

# **AWARD MODERNISATION CONSULTATION**

**Re:**

- **Timetable**
- **Priority Industries/Occupations, and**
- **Model Award Flexibility Clause**

## **Submission**



**6 June 2008**

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### Submission

#### 1. Introduction

1. In the proceedings before the Full Bench on 26 May 2008, Ai Group tendered a Written Outline of Submission. This document was marked ***Exhibit AiG1***.
2. All of the arguments set out in ***Exhibit AiG1*** are important. Nothing submitted by any party in the consultations during the week commencing 26 May has led Ai Group to question any of the points made in this Exhibit and Ai Group continues to rely upon such arguments. The arguments include those dealing with:
  - The three priority industries / occupations proposed by Ai Group and the reasons why they should be given priority – that is, (1) Metal, Engineering and Associated Industries, (2) ICT and (3) Professional Engineers and Scientists;
  - Ai Group's support for the Commission's draft award modernisation timetable;
  - Ai Group's proposed model award flexibility clause and the reasons why such clause is appropriate, including that:

- It is simple to understand and apply;
  - It contains a fair, appropriate and objective method for assessing disadvantage;
  - It does not mix-up the concepts of award facilitative provisions and award flexibility clauses but, rather, provides an additional layer of flexibility;
- Ai Group's strong opposition to the ACTU's proposed clause and the reasons why the clause is highly inappropriate. These include the fact that the clause is very prescriptive and inflexible, and mixes up the concepts of award facilitative provisions and award flexibility clauses. Such an approach is unworkable and would frustrate the award modernisation process and prevent the timeframe and objectives of the process being achieved. The Unions' approach would significantly reduce existing award flexibility, which is inconsistent with the objectives of award modernisation.

## **2. Timetable**

3. Ai Group supports the draft award modernisation timetable.
4. In its Statement of 5 June, the Full Bench gave parties the opportunity to file brief reply submissions up to 12 June. This additional step was sought by Ai Group and we appreciate the Commission's willingness to accommodate it.
5. The NSW Government has suggested that the timetable be amended to reflect its proposal that only one award be initially modernised to develop guidelines and principles applicable to the modernisation of all awards.
6. While there is logic in the NSW Government's arguments, the extremely ambitious timeframe for award modernisation requires that faster progress be made. The best approach is for a reasonable and manageable number of awards to be modernised as priorities.

### 3. Priority industries / occupations

7. A number of issues arose during the public consultations in the week commencing 26 May regarding the draft list of 19 priority industries / occupations. Ai Group's position on many of the issues which arose is set out below.

#### Proposed additional priority industries

8. Various parties have proposed the following additional priority industries:

• Cleaning Industry	• Security Industry
• Community Services Industry	• Transport Industry
• Electrical and Communications Contracting Industry	• Vehicle Manufacture Industry
• Food, Beverage and Tobacco Industry	• Vehicle Repair, Service and Retail Industry
• Mining Industry	• Recorded Entertainment Industry

9. Ai Group neither supports nor opposes the addition of these priority industries but, rather, leaves the matter to be determined by the Commission. However, Ai Group urges the Commission to ensure that the list of priority industries / occupations does not grow so large that the resource demands on the Commission and the industrial parties become stretched to such an extent that the necessary thorough, fair and consultative approach is not possible. Ai Group has a major interest in around half of the additional priority industries which have been proposed.

10. No party sought that the construction industry be a priority industry. (NB. The CFMEU / MBA proposal for a Full Bench to determine the scope of construction awards at an early stage is dealt with later in this submission).

**Should any of the priority industries / occupations be defined at this stage?**

11. Ai Group submits that it would be highly inappropriate and prejudicial for the Full Bench to define or determine the scope of award coverage in any of the priority industries or occupations at this early stage.
12. This is a very complex issue that needs to be considered and discussed by relevant industrial parties and then considered by the Commission during and after the pre-drafting consultation process within each individual priority industry / occupation (as set out in the draft timetable).
13. Many parties (including Ai Group) have suggested lists of awards of potential relevance to particular priority industries / occupations. Such lists have been submitted on a without prejudice basis. Any lists released by the Commission or any party at this early stage should be indicative only and treated on a completely without prejudice basis.
14. It should not be assumed that it will be desirable to have only one award in each of the priority industries / occupations. The number of modern awards and the content of those awards need to be considered in detail by the industrial parties and the Commission over the period ahead.

