*certain and stable... modern award system*" as required by section 576A(2)(e).
120. Accordingly, Ai Group contends that whilst registered organisations should clearly have a right to be bound to the terms of a modern award, the existing limitations on their coverage should also generally be maintained. Hence, if an organisation was bound to the terms of a NAPSA whose terms were largely absorbed by the creation of a modern award, that organisation could seek to be bound by the terms of that modern award, but only to the extent that they were bound to the terms of the NAPSA with respect to industry / occupational coverage and geographical location. This approach has been adopted, by agreement between the manufacturing unions and Ai Group, in drafting the modern *Manufacturing and Associated Industries / Employees Award 2010*.

### **Binding employers, and employees of the employer**

121. As an adjunct to the matters identified above concerning parties bound to a modern award, Ai Group also believes that in identifying the scope of the award, and those employers and employees which are accordingly bound, focus should be placed upon the industry / occupations covered by the award and the classification structure in the award, and not some other proposition.
122. Such a proposition is particularly relevant in determining which employees are bound to the award and the following extracts from the model award format set out earlier in this Chapter are illustrative of Ai Group's contention in this

regard as it identifies the employees bound to the award by reference to the terms of the classification structure:

### **1.3.1 Employers**

This award has application to and is binding upon all employers engaged in the [INSERT INDUSTRY], as defined in clause [INSERT], except those who are exempt as set out in clause [INSERT].

### **1.3.2 Employees**

This part of the award has application to and is binding upon the employees of the employers in 1.3.1 for whom classifications appear in the award.

123. Ai Group submits that the drafting of a modern award “application clause” in this manner, is not only in accordance with the terms of the Act but additionally aligns with established industrial convention.<sup>25</sup>

124. It is Ai Group’s understanding that some unions in drafting the parties bound provisions of their proposed awards are seeking to ground the application on the notion of eligibility to be a member of the union/s which are party to the award. We would submit that such an approach is highly dangerous and could lead to considerable uncertainty and instability in relation to the application of an award.

125. As the Commission is well aware, the terms of the *Registration and Accountability of Organisations Schedule* to the Act, allows for registered organisations to make application to vary their eligibility rules pursuant to Division 5 of that Schedule. Indeed such applications have often been met with opposition from other registered organisations, which have then resulted in protracted proceedings before the Commission.

126. Whilst the industrial instability created by such a situation is not ideal, its effects would be compounded if any application to vary an organisation’s eligibility rules, also created a potential dispute in relation to the application of a modern award.

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<sup>25</sup> See *Metal, Engineering and Associated Industries Award 1998* (Clause 1.7.3), *Textile Industry Award 2000* (Clause 7.2) and *Clerical and Administrative Employees (Victoria) Award 1999* (Clause 6.2) and

127. We submit that this is precisely the scenario that could occur if award coverage were hinged off a concept as malleable and uncertain as union eligibility. Ai Group contends that the most appropriate means of creating certainty for a modern award in this regard is to draft it in a manner that confines application by the classification structure of the award.

## **Application of modern awards to high income employees**

128. The terms of the Award Modernisation Request identify that modern awards are not intended to:

*“(b) result in high-income employees being covered by modern awards<sup>26</sup>”*

129. Within the terms of the Act or the Award Modernisation Request however there is no additional explanation of what the term *“high-income employees”* is intended to include.

130. Despite this omission, Ai Group understands that the Government’s intention in outlining this objective is that employees who earn in excess of \$100,000 per annum will not be covered by modern awards. The basis of this understanding has been derived from the Government’s policy document *Forward with Fairness – Policy Implementation Plan – August 2007* where it states:

*“Labor in Government will legislate to confine the application of Labor’s new award system to employees who ear less than \$100,000 per year when the new award system commences on 1 January 2010.<sup>27</sup>”*

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<sup>26</sup> *Award Modernisation Request (Consolidated Version) 16 June 2008*; at paragraph 3(b)

<sup>27</sup> *Forward with Fairness – Policy Implementation Plan – August 2007*; at p11.

131. Ai Group anticipates that this matter will be specifically dealt with in the substantive legislation, including the method of indexation of the amount from year to year and the methodology for calculating the figure.
132. When these matters are finalised, Ai Group submits that it may be appropriate for modern awards to include a provision that identifies that the terms of the award do not apply to those employees who earn in excess of the prescribed figure as calculated under the Act. We contend that such a notion will assist employers and employees in understanding whether the terms of the award apply to their employment.

### **Dispute resolution processes**

133. The inclusion of provisions within modern awards that relate to resolution of disputes is an allowable award matter expressly provided for in section 576J(1)(j) of the Act.
134. In addition, the Award Modernisation Request directs the Commission to include dispute settlement processes as a mandatory element of all modern awards stating:

*“11A. The Commission should ensure that each modern award includes a clause that sets out a process or processes to ensure the settlement of disputes in relation to matters arising under the award. The Commission should ensure the process or processes are suitable for the settling of disputes in relation to matters arising under the NES for employees to whom awards apply. In drafting this clause the Commission may have regard to any method of dispute resolution that it considers appropriate.”*

135. In determining the method of dispute resolution that is “*appropriate*” for modern awards, Ai Group submits that there are a range of questions that need to be asked in relation to the formulation of a clause, the first of these being what process or processes should be adopted.

136. In this regard Ai Group supports the inclusion of a process that focuses on direct engagement between an employer and its employees at a workplace level, such a provision we submit accords with the objects of the Act most notably:

**“3    *Principal object***

... ..

*(d) ensuring that, as far as possible, the primary responsibility for determining matters affecting the employment relationship rests with the employer and employees at the workplace level;...*”

137. The facilitation of resolution of disputes at a workplace level may also include the ability to escalate resolution of the grievance through higher levels of management within the employer’s operations. In this regard Ai Group makes no submissions about the appropriate number of escalating steps that should be reflected, other than to note that escalation should generally not be available unless the parties to the dispute have attempted to resolve the grievance at the lower level first.

138. Should resolution not be able to be achieved at the workplace level, Ai Group believes that it is appropriate that the Commission / Fair Work Australia should be capable of being enlisted to assist the parties in resolution of the dispute.

139. Importantly however, Ai Group submits that any such assistance by the Commission should only be in the form of a conciliation or mediation function unless the parties to the dispute at the relevant enterprise agree otherwise at the time the dispute arises. We contend that there should be no general right

for the Commission to exercise arbitral powers in relation to a disputes provision within a modern award unless at the time of the dispute the parties to the dispute agree to confer such power upon the Commission.

140. Such a proposition we submit is the only one available to the Commission in accordance with the terms of the current Act. In particular we note that the objects of the Act specifically identify the notion of voluntary dispute resolution where it states:

**“3     *Principal object***

... ..

- (h)     *supporting harmonious and productive workplace relations by providing flexible mechanisms for the voluntary settlement of disputes;...*”

141. Additionally, we submit that a dispute settlement process of the nature which we have outlined also aligns with the mechanism for resolving disputes that applies to existing awards through the model dispute resolution process outlined in Part 13 of the Act.

142. As set out above, paragraph 11A of the Award Modernisation Request requires that modern awards contain dispute settlement processes that are suitable for settling disputes under awards and the NES.

143. The Government has already announced that Fair Work Australia will not be empowered to arbitrate in respect of disputes arising in relation to Division 2 – Requests for Flexible Work Arrangements, of the NES as evidenced by the following extract from the discussion paper which accompanied the draft NES released in early 2008:

*“Fair Work Australia will not be empowered to impose the requested working arrangements on an employer”<sup>28</sup>*

144. Accordingly, a dispute settling procedure providing a general power for the Commission / Fair Work Australia to arbitrate would not be appropriate to settle disputes under the NES and hence would not meet the requirements of paragraph 11A of the Award Modernisation Request.
145. In reference to the representation rights that should be made available to any party involved in a dispute, Ai Group believes that it is important to provide parties with a right to representation at any stage of the process should they so desire. This representative could be an official of a registered organisation (be it employer or employee) but there should be no requirement that limits representation to registered organisations. Instead, an employer or employee should be able to freely select whatever representative they choose to assist them in resolving a dispute.
146. Whilst the foregoing represents Ai Group’s view of the appropriate terms of a dispute settlement procedure for modern awards, a range of assumptions have been made about the powers that will be conferred upon Fair Work Australia within the terms of the substantive legislation in framing this view. Should the assumptions that Ai Group has made in forming its view prove to be misplaced once the substantive legislation is released, we would seek to reserve our position in amending some or all of our submissions in relation to the terms of the dispute settlement procedure in modern awards.

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<sup>28</sup> Discussion Paper, National Employment Standards Exposure Draft, Department of Education, Employment and Workplace Relations.

## Interstate differences

147. As Ai Group has already identified, the Commission in creating modern awards has been provided with a range of matters which may be included within modern awards and a range of matters which must be excluded. Whilst ordinarily one would expect that the notion of excluding a matter or group of matters from the terms of an instrument would not cause substantial problems, the proposition that a modern award can include no differences in wages or conditions that are determined by State or Territory boundaries is one that Ai Group conceives will present a number of challenges.

148. This requirement is reflected in section 576T of the Act as follows:

***“576T Terms that contain State-based differences***

- (1) *A modern award must not include terms and conditions of employment that:*
- (a) are determined by reference to State or Territory boundaries;*
  - or*
  - (b) do not have effect in each State and Territory.*
- (2) *Despite subsection (1), a modern award may include terms and conditions of employment of the kind referred to in subsection (1) for a period of up to 5 years starting on the day on which the modern award commences.*
- (3) *If, at the end of the period of 5 years starting on the day on which a modern award commences, the modern award includes terms and conditions of employment of the kind referred to in subsection (1), those terms and conditions of employment cease to have effect at the end of the that period.”*

149. Whilst the terms of this section of the Act provide no source of complication in and of themselves, and indeed the ability to maintain interstate differences for a period of up to five years as reflected by sub-clause (2) creates additional flexibility in relation to the manner in which interstate differences may be excised from modern awards, the difficulties in seeking to achieve this outcome are presented when one considers the broader objects of the Act.