## **CFMEU / MBA proposal re. construction industry awards**

15. The Construction, Forestry, Mining and Energy Union (CFMEU) and the Master Builders Association (MBA) have sought that the various on-site construction industry awards be replaced by one on-site award. They have also sought that various off-site awards be replaced by a second “construction” award (albeit that in many cases off-site awards have never been considered construction awards).
16. The CFMEU and MBA have also sought that the scope of the two awards which they propose be determined by a Full Bench at an early stage.
17. Ai Group has a major interest and a large membership in the construction sector. We also have a major interest and a large membership in sectors which manufacture products used in the construction sector or provide services of relevance to the construction industry.
18. Ai Group strongly opposes the CFMEU/MBA proposal for the following reasons:
  - No party has asked for the construction industry to be a priority industry and it would be inappropriate for the scope of awards in this industry to be dealt with before dealing with the scope of awards in the priority industries / occupations;
  - The determination of the scope of the awards in the construction industry could be highly prejudicial to industrial organisations, employers and employees involved in other industries / occupations where awards overlap with those in the construction sector - including numerous awards which operate in the Metal, Engineering and Associated Industries and other manufacturing industries;

- The award structures which the CFMEU and MBA propose are not supported by Ai Group or, we understand, several major unions involved in the construction industry;
- If the scope of awards in the construction industry is extended, there will be a major negative impact upon employers in a myriad of ways. For example, the CoINVEST portable long service leave scheme in Victoria is based upon the scope of various construction industry awards and it is essential that the boundaries of this scheme not be extended as a consequence of award modernisation. Also, many companies involved in construction have worked very hard over many years to stop construction industry conditions flowing into their manufacturing and service operations;
- Given the huge implications of the award structures proposed by the CFMEU and MBA - the Full Bench proceedings sought by them would require that Ai Group and numerous other employee and employer representative bodies devote substantial resources to protect the interests of their members. It is not in the public interest for such resources to be diverted from modernising awards in priority industries and occupations, particularly when the timeframe for modernising priority awards is so tight.

### **Additional submissions about the three priority industries / occupations proposed by Ai Group**

19. The three priority industries / occupations proposed by Ai Group are:
- Metal, Engineering and Associated Industries;
  - Technical Services - Engineers and Scientists Occupations; and
  - Information and Communications Technology (ICT).
20. Given the issues raised during the public consultations, Ai Group makes the following additional submissions about these proposed priority industries / occupations:

## ***Metal, Engineering and Associated Industries***

21. In its submissions to the Full Bench, the AMWU appeared to indicate that agreement had been reached with Ai Group on a list of awards for this industry. Ai Group wishes to clarify that the parties have agreed to discuss a lengthy list of potentially relevant awards on a “without prejudice” basis. There is no agreement on what the eventual outcome will be in terms of award structures, scope or content at this early stage.

## ***Technical Services - Engineers and Scientists Occupations***

22. Ai Group is having discussions with APESMA regarding professional engineering and scientists awards in a range of industries. These awards are very similar across industries and have an important role to play. They are very different in their conditions than most other awards and hence need to be specifically focussed upon.
23. Both the ACTU and Ai Group have sought that the sector of Technical Services – Engineers and Scientists Occupations be placed on the priority list, and it currently appears on the draft list.
24. There is no pre-determined outcome in terms of award structures, scope or content.
25. Numerous issues will arise over the coming months. One such issue is the link between the classification structure in the *Metal Engineering and Associated Industries Award* and the classifications in the *Metal Industry (Professional Engineers and Scientists) Award*. Another relevant issue was identified by Her Honour SDP Acton (*Ref. PN402-406 of Transcript*) in relation to trainee engineers and scientists. Ai Group has not formed a final view on these issues at this stage and intends to discuss them at length with relevant unions over the months ahead.

26. As set out in Ai Group's May Outline of Submission:

“Ai Group has had discussions with APESMA with regard to engineers and scientists awards across all industries. Ai Group and APESMA have reached agreement on a list of awards (Annexure C) which will be discussed within the priority occupation of “Technical Services – Engineers and Scientists Occupations”). It should not be assumed that it will be desirable to have only one award within these industries/occupations. This will be an issue which the parties will consider. A further meeting between Ai Group and APESMA has been scheduled for 19 June.”