150. In particular there are three propositions reflected within the Award Modernisation Request and the Act which generate challenges for the limitations expressed in section 576T. These notions are:

- The objective of reducing the number of awards operating in the workplace relations system;<sup>29</sup>
- The directive that the creation of modern awards is not intended to “disadvantage employees”;<sup>30</sup> and
- The directive that the creation of modern awards is not intended to “increase costs for employers”.<sup>31</sup>

151. Had any one of these objectives been omitted and the other two remained, the undertaking of removing interstate differences would not pose the level of complexity that it does. However, the presence of all three, each embodying an objective of equivalent importance under the Act, is what ultimately gives rise to the challenges.

152. In seeking to resolve this tension, Ai Group submits that there is no formula, or mechanism of general application that can be applied to the drafting of modern awards to remove interstate differences. If the Commission were to decide to level-upwards the state based differentials that may exist within a single award or that apply across a number of awards that were being

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<sup>29</sup> Section 576B(2)(d) of the *Workplace Relations Act 1996*

<sup>30</sup> *Award Modernisation Request (Consolidated Version) 16 June 2008*; at paragraph 2(c).

<sup>31</sup> *Award Modernisation Request (Consolidated Version) 16 June 2008*; at paragraph 2(d).

rationalised into a single modern award, this would clearly have the effect of increasing costs for employers. Similarly, if the Commission were to decide to level-down any disparate state based conditions, this would create disadvantage to employees.

153. Accordingly, it is Ai Group's submission that the only approach that can be adopted by the Commission is one of assessment and balance on a case by case, condition by condition basis, with regard always to the various objects of the Act and the Award Modernisation Request. Such an approach we contend reflects the complex nature of determining a safety net of conditions for a group of employees where a myriad of different conditions may have been applied to employees performing similar work in different jurisdictions.

154. In arriving at the outcome that is directed by section 576T, Ai Group believes that in addition to the objectives already identified within this section, the following principles are also important to the Commission's deliberations:

- Ensuring that modern awards operate as a fair **minimum** safety net for employees;<sup>32</sup>
- Creating a system that is economically sustainable and promotes the creation of jobs, high levels of employment and national and international competitiveness;<sup>33</sup>
- Protecting the position in the labour market of young people, employees with a disability and employee to whom training arrangements apply;<sup>34</sup>
- Considering the needs of the low paid;<sup>35</sup> and
- Promoting the pursuit of low inflation.<sup>36</sup>

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<sup>32</sup> Section 576A(2)(b) and 576L of the *Workplace Relations Act 1996*.

<sup>33</sup> Section 3(a)&(c), 576A(2)(c) and 576B(2)(a) of the *Workplace Relations Act 1996*.

<sup>34</sup> Section 3(k) and 576B(2)(b) of the *Workplace Relations Act 1996*.

<sup>35</sup> Section 576B(2)(c) of the *Workplace Relations Act 1996*.

<sup>36</sup> Section 3(a) and 576B(2)(a) of the *Workplace Relations Act 1996*.

155. Whilst Ai Group hopes that in distilling those considerations which it believes are relevant to the question of how the removal of interstate differences will ultimately be achieved provides assistance to the Commission, it does not presume that such a task will necessarily be simple as a result. As already eluded to, the proposition that modern awards should contain no interstate differences has been qualified under the Act by providing an amnesty of five years where such provisions can be maintained. Ai Group believes that there should be no reluctance on the Commission's part in utilising some or all of this period should it determine that a staged transition is warranted.
156. The terms of the Award Modernisation Request make it clear, at paragraph 12, that the Commission may include transitional provisions within modern awards where it states:
- “12. The Commission may include transitional arrangements in modern awards to ensure that the Commission complies with the objects and principles of award modernisation set out in the award modernisation request.”*
157. Ai Group contends that the challenges that may be presented by the task of removing interstate differences, particularly in the context of seeking not to disadvantage employees nor increase costs for employers, necessitate the consideration of transitional arrangements. That is not to say that transitional arrangements will be warranted in each circumstance or that the terms of any transitional arrangement will need to be identical for all modern awards.

## **Rationalisation of conditions generally**

158. As with the rationalisation of conditions to ensure that modern awards do not contain interstate differences, the broader project of creating a single industry or occupational award which may consolidate the scopes of a number of awards and NAPSAs is one that invariably will create challenges as to which

terms and conditions from those instruments should be reflected within the modern award.

159. Whilst the obligations to have regard for existing award provisions and the provisions of NAPSAs is one that relates to the manner in which modern awards may supplement the NES, Ai Group submits that it is appropriate to have regard to the existing terms within any industrial instrument that is being absorbed into a particular modern award when the Commission is determining the safety net.
160. That is not to say that any particular conditions, be they the high water-mark or the low, nor any particular jurisdiction should be given primacy over another as a matter of course in determining the appropriate safety net level. Such a proposition we contend is reflected in the Commission's statement of 29 April 2008 where it noted:

*"[11] Within each industry / occupation the principal federal award will usually be the starting point for drafting. The drafting process may take into account the terms of other Federal awards (non-enterprise) in the same industry. The Commission is required to take into account wage rates derived from the State awards constituting NAPSAs as well as rates in transitional awards. Other terms in State awards may also be relevant.<sup>37</sup>"*

161. Ai Group contends that the above quoted section should not be misinterpreted as authority for the proposition that the principal federal award and its conditions should have some presumptive status as the safety net, with the conditions from other instruments then having to agitate a case to disrupt this presumption.

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<sup>37</sup> President's Statement regarding Award Modernisation 29 April 2008; at [11]

162. Instead, whilst the terms of the principal federal award will ordinarily be the starting point for drafting, and indeed such a notion is logical particularly in the context of framing some of the fundamental provisions such as scope of the award or parties bound to the award, an assessment of what should represent the minimum safety net for the industry must always be undertaken.
163. Ai Group submits that the observations and contentions that it has detailed in relation to the removal of interstate differences, in particular those submissions that contextualize the objects of the Act and the Award Modernisation Request, together with the transitional mechanisms that are available to the Commission, are equally relevant to the manner in which the Commission should approach the issue of identifying the appropriate minimum safety net.

## Chapter 4 – Relationship of modern awards to the NES

164. The Award Modernisation Request makes it clear that the terms of modern awards will operate in conjunction with the provisions of the NES to provide a *“fair safety net of minimum entitlements for award covered employees.”*<sup>38</sup>
165. That being said, the terms of the Award Modernisation Request also identify distinct limitations in relation to the manner in which modern awards can reflect matters that are dealt with in the NES. These limitations are primarily drawn from expressed provisions within the NES where at Section 3 it provides:

### **“3 Relationship between National Employment Standards and modern awards**

- (1) *A modern award must not exclude the National Employment Standards or any provision of the National Employment Standards.*
- (2) *A modern award may include the following kinds of provisions:*
- (a) *provisions that are ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards;*
  - (b) *provisions that supplement the National employment standards;*

*but only if the effect of those provisions is not detrimental to an employee in any respect, when compared to the National Employment Standards.*

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<sup>38</sup> *Award Modernisation Request (Consolidated Version) 16 June 2008; at paragraph 28.*

*Note 1: Ancillary or incidental provisions permitted by paragraphs (a) include (for example) provisions:*

- (a) under which, instead of taking paid annual leave at the rate of pay required by section 35, an employee may take twice as much annual leave at half the rate of par; or*
- (b) that specify when payment under section 35 in respect of paid annual leave must be made.*

*Note 2: Supplementary provisions permitted by paragraph (b) include (for example) provisions:*

- (a) that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks applicable under section 32; or*
- (b) that allow an employee to take paid personal/carer's leave while he or she is on unpaid parental leave (despite subsection 25(2)).*

*Note 3: Provisions which would not be permitted by paragraph (a) or (b) include (for example) provision requiring an employee to give more notice of the taking of unpaid parental leave than is required by section 20.*

- (3) A provision in a modern award that is permitted by subsection (2) does not contravene subsection (1).*
- (4) A modern award has no effect to the extent to which it contravenes this section.”*

166. In rearticulating these notions, paragraphs 28 to 46 of the Award Modernisation Request also provide additional guidance to the Commission as to the principles that should govern the circumstances in which matters dealt with by the NES should be reflected in modern awards.

167. Ai Group submits that there are a number of significant propositions contained within the s.3 of the NES and in the Award Modernisation Request, including that:

- A modern award cannot exclude the NES or any provision of the NES (s.3 of the NES and para 30 of the Request);
- A modern award may replicate a provision of the NES only where the Commission consider this essential for the effective operation of a particular modern award provision (para 29 of the Request);
- A modern award can provide ancillary or incidental detail in limited circumstances (para 30 of the Request);
- A modern award may include industry-specific detail in limited circumstances (para 31 of the Request);
- A modern award may supplement the NES in limited circumstances (para 32).

### **Prohibition on exclusion of any provision of the NES**

168. An example which highlights the effect of the prohibition on excluding provisions of the NES would be an award provision requiring that an employer with fewer than 15 employees make redundancy payments. Such a provision would exclude s.62(1)(b) .

169. Paragraph 34 of the Award Modernisation Request contains a reference to small business redundancy entitlements but, in Ai Group's submission, this can only relate to entitlements which are not included within the NES (eg. time off to search for another job if the employee is being made redundant) not redundancy pay. The use of the term "redundancy pay" in the title of the relevant Division of the NES and the term "redundancy entitlements" in paragraph 32, we submit, is significant.

170. In the Government's *Forward with Fairness – Policy Implementation Plan, August 2007*, a commitment was given to not impose redundancy pay obligations upon small businesses under the heading of “*Certainty for Small Business*” in the following terms:

*“Small businesses are excluded from Labor’s National Employment Standard for redundancy payments”.*

171. In its earlier *Forward with Fairness* policy document (April 2007) the issue was also addressed, as set out in the following extract (p.9):

*“Employees who are made redundant and who are employed in workplaces with 15 or more employees will also be entitled to redundancy pay as determined by the Australian Industrial Relations Commission in the 2004 Redundancy Test Case.”*

#### **A modern award may supplement the NES in limited circumstances**

172. Paragraph 34 of the NES allows a modern award to supplement the NES in very limited circumstances. Those circumstances are:

- where it is “**necessary to do so** to ensure the maintenance of a fair minimum safety net”; and
- “**having regard to terms of this request**”; and
- “**having regard to.....the existing award provisions** (including under NAPSAs) for those employees, such as small business redundancy entitlements”; and
- **Where the effect....is not detrimental** to an employee in any respect, when compared to the NES”.

173. The concept of it being “**necessary**” to insert a provision in a modern award supplementing the NES must not be taken lightly. The Concise Oxford Dictionary defines “necessary” as “**indispensable, requisite..**”. The Macquarie Concise Dictionary defines “**necessary**” as “**that cannot be dispensed with**”. Clearly, this is a relatively high hurdle to be overcome for those seeking to insert provisions in an award which supplement the NES.
174. The second requirement is that it is necessary to have regard to the terms of the request, including, for example, that award provisions must not exclude any provision of the NES.
175. The third requirement is that in deciding whether it is necessary to include a provision of the NES regard must be had to the **existing award provisions**.
176. The notion of **existing award provisions**, we submit, must be given its natural meaning. The Macquarie Concise Dictionary defines “**exist**” as “**to have actual being**”. Accordingly, the reference point can only be the terms of a relevant award or NAPSA which are in force **at the time when the modern award is made**. It would be totally inconsistent with paragraph 34 for any former award provision or a provision which currently has no effect to be regarded as an existing award provision.
177. As stated above, Ai Group submits that the inclusion of a redundancy pay obligation in a modern award would offend s.3 of the NES and paragraph 30 of the NES. However, if Ai Group is wrong in this respect then the only federal award redundancy pay obligations which meet the test of being an “**existing award provision**” are those provisions which imposed redundancy pay obligations upon small businesses immediately prior to the date of the *Redundancy Case* decision - 26 March 2004 (eg. the Clothing Trades Award). These provisions were preserved under the WorkChoices legislation and are in existence at the present time.

178. From this analysis of the guidance provided to the Commission in relation to the manner in which modern awards should interact with the NES, Ai Group contends that the drafting of any such provisions should be done in a very limited fashion. We submit, it is clear from the parameters articulated in the NES and the Award Modernisation Request that *“ancillary and incidental detail”*, *“industry specific detail”* and *“supplementing provisions”* can only be included within modern awards in specific and limited circumstances.

## **Chapter 5 – Matters of relevance within specific priority industries**

179. This Chapter deals separately with the 14 priority industries / occupations.

180. Chapters 1 to 4 are relevant for each of the 14 industries / occupations.

## 5.1 – Coal mining industry

181. Ai Group has many member companies which carry out work in the mining industry, particularly those covered under the Metals Award and construction awards. Because the mining industry is currently experiencing boom times, many contractors are focussing on the industry, even though traditionally they may have not have done so, and in the future may no longer do so.
182. If contractors are required to apply mining industry conditions, substantial cost increases would result. Mining industry conditions are typically far more generous than the conditions in other industries.
183. If an appropriate exclusion is not inserted into any coal mining industry modern award there is a significant risk of the following negative consequences:
- A reduction in career path and skill-development opportunities for employees of contractors (this argument is set out in section 5.5 of this submission);
  - Increased administrative and direct costs for contractors, through different awards applying for work carried out for different clients.
184. Accordingly, we would seek for the following exclusion be set out in any coal mining industry modern award:

*“X.X.1 This award does not apply to employees covered under the Manufacturing, Engineering and Associated Industries Award. Without limiting the generality of the forgoing exemption, this award does not apply to employees who provide metal working and/or fabrication and/or engineering and/or mechanical and/or electrical and/or installation, maintenance, refurbishment or repair services to client/s*

*in the mining industry, on a contract basis, and whose business is independent of the client.*

**X.X.2** *This award does not apply to employees of employers who:*

- a. construct, alter, extend, repair, demolish or dismantle buildings, structures or works; or*
- b. carry out work which is preparatory to, or for rendering complete, work in (a);*

*for client/s in the mining industry on a contract basis, and whose business is independent of the client.”*

185. We submit that such an exemption does no more than reflect the current arrangements in relation to the application of the Metals Award and construction awards within this industry.

## **5.2 – Glue and gelatine industry**

186. In accordance with the Commission's decision of 20 June 2008, the parties have addressed this industry in conjunction with the development of terms and conditions for the metal and associated industries.

## **5.3 – Higher education industry**

187. Ai Group has not identified an interest at this time in relation to the priority industry of higher education. Should anything resulting from these proceedings alter Ai Group's view, we will advise the Commission accordingly.

## 5.4 – Hospitality industry

188. Ai Group has member companies in the hospitality industry and intends to monitor developments in relation to the development of modern award/s and make submissions, as necessary.
189. With regard to maintenance work, Ai Group seeks and exclusion for contractors engaged under the Metals Award.
190. If an appropriate exclusion is not inserted into any hospitality industry modern award there is a significant risk of the following negative consequences:
- A reduction in career path and skill-development opportunities for employees of contractors (this argument is set out in section 5.5 of this submission);
  - Increased administrative and direct costs for contractors, through different awards applying for work carried out for different clients.

## 5.5 – Metal and associated industries

### Negotiations between Ai Group and the manufacturing unions

191. The *Metal, Engineering and Associated Industries Award 1998* (the “Metals Award”) and its predecessors have historically played a pivotal role in Australia’s federal award system.
192. Since mid-April, Ai Group and the union parties to the *Metal, Engineering and Associated Industries Award* (AMWU, AWU, CEPU, NUW, CFMEU and LHMU) have devoted substantial resources to negotiating the terms of a modern award to cover the priority industries of:
- Metal and associated industries;
  - Glue and gelatine industry; and
  - Rubber, plastic and cabling industry.
193. Ten meetings have been held between Ai Group and the manufacturing unions on 18 April, 2 May, 15 May, 24 June, 2 July, 11 July, 16 July, 21 July, 23 July and 28 July. Some of these meetings were full day meetings, others half-day. The AMWU has led the negotiations on behalf of the unions. The latest draft is the 14<sup>th</sup> one prepared. The proposed award is entitled the *Manufacturing and Associated Industries / Employees Award 2010*. The draft award is set out in **Annexure A**.
194. In addition to the meetings, a very large number of emails, telephone conversations and other communications have occurred.
195. Ai Group is happy to advise the Commission that as a result of the efforts of all of the aforementioned parties, a substantial measure of agreement has been reached in respect of the scope of the award and the core award provisions.

Where matters have not been agreed, the draft award sets out the positions of the parties.

196. Despite the efforts of the parties there is still a great deal of work to be done in analyzing and endeavouring to address the differences in conditions in the very large number of federal awards and NAPSA in the relevant industries.
197. As set out in Chapter 1, Ai Group submits that it is in the public interest for the parties to be allowed to continue their negotiations and provide updated draft/s and other materials to the Commission up to 31 August 2008.

### **Structure of the Manufacturing and Associated Industries / Employees Award**

198. In formulating the terms of the draft award, Ai Group and the unions have adopted a structure with the following Parts:

Part 1 – Preliminary

Part 2 – Manufacturing and Associated Industries/Employees;

Part 3 – Draughting, Planning and Technical Employees;

Part 4 – Supervisors; and

Part 5 – Trainee Engineers and Scientists

199. The non-agreed Parts are the inclusion of the sugar industry as Part 6 of the award, and the inclusion of professional engineers and scientists as Part 7.
200. Part 1 applies to employees covered under all Parts, whereas Parts 2, 3, 4 and 5 apply only to the employers and employees bound by that Part.

## Scope of the Manufacturing and Associated Industries Award 2010

201. In respect of the metals and associated industries, the parties were, in effect, asked by the Commission to give consideration to a modern award with a broad scope. The Full Bench said:

*“...we see some potential to broaden the scope of a modern metal and associated industries award to encompass comparable manufacturing industries. As a result, but without prejudging the ultimate scope of such an award, we will also include the rubber, plastic and cabling, glue and gelatine and vehicle manufacturing industries on the priority list to be considered in conjunction with the metal and associated industries. This will facilitate consideration of the possible broadening of the scope of the proposed award.....we have decided to limit the number of industries to make the initial task more manageable.”*

202. In addition to the above industries, the Commission identified various other industries and occupations which could potentially fall within the scope of a modern metal and associated industries award, including:

- Brass, copper and non-ferrous metals
- Technical officers in other industries, such as the chemical industry
- Engine drivers and firemen in various industries
- Maintenance workers in the glass industry
- Jewellery manufacturing
- Optical mechanics
- Maintenance workers in the meat industry
- Metal industry awards in the Territories
- Scientific services
- Professional engineers and professional scientists in the metal industry
- Shipbuilding

- Space tracking
  - Sugar industry
  - Technical services
203. There are more than 100 awards in the industries / occupations identified by the Commission as being relevant for consideration as part of a modern metal and associated industries award (excluding enterprise awards). Hence, there is a massive amount of work to be done in developing such an award.
204. In its Decision of 20 June 2008, the Commission provided to those parties with an interest in the Metal and Associated Industries, a list of federal awards, NAPSAs and Victorian Minimum Rates Instruments which in its view may be capable of being included within modern award/s for the Metal and Associated Industries.
205. As the Commission can see from **Annexure A**, a great deal of work has been done by the parties in developing the scope of the proposed award but the scope should be considered at this stage as “work in progress”.
206. Part 2 of the proposed award utilises as the basis for its scope, the scope provisions from: Part I of the Metals Award, the main Rubber, Plastic and Cablemaking Industry Award and the main Glue and Gelatine Award. Additionally, the scope provisions from a significant number of relevant federal awards and NAPSAs have been incorporated. A cautious approach to rationalising the wording in the scope provisions has been adopted. The parties intend to continue analysing the issues and update the wording in draft clause 1.3 of Part 2 accordingly. The same approach is being adopted in drafting the scope provisions of the other Parts.
207. The scope clause of the Metals Award, as with the scope provisions of the vast majority of other awards under consideration, have developed over time, and carry with them substantial industrial history that has ultimately shaped

the application of the various awards. Ai Group submits that it would be highly dangerous to ignore this history and start with a blank piece of paper in drafting the scope. Such an approach would most likely disturb numerous settled industrial arrangements, lead to operational and cost problems for employers, and disadvantage employees.