### ***Information and Communications Technology (ICT) Industry***

27. Similar to the above two proposed priority industries / occupations, in the ICT sector Ai Group has no predetermined outcome in mind in relation to award structures, scope or content.

28. Ai Group has many hundreds of member companies in the ICT industry and it is important that the existing flexible and relatively modern awards which exist are given adequate focus during the modernisation process. Ai Group, relevant unions and members of the Commission (particularly Commissioner Smith), have devoted a massive amount of time over recent years to create a number of new industry awards.

29. The modernisation task in the ICT industry may not be as difficult as in some others because there are fewer awards in the industry than many other industries and some of the major awards are very similar.

30. The ICT industry has a high proportion of employees on AWAs. Statistics tabled in the Senate in 2006 showed that the following sectors had the greatest number of AWAs for the period from January 1998 to July 2006:

Retail	151,337
Business Services	114,843
Manufacturing	109,392
Hospitality	107,342
Communication Services	81,361

31. In terms of the above sectors, employees in the ICT sector comprise the sector of Communication Services plus a portion of the sector of Business Services (eg. IT Consulting, Software Development etc). The above figures comprise only the actual number of AWAs and do not set out the proportion. A much smaller number of employees work in the Communications Services sector than, say the Retail and Manufacturing sectors. In proportional terms, it is very evident that a high proportion of employees in the ICT industry are on AWAs.
32. The Workplace Authority's Quarterly Report for the March 2008 Quarter showed that the highest number of AWAs were lodged in the Information Media and Communications industry – 12,057 or 16% of all AWAs lodged in the Quarter.
33. As set out in May Outline of Submission:
- “Ai Group has been in touch with the CPSU, ASU, CEPU and the NUW and a meeting has been arranged for 11 June. At that meeting the parties will discuss the awards that they believe should be included as part of the award modernisation process in the ICT industry. The ICT industry includes several major industry sub-sectors and it should not be assumed that it will be desirable to have only one award in this sector.”

## 4. Relevance of extrinsic material

34. In seeking to give meaning to the terms of the Act and to discharge the functions conferred on the Commission in accordance with the Act, the Bench may have regard to the use of extrinsic materials.
35. The *Acts Interpretation Act 1901* at section 15AB(2) identifies the material which may be utilised in the interpretation of a provision of an Act in the following terms:
- “(a) all matters not forming part of the Act that are set out in the document containing the text of the Act as printed by the Government Printer;*
  - (b) any relevant report of a Royal Commission, Law Reform Commission, committee of inquiry or other similar body that was laid before either House of the Parliament before the time when the provision was enacted;*
  - (c) any relevant report of a committee of the Parliament or of either House of the Parliament that was made to the Parliament or that House of the Parliament before the time when the provision was enacted;*
  - (d) any treaty or other international agreement that is referred to in the Act;*
  - (e) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted;*
  - (f) the speech made to a House of the Parliament by a Minister on the occasion of the moving by that Minister of a motion that the Bill containing the provision be read a second time in that House;*
  - (g) any document (whether or not a document to which a preceding paragraph applies) that is declared by the Act to be a relevant document for the purposes of this section; and*

(h) *any relevant material in the Journals of the Senate, in the Votes and Proceedings of the House of Representatives or in any official record of debates in the Parliament or either House of the Parliament.”*

36. In the course of consultation proceedings before the Commission, a number of parties, including Ai Group, sought to frame their submissions, particularly in relation to the appropriate terms of the flexibility clause, not only in reliance on the provisions of the Act and the modernisation request, but also on the basis of extrinsic materials.
37. In reference to the reliance by various parties on extrinsic materials that would not ordinarily sit within the scope of section 15AB(2) of the *Acts Interpretation Act 1901*, the Bench noted that whilst the statements which were being sought to be relied upon were in some cases from very eminent politicians, the performance of the Commission’s functions would not be influenced by these statements and instead they would be guided by the ‘*conventional materials*’ in their interpretation and implementation of the Act.<sup>1</sup>
38. Whilst Ai Group does not dispute the regard which should be had for the ‘conventional’ extrinsic materials, we would respectfully contend that the manner in which these ‘conventional materials’ – most notably the Deputy Prime Minister’s *Second Reading Speech on the Introduction of the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008* (“the Second Reading Speech”), and the *Explanatory Memorandum to the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008* (“the Explanatory Memorandum”) – seek to explain the operation of the Act through reference to a broader range of documents to assist in the interpretation.