208. In the *Boeing Australia Limited v Australian Workers Union*<sup>39</sup> case, which related to an application to the Full Bench of the Commission for an order restraining the New South Wales Industrial Relations Commission from further involving itself in a dispute between Boeing and the AWU, the central matter became whether the terms of the *Metal, Engineering and Associated Industries Award 1998* applied to Boeing and the aviation / aerospace industry.
209. In agitating its case for application of an alternate instrument, the AWU directed the Commission to an analysis of how the scope provision of the *Metal, Engineering and Associated Industries Award 1998* had evolved over time, and placed particular reliance on the omission of the term “*aero mechanic*” between the creation of the 1935 and the 1941 award<sup>40</sup>.
210. The Commission ultimately determined that the terms of the *Metal, Engineering and Associated Industries Award 1998* did apply to Boeing’s operations and this case is clearly illustrative of the risks associated with moving away from established provisions which identify the scope of awards without careful consideration.
211. The Commission will also note that in relation to the scope of Part 2 of the proposed award, the scope of the Metals Award in respect of its ability to operate as a default occupational award for maintenance operations in other industries has been retained within item 78 of Clause 1.3.1 which states:

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<sup>39</sup> Print PR968945

<sup>40</sup> Print PR968945 at [30].

*“78. Making, manufacture, treatment, installation, maintenance, repair and reconditioning of any articles, part or component, whether of metal and/or other material in any of the foregoing industries.”*

212. There are some very important points which need to be made about the scope of the proposed award, as follows:

- The Metal Industry Award has always been both an occupational and industry award, and it is vital that this remain the case. The work carried out under the award is carried out in numerous industries. For example, maintenance contractors bound by the award carry out work in the metal industry, rail industry, mining industry, hospitality industry, and so forth.
- The Metal Industry has been a leader in the development of competency based training programs and skill based career paths. The accredited industry training programs, competency standards, apprenticeship structures and the workings of the Manufacturing Industry Skills Council reflect the common understanding that the industry of metal working, fabrication, engineering, maintenance, etc, is, in effect, an industry that operates in numerous other industries.
- If the scope of the award is reduced as a result of award modernisation, through a lack of appreciation and acceptance of the cross-industry role of the award, there is a significant risk of the following negative consequences:
  - A reduction in career path and skill-development opportunities for employees;
  - Increased skill-shortages and labour shortages for employers;
  - Increased administrative and direct costs for employers, through different awards applying in each industry that they work in;

- Potentially reduced wages for employees, through different awards applying in each industry that they work in;
- An increased regulatory burden for employers bound by the award.

## **Award flexibility clause**

213. In addition to identifying the priority list of industries / occupations and establishing a timeline for the process of award modernisation, the Commission in its Decision of 20 June 2008 determined the terms of the model award flexibility clause that is required to be inserted into each modern award.

214. In delivering its decision, the Commission noted that whilst the terms of the clause were intended to operate in a model fashion, there may be circumstances where adaptation or modification of the model clause was required.

*“[191] The model clause may require adaptation to suit the circumstances of the industry or occupation covered by a particular modern award. Clause 11 of the Ministers’ request provides that the model flexibility clause is to be included in each modern award “with such adaptation as is required for the modern award in which it is included”. In this respect some of the proposals directed at ensuring employees are aware of their award rights which we have not included in the model clause might be reconsidered in particular industries. We have in mind particular proposals for translation of relevant materials into languages other than English. Overall, however, we would expect that changes in the model clause would not be numerous. An adaptation would only be appropriate where it is “required” in the modern award concerned.”*

215. Ai Group submits that in relation to this industry, there is no necessity to make any adaptation or modification to the model clause determined by the Commission in its Decision. In this regard, Ai Group’s position is at odds with

that advanced by the unions who seek additional wording to be attached to the model clause.

216. The unions' additional wording is set out at sub-clause (b) of 1.10.8 of the draft award. The wording would exclude from the application of the award flexibility clause all matters that are dealt with by the facilitative provisions in the award.
217. The facilitative provisions provide for facilitation of flexibilities by solely individual agreement, solely majority agreement or either individual or majority agreement. We submit that the provision drafted by the unions goes beyond the limitations intended for the award flexibility clause, and does so without justification.
218. In support of this contention, we note the following passage from the Commission's 20 June Decision which identifies precisely the manner in which the award flexibility clause will interact with existing flexibilities.

*“[190] We have also provided for the continuation of other flexibility arrangements which might be in the modern award. There are two types of award terms which may be involved. The first are modern award terms which are made in relation to one of the matter specified in s.576J(1)... The second type of award term would be an individual flexibility provision in relation to a specific matter which is already contained in a pre-reform award which carries over into the modern award.” (Emphasis Added)*

219. It is clear from this passage that the Commission intended to preserve the operation of individual facilitative provisions by not allowing the award flexibility clause to cut across the operation of these provisions. There is however, no similar proposition in relation to the manner in which the clause would interact with majority facilitative provisions. The Commission's decision to not identify majority facilitative provisions in the above passage, we submit,

reflects an unequivocal intention for the award flexibility clause to be able to traverse ground covered by majority facilitative provisions.

220. The unions' proposed 1.10.8(b) is therefore a clear departure from the terms of the model clause articulated by the Commission. There is no basis for such a departure within this industry and accordingly it should be rejected.

## Consultative mechanism and procedures

221. Whilst the terms of the Act identify as an allowable award matter, "*procedures for consultation, representation and dispute settlement*"<sup>41</sup>, Ai Group submits that specific consultative mechanisms and procedures are not required within the award when one considers the broader representation rights that are reflected within the award.
222. In particular we note that in addition to providing for a dispute resolution process that expressly identifies a "*shop steward, delegate... or union official*" as capable of being involved in assisting and representing an employee in the event of a dispute,<sup>42</sup> there are also provisions that allow for dispute resolution training leave for eligible employee representatives.<sup>43</sup>
223. We submit that given the inclusion of provisions in these terms, there is no additional need for provisions in relation to consultation, as the ability for the union, if requested, to remain engaged and active within a workplace is ensured by these clauses.
224. Additionally, modern awards are required to be "*simple to understand and easy to apply and must reduce the regulatory burden on business*"<sup>44</sup>. The unions' proposed clause cannot be said to satisfy this objective as it creates a

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<sup>41</sup> Section 576J(1)(j) of the *Workplace Relations Act 1996*

<sup>42</sup> See Clause 1.12.1(a) and 1.12.1(b) of the *Manufacturing and Associated Industries Award 2010*

<sup>43</sup> Clause 1.12.5 of the *Manufacturing and Associated Industries Award 2010*

<sup>44</sup> Section 576A(2)(a)

mandatory obligation on the employer to establish not only a consultative mechanism but also erect a noticeboard for communication between employees and the Union. This obligation exists irrespective of whether the employer only employs a single employee. In such circumstances we submit, the regulatory burden on employers is actually being increased and unnecessarily so.

## **Dispute resolution**

225. As identified in Chapter 3 of this submission, it is Ai Group's contention that in accordance with the terms of the Act, the dispute resolution procedures for modern awards must provide for voluntary dispute resolution, and should not allow for arbitration without the mutual consent of the parties. To that end, Ai Group's proposed 1.12.1(d) clarifies the function of the Commission in assisting the parties to resolve their dispute in the following terms:

***"Ai Group clause:***

***1.12.1(d)*** *In relation to matters arising under the award and/or the NES, the Commission does not have the power to arbitrate the matter, or matters, in dispute or to otherwise determine the rights or obligations of a party to the dispute. However, if the parties request the Commission to make recommendations about particular aspects of a matter about which they are unable to reach agreement, then the Commission may make recommendations about those aspects of the matter."*

226. We submit that the powers conferred on the Commission within the terms of the unions' proposed clause, by providing for the power of arbitration without requiring consent from the parties to the dispute goes beyond the powers available to the Commission, even for modern awards, as prescribed by the Act.

227. Should Ai Group's view in relation to this matter be incorrect, and indeed, our position in this regard may ultimately be informed when the substantive legislation is released, we would seek the opportunity to make further submissions in relation to the appropriate powers to be conferred upon the Commission within the award when resolving disputes.

## **Facilitative provisions**

228. The promotion of facilitative provisions within federal awards was a process that arose following the Commission's decision in the *Safety Net Adjustment and Review – September 1994 Decision*.<sup>45</sup>

229. The rationale that underpinned their introduction was as a result of the Commission's statutory obligation to provide greater flexibility in the award system. In particular the Commission identified the following in its decision:

*“One of the Commission's statutory obligations is to ensure that “awards are suited to the efficient performance of work according to the needs of particular industries and enterprises, while employees' interests are also properly taken into account” (s 99A(c)).*

*We have decided to promote a range of measures directed at introducing greater flexibility in the award system and ensuring that awards are suited to the needs of particular industries and enterprises.*

*The particular measures we have in mind are the effective use of:*

- *Enterprise flexibility clauses;*
- *Facilitative provisions; and*
- *Majority clauses.*<sup>46</sup>

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<sup>45</sup> (1994) 56 IR 114; at 135

<sup>46</sup> (1994) 56 IR 114; att 135

230. Within modern awards, despite the introduction of the model flexibility clause, and given the manner in which Ai Group understands that the award flexibility clause can interact with facilitative provision,<sup>47</sup> Ai Group believes that facilitative provisions continue to provide a useful and different type of flexibility to employers and employees and hence should be retained.
231. Reflected at Clause 2.1 of Part 2 of the draft award is a facilitative provisions clause that, save for one matter, is agreed between Ai Group and the unions.
232. The draft provision allows for facilitation by individual agreement and also facilitation by majority agreement. In relation to the latter category of facilitation, Ai Group notes that whilst provisions relating to majority facilitation are non-allowable matters for current federal awards pursuant to section 521 of the Act, no similar restriction is reflected within Part 10A of the Act in relation to modern awards. Accordingly, it is Ai Group's view that should such a provision relate to an allowable award matter<sup>48</sup> there is no prohibition on including such a clause within a modern award.
233. In providing for the two mechanisms of facilitation, the provision also reproduces the safeguards identified by the Commission in relation to facilitative provisions in *Re Award Simplification Decision – the Hospitality Industry – Accommodation, Hotels, Resort and Gaming Award 1995*<sup>49</sup> . Specifically;
- Recording of the facilitative agreement within the time and wages records of the employer; and
  - The right to union consultation prior to seeking agreement.

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<sup>47</sup> See section 4.4.3 of this Chapter

<sup>48</sup> See Chapter 2 of this submission for an identification of allowable award matters

<sup>49</sup> (1997) 75 IR 272; at 304

234. As already identified, whilst the majority of the clause has been agreed between Ai Group and the unions, there is one matter where there is disagreement. This matter concerns clause *2.1.3 – Facilitation by either majority or individual agreement*, or rather, the safeguards that should be reflected for this type of facilitation.
235. Ai Group submits that the draft provision advanced by the unions is unnecessarily complex, difficult to apply and impractical. We would further contend that with these notions in mind, it does not align with the objects for modernisation identified in the Modernisation Request.
236. Specifically, the unions' proposed clause identifies that should an employer seek to implement a majority facilitative provision which is provided for by the clause, once the employer has received majority endorsement they must then seek the individual endorsement of each individual employee to be covered by the facilitative provision before it can be implemented. Such a requirement essentially renders the majority endorsement useless as a single individual who withheld their agreement could then prevent the facilitative provision from being implemented. In relation to the additional safeguards identified in relation to individual facilitation under this clause, the unions' proposal precludes an employer from implementing these individual facilitative provisions once 50% of the workplace or section of it is covered by the individual arrangement.
237. We submit that there is no justification for either of these notions, with the first having the practical effect of effectively precluding the implementation of majority facilitation, and the second prejudicing the 51<sup>st</sup> employee out of 100 from seeking to obtain individual flexibility.
238. This can be contrasted with Ai Group's proposal which does not prescribe any additional safeguards than that which would be applied if the agreement

sought were either an individual or majority facilitative provision as opposed to a term capable of being both.

***“Ai Group’s clause:***

**2.1.3(b)** *If agreement is reached with an individual, 2.1.2(b) and 2.1.4(c) applies. If agreement is reached with the majority, 2.1.4(b) applies.”*

239. The terms of Ai Group’s proposed clause clearly encapsulate the modernisation principles identified in the Modernisation Request.

## **Casual employment**

240. Casual employment has historically been a feature of the Metals Award<sup>50</sup> and the vast majority of awards and NAPSAs which the Commission is giving consideration to including within the coverage of the proposed award.

241. Ai Group and the unions agree that the concept of causal employment should be retained with the terms of the modern award in this industry.

242. Additionally, Ai Group identifies that casual employment as a type of employment is expressly provided for, and therefore allowable within the terms of section 576J(1)(b) of the Act.

243. Whilst the conceptual inclusion of this category of employment is mutually agreed, the terms upon which casual employees may be engaged however is an area of disagreement between Ai Group and the unions.

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<sup>50</sup> See *The Amalgamated Society of Engineers v The Adelaide Steam-ship Company limited and Others* 15 CAR 297; at 333.

244. The central aspect of this disagreement relates to the inclusion of a clause, as proposed by the unions, which seeks to provide an entitlement for casual employees to convert to permanent employment.
245. The terms of the unions' proposed clause are in similar terms to the clause that was inserted into the Metals Award following a decision of the Commission in *The Metals Industry Casual Employment Case*<sup>51</sup>.
246. Whilst Ai Group acknowledges that this was a provision that was included within the Metals Award prior to *Workchoices*, and was the subject of arbitral proceedings when it was inserted, we submit that its inclusion within the terms of a modern award is no longer appropriate and would offend the objects of award modernisation. It is not an existing award provision.
247. As previously stated, the terms of the Act require that modern awards enshrine “flexible and modern work practices and the efficient and productive performance of work<sup>52</sup>”, this was not a proposition that was reflected within the terms of the Act when the *Metals Industry Casual Employment Case* was determined. We submit that this notion is of particular relevance, and unfettered casual engagements embody the concept of flexible and modern work practices.
248. Additionally, as already eluded to, the ability for casual employees to convert to permanent employment is not a matter that is currently reflected within the terms of federal awards by virtue of section 515(1)(b) of the Act. As we have previously submitted, Ai Group contends that in determining the appropriate safety net within a modern award, the Commission should give primary consideration to the existing award terms and not the provisions of any award that applied in the past.

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<sup>51</sup> Print T4991

<sup>52</sup> Section 576A(2)(c) of the *Workplace Relations Act 1996*

249. This contextualizing of the notion of ‘existing award provisions’ is also significant when assessing whether the objectives of “not disadvantaging employees” and “not increasing costs for employers” have been achieved. We submit that should modern awards not include provisions relating to casual conversion employees would not be disadvantaged as this is not a condition that they currently receive. By contrast, if it were included, there is clear evidence that this would have the effect of increasing costs for employers. In this regard, we rely on the evidence accepted by the Commission in the *Metals Industry Casual Employment Case* where they noted:

*“[98] The AMWU's expert witnesses each provided a worthwhile analysis of why employers may have made increased use of casual employment in the metals and manufacturing industry. In the SA Casual Clerks Case, Stevens DP summarised evidence given by Dr Campbell. Similar evidence was given by Dr Campbell in the hearing before us:*

*"In his research on casual employment he had looked at the possible advantages for employers, and found about five different headings. He believed that in certain circumstances casual employees offered cheaper labour costs, they offered greater ease of dismissal, they offered the opportunity to match labour time to fluctuations in demand, they offered greater administrative convenience, and they offered a greater opportunity for enhanced control of employees. He thought there was some ideological attraction for employers to engage casual employees as well as for administrative convenience, particularly for small business employers.” (Emphasis Added)*

250. Ai Group submits that given these notions, its approach of seeking that casual conversion provisions not be included in the draft modern award is appropriate and necessary to achieve the objectives under the Request and the Act, as outlined.

## Termination of employment

251. The terms of the NES identify the notice period that an employer is required to provide to an employee in order to terminate their employment<sup>53</sup>. In relation to the notice an employee is required to provide to an employer, the NES allows for the terms of a modern award to deal with this matter stating:

***“59 Modern awards may provide for notice of termination by employees***

*A modern award may include provisions specifying the period of notice an employee must give in order to terminate his or her employment.”*

252. Ai Group and the unions have agreed that it is appropriate that the period of notice that an employee should be required to provide to an employer if seeking to terminate their employment be the same as that which is detailed in the NES for an employer when terminating an employee, excepting any additional notice that an employer would have to provide based upon the age of the employee. This agreement is reflected in clause 3.6.3(a) of Part 2.

253. In addition, Ai Group proposes that should an employee fail to provide such notice of termination, the employer shall have the right to withhold certain monies from the employee. This notion is reflected in clause 3.6.3(b) of Part 2 of the draft award in the following terms:

***“Ai Group clause:***

***3.6.3(b)*** *If an employee fails to give the notice set out in 3.6.2(a) then the employer has the right to withhold monies due to the employee to a maximum amount equal to the payment in lieu of notice that the employee would have received under the NES.”*

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<sup>53</sup> Section 57 of the National Employment Standard

254. It is this aspect of the clause that the unions do not support and they have advanced the view that whilst an employee should provide notice of termination, there should be no penalty should that employee fail to abide by such notice.
255. Ai Group submits that such a notion would essentially render the notice of termination provisions for an employee useless. The principle that an employer has the right to withhold monies from an employee to the value of any notice of termination not provided is one that is entrenched within numerous awards and NAPSAs. Within the Metals Award, this concept dates back as far as the terms of the *Metal Trades Award 1941*<sup>54</sup>.
256. We submit that such a concept must be retained for the modern award as the only other means by which an employer could seek to bind an employee to the requirement to provide notice would be through threat of prosecution for breach of the award. Such a reality would be of little practical effect for an employer given the time and cost associated with pursuing such a remedy.

## **Redundancy**

257. The unions are seeking to include small business redundancy pay obligations in the award. Ai Group strongly opposes the unions' position for the reasons set out in Chapter 4.

## **Annualised salaries**

258. Whilst annualised salary arrangement provisions have not historically been a feature of the Metals Award and its predecessors, Ai Group submits that this should not preclude their inclusion within a modern award.

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<sup>54</sup> (1941) 45 CAR 751; at 774 which provides the following:  
"18(b) Employment shall be terminated by a week's notice on either side given at any time during the week or by payment or forfeiture of a weeks wages as the case may be."

259. In determining that annualised wage and salary arrangements were not a matter that the Award Flexibility Clause should deal with, we submit that the Commission clearly contemplated their inclusion within modern awards<sup>55</sup>. Accordingly, there should be a presumption that modern awards will contain annualised salary provisions.

260. Within Chapter 3, Ai Group identified the terms of an annualised salary clause that it believed accorded with the objects of the Act and was fair and reasonable for inclusion as a model provision within modern awards. Ai Group advances this clause for the proposed modern award.

## **Superannuation**

261. This issue is dealt with in Chapter 3.

## **Cashing out of annual leave and personal / carer's leave**

262. As identified within Chapter 3, the NES allows for modern awards to include provisions allowing employers to cash-out annual leave and personal / carer's leave entitlements of employees at the election of the employee.

263. Ai Group and the unions support the inclusion of this notion within the terms of proposed award, however the mechanism by which the cashing-out can be triggered is in dispute between the parties.