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<sup>1</sup> Transcript 26 May 2008; at PN161

39. In reviewing the terms of the Second Reading Speech and the Explanatory Memorandum, express reference is made to the Government's previous policy documents and the fact that the proposed legislation is intended to give effect to the commitments reflected in those policy documents.
40. We submit that the manner in which they have been referenced squarely places the terms of these policy documents under the microscope and legitimately allows them to be viewed as 'conventional' extrinsic materials.
41. Within the Second Reading Speech it is articulated at the commencement of the section relating to the description of the various aspects of the Bill, where the Deputy Prime Minister states:

*"As I have indicated, this bill deals with the following matters as set out in the Forward with Fairness Policy Implementation Plan."<sup>2</sup>*

(Emphasis Added)

42. The Explanatory Memorandum makes such a proposition even clearer where it states:

*"The Government's election commitments for the transition to the new workplace relations system are spelt out in the Forward with Fairness – Policy Implementation Plan (the Policy Implementation Plan) released in August 2007. The proposed legislation is framed to give effect to the transition arrangements set out at pages 4 to 8 of the Policy Implementation Plan."<sup>3</sup>*

(Emphasis Added)

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<sup>2</sup> Julia Gillard MP, Second Reading Speech, *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008*, House of Representatives, 13 February 2008, at 181

<sup>3</sup> Explanatory Memorandum to the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008*, at Pg5.

43. Ai Group submits that these references within the Second Reading Speech and the Explanatory Memorandum make it clear that in interpreting the functions and obligations of the Commission as reflected in the Act, regard must be had to the terms of the *Forward With Fairness – Policy Implementation Plan – August 2007* (“the Implementation Plan”) in particular the matters articulated in ‘pages 4 to 8’ of the Implementation Plan.
44. On the basis of that submission, Ai Group respectfully contends that there are a range of principles expressed in the Implementation Plan that are pivotal in understanding the approach to be adopted in relation to award modernisation and in particular the terms of the model flexibility clause.
45. The terms of the Implementation Plan, we submit, make it evident that the manner in which modern awards and the model flexibility clause are intended to operate is in an expansive and non-prescriptive fashion. Such a proposition is evident from the manner in which the abolition of AWAs is expressed as not impeding the reaching of arrangements that accommodate the need for individual flexibility:

*“Common law agreements can also offer flexibility provided that the award safety net is simple, modern and enables fair and flexible arrangements. Labor will genuinely modernise and simplify awards and ensure they are suited to the efficient performance of work.*

*This means that for those employers and employees who want flexible individual arrangements, under Labor’s new system common law agreements will meet their needs.”<sup>4</sup>*

46. This concept of flexibility in awards is further developed within a specific section of the Implementation Plan. The principles reflected in this chapter we also contend have relevance in interpreting the terms of the Act, for although

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<sup>4</sup> *Forward with Fairness – Policy Implementation Plan – August 2007*, at Pg6

they are not within the pages directly referenced in Explanatory Memorandum, they do provide context for the manner in which the concept of “flexible arrangements” as reflected in the cited section are intended to operate.

47. Specifically, we submit that the following principles, as reflected in the “Flexibility in Awards” section of the Implementation Plan, are relevant to the Commission’s considerations in relation to the model flexibility clause:

- (a) The flexibility clause must enable arrangements to meet the “*genuine individual needs of employers and employees.*”<sup>5</sup>
- (b) The flexibility clause “*cannot be used to disadvantage individual employees.*”<sup>6</sup>
- (c) The flexibility clause must “*be as simple as possible for an employer and employee to understand and implement.*”<sup>7</sup>

48. Whilst a number of these concepts are also reflected within the modernisation request, the notion of simplicity in the operation and application of the flexibility clause is not expressly stated. The Implementation Plan therefore in our submission provides valuable guidance to the Commission in relation to the intended manner in which the flexibility clause articulated in the modernisation request is intended to operate, in particular that it must be in terms that are “*as simple as possible.*”

49. Beyond the terms derived from the Implementation Plan, Ai Group submits that the Second Reading Speech also provides additional guidance in relation to the terms of the model flexibility clause. Specifically, it must:

- (d) “*not be overly prescriptive;*”<sup>8</sup>
- (e) operate in a manner that is simple and “*removes the need for individual statutory employment agreements;*”<sup>9</sup> and

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<sup>5</sup> *Forward with Fairness – Policy Implementation Plan – August 2007*, at Pg11

<sup>6</sup> *Forward with Fairness – Policy Implementation Plan – August 2007*, at Pg11

<sup>7</sup> *Forward with Fairness – Policy Implementation Plan – August 2007*, at Pg12

<sup>8</sup> Julia Gillard MP, Second Reading Speech, *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008*, House of Representatives, 13 February 2008, at 184

(f) “ensure that employers and employees work out at the enterprise level what suits them best”.<sup>10</sup>

50. These principles we contend are critical to the framing not only of the model flexibility clause but also the terms of the modern award system. In our submission they provide clear authority for the creation of a clause that allows an employer and an employee virtually unfettered discretion in relation to the matters which they wish to enter into a flexibility arrangement on, and the terms of such arrangement. The only caveat to this principle being that an employee cannot be disadvantaged as a result of the arrangement.
51. To provide restrictions beyond this would, we submit, be contrary to a system which is intended to not contain unnecessary prescription, allow employers and employees at the enterprise level to decide what suits them best, and accommodates the absence of individual statutory employment agreements. Notions which the Act together with the extrinsic materials cited make clear are intended.

## **5. Model award flexibility clause**

52. In the oral submissions provided to the Commission on 26 May 2008, Ai Group outlined the broad principles that guided it in the development of its proposed model flexibility clause, particularly sourcing the terms of the Modernisation Request and Part 10A of the Act in support of our position.
53. In relation to the ACTU’s proposed flexibility provision we also articulated in conceptual terms the basis upon which the unions’ clause failed to reflect the criteria required by the Act and the Minister’s Request.

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<sup>9</sup> Julia Gillard MP, Second Reading Speech, *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008*, House of Representatives, 13 February 2008, at 185

<sup>10</sup> Julia Gillard MP, Second Reading Speech, *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008*, House of Representatives, 13 February 2008, at 185

54. The following section explores both Ai Group and the ACTU's proposed flexibility clauses in greater detail, and additionally addresses specific matters of relevance raised throughout various stages of the consultation proceedings regarding the operation of a model flexibility clause.

## **Terms of the legislation and the Modernisation Request**

55. In considering the guidance provided to the Commission regarding the terms and form of modern awards, regard must be had to the provisions of Division 10A of the Act and any matters arising from the Modernisation Request.
56. To that end we submit that the terms of both Division 10A and the Modernisation Request contain three broad categories of matters which will guide the Commission's performance of its award modernisation functions and consequentially affect the form and content of the provisions of modern awards.
57. We contend that the Act and Modernisation Request make it clear that there are:
- (a) matters which **must** be reflected within modern awards;
  - (b) matters which **must be considered** by the Commission in the performance of its functions; and
  - (c) matters which **may be reflected** in the award but which the Commission is not obliged to consider.
58. At first blush, it may appear that there is very little by way of distinction between those matters referred to in (a) as opposed to those to which category (b) may apply. In this regard, we would submit that although the difference is only slight, it is highly relevant to the Commission's considerations.

59. We submit that the distinction between matters (a) and (b) is that whilst both categories of matters must clearly be at the forefront of the Commission's thinking when performing its functions, those matters reflected in category (a) must be reflected in each modern award. By comparison we would contend that those within category (b) whilst mandatorily forming part of the Commission's considerations may not be equally reflected in each modern award.
60. The distinction between these three categories, and the matters contained within them is significant as it will serve to inform the Commission on how it should weigh the various principles encapsulated within the Act and the Modernisation Request and where necessary which principles should hold primacy over others.
61. Within the first category of matters, namely those objectives or terms that we submit the Commission is obliged to reflect within the terms of its modern awards, the provisions of section 576A(2) of the Act, we contend, are articulated in a manner that reflect a mandatory obligation.
62. To that end section 576A(2) provides:

*“(2) 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 employment 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”*

63. Section 576G also expresses a mandatory requirement which must be reflected within a modern award, namely that:

*“(2) A modern award must be consistent with the award modernisation request to which the modern award relates.”*

64. In turning to the terms of the Modernisation Request, whilst there are a range of matters that the Commission may include within a modern award or need to have regard to in the performance of its functions, there are only two matters which must be included within a modern award, specifically;

- the Commission must include in every modern award the model flexibility clause;<sup>11</sup> and
- the Commission must ensure that ordinary hours of work for each classification of employee covered by the modern award is specified.<sup>12</sup>

65. In turning to those matters that fall within the second category of principles, namely those matters which the Commission must have regard to in the performance of its functions. These matters, whilst having an important role to

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<sup>11</sup> Award Modernisation Request; paragraph 11.