264. In accordance with the submissions made within Chapter 3, Ai Group's draft proposal in relation to cashing out of annual leave and personal / carer's leave largely reproduces the safeguards that are reflected within the terms of the Act

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<sup>55</sup> *Request from the Minister for Employment and Workplace Relations – 28 March 2008 – Award Modernisation* [Print PR062008; at [190]]

pursuant to the Australian Fair Pay and Conditions Standard.<sup>56</sup> The only exception to this proposition is that there is no requirement for a workplace agreement to be in place which provides for the ability to cash-out before the entitlement can be triggered.

265. By comparison, whilst the unions' proposal accepts the safeguards within Ai Group's provision as appropriate, they require an additional provision which identifies that the only mechanism by which cashing out can be effected is through the terms of a workplace agreement.

266. This notion is reflected in equivalent terms for both annual leave and personal / carer's leave cashing-out. Specifically stating:

***"Unions' clause:***

#### ***6.1.12 Cashing out of annual leave allowed in enterprise agreements***

***6.1.12(a)*** *Nothing in this clause permits annual leave to be cashed out under the award, however an enterprise agreement registered with Fair Work Australia may provide for the cashing out of annual leave provided that:*

*(i) A provision in a workplace agreement binding the employee and the employer entitles the employee to forgo the amount of annual leave; ..."*

267. Ai Group submits that the additional requirement that annual and personal / carer's leave can only be cashed out if there is a workplace agreement in place is an unnecessary additional regulatory burden for business and one that thereby offends the objects of modernization.<sup>57</sup>

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<sup>56</sup> Section 233 and 245A of the *Workplace Relations Act 1996*

<sup>57</sup> See section 576A(2)(a) of the *Workplace Relations Act 1996*

268. In addition we submit, that should the motivation be the provision of an additional level of safeguard for employees, such a notion is unnecessary given the extensive safeguards already contained within the provision including:

- The restriction on the maximum amount of leave that can be cashed out in any 12 month period<sup>58</sup>;
- The requirement that any election be at the initiation of the employee and in writing<sup>59</sup>;
- The prohibition on the employer exerting undue influence<sup>60</sup>; and
- The record keeping requirements attributed to the employer in relation to retention of the written election<sup>61</sup>.

269. Ai Group submits that the ability to cash-out annual leave and personal / carer's leave is a significant flexibility that benefits both employers and employees. Access to it should, subject to appropriate safeguards, not be made complicated and protracted, but rather should be as efficient and easy as possible.

270. We contend that a cashing-out clause drafted in the manner proposed by Ai Group supports the following objectives of award modernisation:

- Creating a provision that is simple to understand and easy to apply, which reduces the regulatory burden on business<sup>62</sup>;
- Ensures a fair minimum safety net of enforceable conditions for employees<sup>63</sup>; and
- Promotes flexible and modern work practices<sup>64</sup>.

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<sup>58</sup> Clause 6.1.12(d)

<sup>59</sup> Clause 6.1.12(a) of Ai Group's proposal and Clause 6.1.12(a)(i)

<sup>60</sup> Clause 6.1.12(e)

<sup>61</sup> Clause 6.1.122(f)

<sup>62</sup> Section 576A(2)(a) of the *Workplace Relations Act 1996*

<sup>63</sup> Section 576A(2)(b) of the *Workplace Relations Act 1996*

<sup>64</sup> Section 576A(2)(c) of the *Workplace Relations Act 1996*

## **Transitional arrangements**

271. Within Chapter 3 of this submission in relation to the removal of interstate differences and the rationalization of conditions generally, Ai Group identified that the Commission should not be reluctant in including transitional provisions within modern awards to ensure that the objectives of award modernisation are achieved.
272. Ai Group anticipates that such provisions will be required within the terms of the various Parts of the proposed award. At this time however, given the limited analysis that Ai Group has had an opportunity to conduct we have not devised the terms of any transitional arrangements. We intend to give this issue further consideration.

## **Exemptions**

273. At Clause 1.4 of Part 2, the Commission will note that there is a provision relating to exemptions from the award. Such a notion is reflected in the current terms of the Metals Award at Schedule B of Part 1.
274. Ai Group's member - Onesteel Limited – has forwarded a submission to the Commission seeking the retention of various steel industry exemptions. Ai Group supports the retention of such exemptions, as noted in Schedule B of the proposed award.
275. Ai Group submits, that the Commission in drafting the terms of modern awards should have regard to whether any expressed exclusions of named employers should be included within the terms of a modern award. We submit that the Commission is not precluded from drafting the terms of a modern award in this manner pursuant to section 576V.

## Negotiations between Ai Group and APESMA re. award coverage for professional engineers and scientists

276. Since mid-June, Ai Group has been negotiating with APESMA over the terms of a separate award covering engineers and scientists in the priority industries of:

- Metal and associated industries;
- Glue and gelatine industry; and
- Rubber, plastic and cablemaking industry.

277. Three meetings have been held between Ai Group and APESMA, on 19 June, 17 July and 30 July, plus additional telephone conversations and email exchanges. The latest draft is the 3<sup>rd</sup> draft prepared. The proposed award is entitled the *Manufacturing and Associated Industries (Professional Engineers and Scientists) Award 2010*. The draft award is set out in **Annexure B**.

278. Again, as set out in Chapter 1, Ai Group submits that it is in the public interest for the parties to be allowed to continue their negotiations and provide updated draft/s and other materials to the Commission up to 31 August 2008.

279. Ai Group opposes the inclusion of professional engineers and scientists in the main award for the manufacturing and associated industries and supports the retention of a separate award.

280. Although both of the existing awards share a similar reference to the industry, they have existed as two distinct instruments for many decades.

281. It is important to retain this distinction for the following reasons:

- The provisions of the two awards are very different;

- Engineers and scientists typically associate themselves more with their profession than with the industry in which they are currently working;
- The training programs and qualifications for professional engineers and scientists are similar across many industries and recognized across industries. This horizontal recognition of skills and training is more relevant than the vertical recognition of skills within an industry;
- Federal awards covering professional engineers and scientists are very similar across different industries. Accordingly awards are best rationalised in a horizontal fashion, rather than a vertical fashion. Ai Group supports in principle the rationalisation of various professional engineers and scientists awards and proposes that this issue be dealt with in Stage 2 of the award modernisation process. There are many industries where the major union and employer parties agree that the main industry award should not cover professional engineers and scientists. Accordingly, there is an ongoing important role for occupational award/s covering professional engineers and scientists.

282. The maintenance of a separate award for professional engineers and scientists would not impede career opportunities for employees under the main manufacturing industry award (regardless of whether awards for professional engineers and scientists are rationalized horizontally). The same opportunities would exist as presently applies.

283. Whilst the Award Modernisation Request identifies that modern awards should primarily be made along industry lines, the Commission is not precluded from creating a modern award along occupational lines where it deems it appropriate. We would respectfully submit, that this is one of the circumstances in which such a distinction is appropriate.

284. Ai Group and APESMA are the primary registered organisations bound to the terms of the current *Metal, Engineering and Associated Industries (Professional Engineers and Scientists) Award 1998* which is the primary

federal award covering professional engineers and scientists in the metal industry. Over time, the terms of this award have developed in an extremely distinct fashion with little regard for the manner in which conditions (other than test case provisions) have evolved in the Metals Award and its predecessors.

285. By way of example the hours of work and overtime provisions within the Metal Industry Professional Engineers and Scientists Award are highly flexible and allow an employer a number of options in remunerating an employee for additional hours worked<sup>65</sup>. This can be compared with the terms of the Metals Award which require specific penalties to be paid to employees when they work outside of their ordinary hours.

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<sup>65</sup> See Clause 5.3.1

## 5.6 – Mining industry

286. Ai Group has many member companies which carry out work in the mining industry, particularly those covered under the Metals Award and construction awards. Because the mining industry is currently experiencing boom times, many contractors are focussing on the industry, even though traditionally they may have not have done so, and in the future may no longer do so.

287. If contractors are required to apply mining industry conditions, substantial cost increases would result. Mining industry conditions are typically far more generous than the conditions in other industries.

288. If an appropriate exclusion is not inserted into any mining industry modern award there is a significant risk of the following negative consequences:

- A reduction in career path and skill-development opportunities for employees of contractors (this argument is set out in section 5.5 of this submission);
- Increased administrative and direct costs for contractors, through different awards applying for work carried out for different clients.

289. Accordingly, we would seek for the following exclusion be set out in any mining industry modern award:

***“X.X.1** This award does not apply to employees covered under the Manufacturing, Engineering and Associated Industries Award. Without limiting the generality of the forgoing exemption, this award does not apply to employees who provide metal working and/or fabrication and/or engineering and/or mechanical and/or electrical and/or installation, maintenance, refurbishment or repair services to client/s*

*in the mining industry, on a contract basis, and whose business is independent of the client.*

**X.X.2** *This award does not apply to employees of employers who:*

- a. construct, alter, extend, repair, demolish or dismantle buildings, structures or works; or*
- b. carry out work which is preparatory to, or for rendering complete, work in (a);*

*for client/s in the mining industry on a contract basis, and whose business is independent of the client.”*

290. We submit that such an exemption does no more than reflect the current arrangements in relation to the application of the Metals Award and construction awards within this industry.

## 5.7 – Private sector clerical occupation

### Scope of the Private Sector Clerical Occupation Award 2010

291. The clerical occupation is one that touches virtually all of Ai Group’s member companies to one degree or another. As a result, Ai Group has a substantial interest in the approach and ultimate terms of any private sector clerical occupational award.
292. In the course of the proceedings that gave rise to the Commission’s 20 June 2008 decision, Ai Group did not make any submissions in relation to the proposed scope of the clerical modern award, but we did advise the Commission that we had no objection to the occupation’s inclusion within the priority list<sup>66</sup>.
293. In determining that the private sector clerical occupation should be given priority status the Commission stated:

*“[53]... Clerical and administrative work is carried out right across the economy and in many industries which do not have industry award coverage for such work. We have decided to include a private sector clerical occupation on the priority list.*

*[54] The modern award which results should cover the area governed by the Clerical and Administrative Employees Victoria Award 1999 and the NAPSAs constituted by the general clerical awards in the other States, and the general clerical awards in the ACT and the Northern Territory. As a general principle it is not intended that this modern occupational award should cut across modern industry awards. As we have already noted, the Minister’s request and the WR Act relevantly provide that modern awards should primarily be industry awards and that the Commission should have regard to the desirability of minimizing*

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<sup>66</sup> Ai Group Outline of Submissions – Award Modernisation Consultation May 2008; at paragraph 17

*the number of awards that apply to a particular employer. In the circumstances at this stage a modern clerical and administrative employees' award should be designed to provide a safety net for employees not covered by industry awards.*

*[55] The precise boundaries will have to await the conclusion of the process. The scope of the award should be limited, however, so as to exclude employers and employees subject to another modern award which includes clerical classifications.”*

294. Ai Group submits that whilst the notion of modern awards being created “*primarily along industry lines*<sup>67</sup>” is central to the modernisation project, this proposition is qualified by the ability for the Commission to also create modern awards along occupational lines “*as it considers appropriate*<sup>68</sup>”. We contend that in relation to the clerical occupation it is appropriate for the Commission to create an occupational clerical award with substantial application.
295. Ai Group is strongly opposed to clerical classifications being inserted into “blue collar” awards, such as those applying in the manufacturing and construction industries. Such an approach would give oxygen to long-standing but largely unsuccessful strategies by “blue-collar” unions to enroll members amongst clerical staff and include such staff within collective agreements.
296. The industrial history of the clerical occupation is such that the vast majority of clerical employees’ terms and conditions are regulated by common rule instruments that do not expressly attach themselves to the terms and conditions of the industry in which the clerical employee is working. We submit that the reason for this is due to the fact that predominantly, the operational requirements that an employer has in relation to their clerical employees are

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<sup>67</sup> Award Modernisation Request (Consolidated Version) 16 June 2008; at paragraph 4

<sup>68</sup> Award Modernisation Request (Consolidated Version) 16 June 2008; at paragraph 4

distinct from the operational requirements they may have for their 'industry' employees.

297. In circumstances where there are distinct requirements for the clerical functions of a business to align with the broader operational conditions that prevail within the industry, this has generally seen the creation of clerical classifications within the industry award. We contend however that this is very much the exception as opposed to the rule and that such a factor is relevant to the Commission's consideration of whether to create a discreet occupational award for the clerical industry.
298. It is Ai Group's understanding, based upon discussions held with the ASU, that the union contends that the prima facie position should be that unless an industry or sector currently contains clerical classification/s there should be a presumption that the clerical modern award should apply to the clerical employees within that industry. The presumptive status of the clerical modern award could be displaced should an interested party in a particular industry be able to demonstrate that there are industry specific demands for their clerical employees that necessitate aligning their conditions with the broader industry instrument.
299. Such a proposition is both sensible and appropriate for the clerical occupation. Ai Group contends that there are a range of industries in which alignment of the broader industry conditions with those of the clerical employees would actually create more difficulties for employers as opposed to supporting efficient and productive operations.
300. For example in the construction and manufacturing industries, ordinary hours of work are often arranged so that employees receive one rostered day off in every two to four week cycle. It is very common that clerical employees, sales employees and managerial employees do not received the rostered day off so that they can continue to liaise with customers, process paperwork, generate

invoices and ensure that administrative matters are attended to. It would not be practical or desirable in many cases for these employees to receive a rostered day off in line with the broader industry conditions.

301. Ai Group submits that there are numerous other examples that reflect this notion and if the solution is to have within a modern 'industry' award, clerical conditions that are unrelated to the broader industry conditions there is no practical advantage to including within the award the clerical occupation either in the body of the award or as a separate Part.
302. Indeed, Ai Group would submit that in that scenario, if the Commission were to create a separate Part to an industry award that contained largely independent conditions, this would potentially make the award more difficult to understand and apply which would clearly offend the modernisation objectives.

### **ASU's proposed modern award**

303. The ASU provided to Ai Group a copy of its draft of the proposed clerical modern award on 30 July 2008 for consideration.
304. Ai Group has conducted an initial review of the terms of the ASU's draft and has identified a range of matters which are of significant concern. Given the limited time which we have had to analyse the document, we have not completely dissected all of the propositions which are reflected within the ASU's draft. We would however seek at this time to make submissions in relation to two substantial areas of disagreement. These relate to the coverage of Part 1 of the award, and the methodology by which the union has sought to establish the 'safety net' for the modern award.

305. In relation to the coverage of Part 1 of the ASU's draft award, whilst Ai Group is supportive of the notion of a modern clerical award that has general application across a range of industries, we submit that the manner in which the ASU has drafted the coverage clause is far too broad and expands substantially the traditional notion of clerical employment.
306. The terms of coverage are detailed in Clause 8 of the ASU's award. The coverage clause is extremely inappropriate. It:
- Includes virtually everyone who works in an office; and
  - Binds employees, regardless of whether they are covered by a classification in the award.
307. In addition, the proposition that the award also covers "*persons employed in connection with machines including computers and other office equipment designed to assist in the performance of any clerical, administrative or office work whatsoever*" would essentially mean that any employee who uses a computer, photocopier or fax machine, would also fall within the coverage of this award.
308. Ai Group submits that in the modern age, these implements are standard tools utilised by any employee that works in an office environment and are no longer limited in their application to employees performing a clerical function. Accordingly, we submit that it is not appropriate or accurate to define the clerical occupation in this manner.
309. In relation to the second area of dispute with the ASU's award, we submit that the methodology utilised by the ASU to establish the appropriate 'safety net' for the award is fundamentally misguided and incorrectly interprets the terms of the Act and the Modernisation Request.

310. It is apparent to Ai Group that the process that the ASU has sought to adopt in determining the terms for the award is one in which the most favourable conditions from any NAPSA or federal award that it has considered have generally been inserted within the draft award. Any disparate conditions have been levelled upwards with the presumption being that such an undertaking creates the appropriate ‘safety net’ for the award.
311. Ai Group strongly rejects this approach as not only does it misconceive the notion of the ‘safety net’, but additionally, it completely disregards key objectives of the modernisation process.
312. As identified within Chapter 2 of this submission, section 576L requires that the terms of the modern award in relation to the ‘allowable award matters’ can only be reflected in terms that represent a “*fair minimum safety net*”. We submit, that there is no basis for assuming, as the ASU has done, that the most generous condition within a current federal award or NAPSA is equivalent to the minimum safety net requirement.
313. In support for its approach the ASU places substantial reliance on the proposition within the Award Modernisation Request that the creation of modern awards is not intended to “*disadvantage employees<sup>69</sup>*”. In so doing however the union completely ignores the objective within the Award Modernisation Request that immediately follows disadvantage to employees, namely that the creation of modern awards is not intended to “*increase costs for employers.<sup>70</sup>*”
314. Furthermore, we would submit that the methodology proposed by the ASU for establishing the ‘safety net’ also challenges other objectives within the Act such as:

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<sup>69</sup> Award Modernisation Request (Consolidated Version) 16 June 2008; at paragraph 2(c)

<sup>70</sup> Award Modernisation Request (Consolidated Version) 16 June 2008; at paragraph 2(d)

- Creating a system that is economically sustainable and promotes the creation of jobs, high levels of employment and national and international competitiveness<sup>71</sup>;
- Protecting the position in the labour market of young people, employees with disability and employee to whom training arrangements apply<sup>72</sup>;
- Considering the needs of the low paid<sup>73</sup>; and
- Promoting the pursuit of low inflation<sup>74</sup>.

315. We submit, as we have articulated within Chapter 3 of this submission, that a uniform leveling upwards or downwards approach cannot and should not be adopted in relation to establishing the minimum safety net for modern awards. Ultimately it is a question of balance, and a balance that must be struck with reference to the objects of the Act.

316. Ai Group proposes that the clerical conditions contained within the *Contract Call Centre Award 2000* and the *Telecommunications Service Industry Award 2002* (largely identical) are an appropriate starting point for drafting a modern clerical award. The terms of these awards were largely achieved by consent (including the conditions and skill-based classification structure relating to clerical employees) after very lengthy negotiations and the common rule clerical awards in each state were the main reference point during the negotiations. The Contract Call Centre negotiations and AIRC proceedings continued for three years. Ai Group negotiated the award on behalf of the employers, with the ACTU, ASU, CPSU and NUW representing employees. Commissioner Smith was heavily involved in conciliating. Annexed to this submission as **Annexures D** and **E** respectively are copies of these instruments for the Commission's reference.

<sup>71</sup> Section 3(a)&(c), 576A(2)(c) and 576B(2)(a) of the *Workplace Relations Act 1996*.

<sup>72</sup> Section 3(k) and 576B(2)(b) of the *Workplace Relations Act 1996*.

<sup>73</sup> Section 576B(2)(c) of the *Workplace Relations Act 1996*.

<sup>74</sup> Section 3(a) and 576B(2)(a) of the *Workplace Relations Act 1996*.

## **Ai Group's proposed award**

317. Given the substantial range of matters and substantial number of awards and NAPSAs which need to be considered in the context of creating a modern clerical award, Ai Group has not been able at this time to draft a complete instrument.
318. Instead, we seek to advance for the Commission's consideration a framework for the model award together with the terms of a number of the key provisions. Annexed and marked **Annexure C** is Ai Group's proposal in this regard.
319. Ai Group's proposed award identifies the coverage of the award at Clause 1.3.1 in the following terms:

### **1.9 COVERAGE OF THIS AWARD AND PARTIES BOUND**

#### **1.9.1 Employers**

*This award applies to and is binding on employers who engage employees in the process, trade, business or occupation of a person or persons or classes or persons (by whatever name called) employed wholly or principally in clerical work which may include administrative duties of a clerical nature, except those who are exempt as set out in 1.4.*

#### **1.9.2 Employees**

*This award has application to and is binding upon the employees of the employers in 1.1.1 for whom classifications appear in this award, except those who are exempt as set out in 1.4."*

320. This provision is largely modeled on the terms of the *Clerical and Administrative Employees (Victoria) Award 1999* which Ai Group contends has operated effectively in identifying the appropriate limits of the clerical occupation since its inception.
321. Ai Group's proposed award identifies a range of exemptions from the application of the modern award. These exemptions are reflected at Clause 1.4.
322. Clause 1.4.1 exempts enterprise awards from the modern award in line with the requirements of the Act<sup>75</sup>. The remainder of the exemptions are drafted from the terms of the Victorian common rule declaration in relation to the *Clerical and Administrative Employees Victorian Common Rule Award 2005*<sup>76</sup> ("the Victorian Common Rule Clerical Award").
323. These exemptions relate to those industries in which there were existing clerical instruments for the industry or sectors that were otherwise appropriately exempted.
324. Ai Group submits that the scope of the Victorian Common Rule Clerical Award is an effective starting point, but acknowledges that the scope may need to be reviewed after a more complete consideration of all the clerical instruments has been conducted.