<sup>12</sup> Award Modernisation Request; paragraph 40.

play in guiding the Commission in its award modernisation function, may not be reflected in each modern award and in some cases represent considerations of a competing nature which may need to be weighed against each other.

66. Support for this contention we say is evident from the list of matters expressed in the Act at section 576B(2), which states:

*“(2) In performing its functions under this Part, the Commission must have regard to the following factors:*

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

67. Whilst the Commission is required to consider all the matters within 576B(2), there may be situations where concepts such as *'promoting high levels of productivity'* and *'assisting employees to balance their work and family responsibilities'* or *'promoting international and national competitiveness'* and *'protecting the position in the labour market of young people or employees with disabilities'* are at odds with one another. In such circumstances whilst the Commission may have regard to all those matters it would have to weigh the competing interests and determine which principle should have primacy at the expense of the other.

68. The Modernisation Request also articulates matters beyond those expressed in s.576B(2) which the Commission must have regard to, these relate to:

- whether it is appropriate to include a definition of shift worker in a modern award;<sup>13</sup>

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<sup>13</sup> Award Modernisation Request; paragraph 36.

- whether it is appropriate to include provisions relating to the payment of piece workers;<sup>14</sup>
- the desirability for a modern award to provide for a comprehensive range of fair minimum wages.<sup>15</sup>

69. The final category of matters which are capable of being included within modern awards are those matters which, whilst permitted, are not mandatory in either their inclusion or consideration as a term of a modern award. These matters are reflected in section 576J<sup>16</sup>, 576K, and 576M of the Act and paragraph 5 of the Modernisation Request.

70. In setting out the three broad categories of classification as reflected in the Act and the Modernisation Request we would contend that it reflects an order of importance in respect of the principles that should guide the Commission in the form and content of modern awards. Specifically that in having regard to the matters identified in categories two and three they can not be reflected at the expense of any of the principles which are contained in category one.

## **Ai Group's proposed clause**

71. As already outlined, the Commission is required to ensure that in creating the modern award system, each modern award contains a model flexibility provision.

72. Such a requirement is dictated by the terms of the Award Modernisation Request where it relevantly states:

*“10. The Commission will prepare a model flexibility clause to enable an employer and individual employee to agree on arrangements to meet*

<sup>14</sup> Award Modernisation Request; paragraph 39.

<sup>15</sup> Award Modernisation Request; paragraph 41.

<sup>16</sup> Excepting any matters within sub-clause (c) relating to ordinary hours of work which is a mandatory requirement by virtue of the terms of the Award Modernisation Request (paragraph 40) and section 576N(1) of the Act.

*the genuine individual needs of the employer and the employee. The Commission must ensure that the flexibility cannot be used to disadvantage the individual employee.*

11. *Each modern award will include the model flexibility clause with such adaptation as is required for the modern award in which it is included.*<sup>17</sup>

73. We would submit that from the terms of the Modernisation Request there are two criteria which must be satisfied by the model flexibility clause:

- it must enable an employer and individual employee to agree on arrangements to meet the genuine needs of the employer and employee; and
- it must not be used to disadvantage the individual employee.

74. The terms of the Act provide no additional expressed insight in relation to how the model flexibility clause is to be framed, however the mandatory objects of modern awards, as reflected in s.576A(2) are clearly applicable to the terms of the model flexibility clause. In this regard the clause;

- must be simple to understand and easy to apply;
- must ensure that the integrity of the safety net is maintained;
- must promote flexible modern work practices and the efficient and productive performance of work;

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<sup>17</sup> Award Modernisation Request; paragraph 10-11.

- 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
- must provide certainty and stability for the modern award system.

75. Ai Group contends that the terms of its proposed model flexibility clause satisfies each of the mandatory requirements as reflected in the Modernisation Request and the Act. The following paragraphs articulate the means by which these criteria are satisfied.

***Must enable an employer and individual employee to agree on arrangements to meet their genuine individual needs***

76. The notion of a flexibility provision that's object is to enable an employer and individual employee to reach agreement on arrangements that meet their individual needs, is one that we contend requires a broad and non-prescriptive articulation provision so that unnecessary limits are not placed on the possible arrangements that are available.

77. The needs of an individual employee or an individual employer are so potentially varied that any provision which seeks to define or restrict the parameters in which a flexibility arrangement could be entered into, runs the risk of precluding an arrangement which an employee or employer may genuinely require.

78. Accordingly, Ai Group's proposed clause whilst providing examples of matters which may be dealt with by an award flexibility arrangement,<sup>18</sup> provides no restriction on the terms within the award which may be varied. Such approach is consistent not only with the terms of the Modernisation Request but the

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<sup>18</sup> See Clause X.X.4 of Ai Group's proposed model flexibility clause which reproduces the examples of matters which may be dealt with in a flexibility arrangement from *Forward with Fairness – Policy Implementation Plan – August 2007*, p11.

intent that underlies the introduction of the model flexibility clause within modern awards as illuminated by the extrinsic material referred to in **Section 4** of this submission.

79. Specifically, we submit that the extrinsic material<sup>19</sup> makes it clear that the model flexibility clause is intended to fill the flexibility gap that has been left as a result of the removal of Australian Workplace Agreements from Australia's workplace relations system. In such an environment, it is imperative and intended that the flexibility clause in modern awards operate in a manner that allows agreements between employers and employees to operate unfettered by prescriptive restrictions.
80. Whilst the model flexibility clause is targeted at achieving individual flexibility for an employer and employee, we do not believe that such a notion precludes an employer from offering similar flexibility arrangements to more than one employee. In this regard we note a number of questions advanced by Commissioner Smith in the course of consultation proceedings in which he sought to ventilate precisely such an issue.<sup>20</sup>
81. We submit that the terms of the Modernisation Request clearly express that the role of the model flexibility clause is to provide for the making of arrangements that meet the '*genuine individual needs of the employer and employee*<sup>21</sup>'. These genuine needs may be needs of the individual employee or the genuine individual needs of the employer. In relation to the latter, we would submit that an employer is capable of having a 'genuine individual need', in the sense of a need that applies to the employer as an individual entity, that he seeks to then implement with more than one employee to satisfy the employer's needs. Such a scenario we submit would not fall foul of the terms of the Modernisation Request.

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<sup>19</sup> Gillard MP, Second Reading Speech, *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008*, House of Representatives, 13 February 2008, at 184-185, and *Forward with Fairness – Policy Implementation Plan – August 2007*, at Pg6.

<sup>20</sup> Transcript 28 May 2008; at PN1013-1020, and Transcript 29 May 2008; at PN1536-1538.

<sup>21</sup> Award Modernisation Request; paragraph 10.

***Must ensure that the clause cannot be used to disadvantage the employee***

82. Ensuring that Ai Group's flexibility clause cannot be used to disadvantage the employee is a central aspect of the proposal we have advanced.
83. To that end, our proposed clause expresses a simple and calculable method of assessing whether an employee has been disadvantaged based upon the total remuneration that the employee received over the relevant period pursuant to the flexibility arrangement versus the amount that the employee would have received for working the same arrangement in accordance with the award provisions.
84. In the course of the consultation proceedings, in response to questions from various members of the Bench, we clarified the manner in which our proposed clause calculated disadvantage in the following respects:
- In calculating the remuneration the employee received as a result of the flexibility arrangement as against the remuneration entitlements pursuant to the terms of the award, over-award payments were able to be off-set against the eligible award entitlements in assessing disadvantage;<sup>22</sup>
  - The employer carried the responsibility of ensuring that the flexibility arrangement satisfied the 'no disadvantage' test within the clause.<sup>23</sup>
  - Should a flexibility arrangement be held not to be valid because it failed the 'no disadvantage' test, the employee would be entitled to receive the benefits of the award as if the flexibility arrangement had not been entered into.<sup>24</sup>

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<sup>22</sup> Transcript 27 May 2008; at PN374-378