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<sup>75</sup> Section 576V(3) of the *Workplace Relations Act 1996*

<sup>76</sup> Print PR950665

## **5.8 – Racing industry**

325. Ai Group has not identified a substantial interest at this time in relation to the priority industry of racing. Should anything resulting from these proceedings alter Ai Group's view, we will advise the Commission accordingly.

## 5.9 – Rail industry

326. In its decision of 20 June 2008, the Commission, in including the rail industry as a priority industry, identified the submissions of the ACTU and the Australian Rail, Tram and Bus Industry Union (“the ARTBIU”) which expressed the rail industry as including the following areas:

*“[68] Rail Industry. The ACTU proposed that the rail industry should be a priority and a modern award should be created to cover all employees employed in or in connection with the transport of freight and/or passengers by rail and construction, modification and maintenance of rolling stock, locomotives and railway infrastructure.*

*[69] The Australian Rail, Tram and Bus Industry Union (ARTBIU) supported the ACTU submission.”*

327. Ai Group has a significant number of members that are major employers in the area of modification and maintenance of rolling stock, locomotives and railway infrastructure. These companies have employed their employees under the Metal Industry Award since the early days of this award and Ai Group strongly opposes any change to this. Many of their employees are members of the AMWU, AWU and CEPU – few, if any, are members of the ARTBIU.

328. The scope of Part 1 of the Metals Award as it currently exists covers work of this nature. The industries and callings set out in Schedule A include:

*“6. Steel fabrication, construction and erection and repairing*

*...*

*45. The making, assembling, repairing and maintenance of vehicles (except where such work is at present covered by another Federal award).*

*...*

*50. Making, repairing, reconditioning and maintenance of motor engines, and/or parts thereof, and of the mechanical and electrical parts including the transmission of chassis of motor cars, motor cycles and other motor driven vehicles.”*

329. Ai Group strongly opposes any variation to the coverage of Part 1 of the Metals Award to remove or limit the award’s application in respect of the modification and maintenance of rolling stock, locomotives and railway infrastructure.

330. Within the terms of Ai Group and the manufacturing unions’ proposed *Manufacturing and Associated Industries Award 2010* (Part 2) the parties have agreed to expressly include this type of work within the scope of the award, as follows:

*“60. Making, assembly, repair, refurbishment and maintenance of railway lines, locomotives, rolling stock and components, other than work carried out by employees of a State Government or State Authority (except the named Governments and Authorities who were respondent to the former Railways Metal Trades Grade Award 2002 [AP817167]) – other than those employed on-site in the building and construction industry;*

331. This does nothing more than reflect the current industrial arrangements that currently apply.

332. Ai Group submits that given the substantial industrial history that has applied in relation to the application of the Metals Award to this type of work, should there be variation to the existing arrangements via the inclusion of modification and maintenance of rolling stock, locomotives and railway infrastructure within the terms of the rail industry modern award, there is a significant risk of disadvantage to employees and increased costs to employers. It would also

substantially disturb the representational pattern and rights of registered organisations. Such notions are fundamentally at odds with the objectives of modernisation under the Act and Award Modernisation Request.

## 5.10 – Retail industry

333. The Commission’s decision of 20 June 2008 identified that at this time it was not considering including the vehicle repair, services and retail industry within the context of the retail industry modern award, saying:

*“[84] We mention two other industries that we have decided not to include in this part of the process. The real estate industry requires separate consideration. The Vehicle repair, services and retail industry should be considered after the scope of the modern awards to operate in relation to the metal and associated industries, vehicle manufacturing industry and retail industry has been settled.”*

334. Ai Group supports this approach and opposes the inclusion of the vehicle industry repair, services and retail awards within a retail industry modern award.

## **5.11 – Rubber, plastic and cabling industry**

335. In accordance with the Commission's decision of 20 June 2008, the parties have addressed this industry in conjunction with the development of terms and conditions for the metal and associated industries.

## 5.12 – Security industry

336. The security industry has been identified as a priority industry in accordance with the Commission's 20 June 2008 decision.
337. Ai Group has not sought to advance a substantial view in relation to the terms of any proposed security industry modern award at this time. We can advise the Commission that since being involved in a pre-consultation conference chaired by His Honour, Vice President Lawler, that we have continued to liaise with member companies on the emerging issues within the industry.
338. The single area of substance that pertains to the security industry that we would seek to raise at this time is in relation to the industry's interaction with the metal and associated industries.
339. Under the terms of the current Metals Award, Schedule B of Part 1 of the Award identifies that the terms of the Metals award do not apply to security personnel<sup>77</sup>. This exemption has been retained in the draft modern award for this industry.
340. Ai Group believes that the terms of any modern security industry award will more accurately reflect the appropriate conditions for security personnel in the manufacturing industry.

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<sup>77</sup> Clause 18

## 5.13 – Textile, clothing and footwear industry

341. As identified at the outset of this submission, Ai Group has a substantial interest in many of the priority industries. The textile, clothing and footwear industries are industries that fall into this category.

342. Ai Group is respondent to the primary federal awards within the textile clothing and footwear industries, namely the:

- *Textile Industry Award 2000*; and
- *Clothing Trades Award 1999*.
- *Footwear Industries Award 2000*

343. Pursuant to directions issued by the Commission in its 20 June 2008 decision in relation to other industries, Ai Group has considered the possibility of consolidating the textile, clothing and footwear industries into a single modern award. At this time we have formed the view that it may be possible to consolidate these three industries into a single modern award, divided into parts, in much the same way as Ai Group's proposed approach in relation to the metal and associated industries.

344. Such an undertaking however is substantial and given the myriad of matters and number of awards and NAPSAs which need to be considered in the context of creating a modern TCF award, Ai Group has not sought at this time to draft a complete instrument.

345. Instead, we seek to advance for the Commission's consideration a framework for the model award together with the terms of a number of the key provisions. Annexed and marked **Annexure F** is Ai Group's proposal in this regard.

346. Should the Commission be supportive of the approach that we have adopted in relation to the drafting of the modern metals award, we anticipate that these drafting principles could be readily applied to the terms of the TCF modern award and Ai Group could efficiently provide to the Commission a modern draft award for the industries.

## **Scope of Part 2 – Textile Industry**

347. Ai Group's proposed definition of the textile industry for the purpose of establishing the scope of Part 2 of the award is set out in Clause 1.3 of our draft.

348. The terms of this clause are modelled on the terms of Clauses 6.2 to 6.10 of the *Textile Industry Award 2000*.

349. The textile industry is a broad industry, with both traditional and newer technical products needing to be effectively accommodated. The definitions used in the Textile Industry Award to delineate and define the activities covered by the award are longstanding and have operated on a practical basis very effectively. The definition also appears to be well accepted by the industry at large.

350. We are of the view that the same would apply to the scope provisions of the clothing and footwear awards.

351. The simplification process of the mid to late 1990s was significant in updating both the language and structure of this group of awards. The award modernisation process gives the parties a further opportunity for practical improvement of the awards.

352. At this stage there are a range of matters which Ai Group has identified within the current award(s) which may require further consideration, including:

- The inclusion of cashing out of annual leave and personal leave provisions.
- Flexibility in the taking of annual leave.
- Updating the payment of annual leave provisions.
- Review of payment of wages provisions.
- Averaging of hours over a longer period than the current 28 day cycle with the agreement of either a majority of employees or with individual employees (under an award flexibility process).
- A provision for the cashing in of RDO's by agreement between the employer and individual employees would be beneficial.
- A more precise definition of a seven day shiftworker to specify an employee who is regularly rostered to work on Sundays and public holidays.

353. Ai Group intends to further consider these matters and others in the context of drafting appropriate and modern terms for the TCF industry.

## 5.14 – Vehicle manufacturing industry

354. In accordance with the Commission's decision of 20 June 2008 parties were asked to consider this industry in conjunction with the development of terms and conditions for the metal and associated industries.
355. Ai Group has held discussions with the Vehicle Division of the AMWU in relation to the possibility of absorbing this instrument within the scope of the proposed *Manufacturing and Associated Industries Award 2010* either as a separate Part or within the scope of Part 2. It is our understanding that the Vehicle Division opposes this approach.
356. Additionally, Ai Group has held discussions with a number of its members who are respondent to the *Vehicle Industry Award* and they have advised us that they too do not support having the award subsumed into a manufacturing and associated industries award.
357. Ai Group submits that the Vehicle Award should remain an independent award and that the historical delineation between the application of the Vehicle Award and the Metals Award be maintained.
358. In particular, we note that the vast majority of automotive component manufactures are bound by the Metals Award. It is important that the award modernisation process not disturb this.
359. Additionally, Ai Group has been instructed by one of its members - Australian Automotive Air Pty Ltd - to seek to be excluded from the award modernization process due to the operation of a federal enterprise award applying to its business, in respect of work that would otherwise be covered by the Vehicle Award. The enterprise award is currently included in the list of awards which form part of the Commission's 20 June decision.

360. Annexed and marked ***Annexure G*** to this submission is a copy of correspondence received from Australian Automotive Air Pty Ltd which details the basis for their requested exclusion.