<sup>23</sup> Transcript 27 May 2008; at PN357-358

<sup>24</sup> Transcript 27 May 2008; at PN359-362

85. Ai Group's proposal for the calculation of disadvantage is in our submission simple and objective. Such an approach we contend is imperative as it is in the interests of both employers and employees to have confidence that the 'no disadvantage' test has been satisfied.
86. Although the responsibility for assessing whether the 'no disadvantage' test has been satisfied rests with the employer, and this has raised some criticism from some unions in the course of proceedings,<sup>25</sup> with this responsibility also comes potential liability should the employer implement an arrangement which does not satisfy the test.
87. Within the current award system it is the employer that carries the responsibility for ensuring that award conditions are being applied correctly and that employees are receiving all their entitlements pursuant to the safety net. Ensuring that a flexibility arrangement entered into pursuant to the terms of a model flexibility clause satisfies the 'no disadvantage' test and is therefore valid is just another incarnation of the employer's obligation to ensure award terms are being met. Additionally, we would note that the model flexibility clause proposed by the ACTU also attributes the responsibility for ensuring that the employee is not disadvantaged by a flexibility arrangement in the hands of the employer.<sup>26</sup>
88. We would submit that not only should the simplicity of our proposal provide the Commission with confidence that employees will not be disadvantaged by any proposed flexibility arrangement, but furthermore, the potential for enforcement of award terms against an employer should a flexibility arrangement be held to fail the 'no disadvantage' test should ensure that the employer is more rigorous in their assessment which will provide further protection for the employee.

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<sup>25</sup> Transcript 28 May 2008; at PN700

<sup>26</sup> ACTU proposed model flexibility clause; Clause #6(b)

***Must be simple to understand and easy to apply***

89. Whilst the terms of the Act express that the provisions of a modern award must be simple to understand and easy to apply,<sup>27</sup> we submit that this phrase is intended to have an even higher value in the context of the model flexibility clause. Support for such a contention is evident in the terms of the Implementation Plan where it states in relation to the flexibility clause:

*“The clause must be as simple as possible for an employer and employee to understand and implement.”*

(Emphasis Added)

90. We contend that the proposal advanced by Ai Group precisely meets this criteria.

***Must ensure the integrity of the safety net is maintained***

91. The breadth of flexibility that is available under Ai Group’s proposed clause has been described by the unions in the course of the consultation proceedings as a mechanism that will render the safety net useless,<sup>28</sup> and additionally one that will allow for the variation of conditions that are contained in the National Employment Standards<sup>29</sup> (“the NES”).

92. We reject both of these constructions of our proposed clause and submit that they clearly reflect a fundamental misunderstanding of the manner in which our proposed clause operates and a misconception of the manner in which the NES will interact with modern awards.

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<sup>27</sup> Section 576A(2)(a)

<sup>28</sup> Australian Council of Trade Unions Submission to the Australian Industrial Relations Commission – Award Modernisation May 2008 – Exhibit ACTU1; at paragraph 51.

<sup>29</sup> Transcript 27 May 2008; at PN1385-1387

93. In turning to the first proposition, that Ai Group's proposed clause will allow for employers and employees to opt out of the safety net, such a contention misunderstands the manner in which the concept of 'no disadvantage' operates within the Ai Group model.
94. For any flexibility arrangement made pursuant to Ai Group's proposed clause there must be a guarantee that the total remuneration paid to the employee over the relevant period of the flexibility arrangement (as defined) is no less than that which they would have been entitled to receive under the terms of the award. The 'award figure' which is used as the baseline for determining disadvantage is taken to include any monetary elements of the safety net that would have applied to the employee but for the flexibility arrangement, including but not limited to allowances, shift penalties and overtime penalties.
95. Additionally, Ai Group's proposed clause also recognises the provision of adequate breaks not only in the context of the employee's safety net entitlements but also in relation to an employer's responsibility to provide a safe and healthy work environment. If these matters were not protected in the context of any flexibility arrangement entered into, the employee would be deemed to be 'disadvantaged' and the flexibility arrangement would not be enforceable.
96. In regards to the second allegation, that Ai Group's proposed clause would allow for a reduction in the entitlements protected by the NES, such a submission in our view is entirely unsubstantiated.
97. Whilst the legislative provisions relating to the NES have not yet been released and indeed we are still awaiting the final version of the NES to be provided by the Government, the terms of the Modernisation Request make it clear that:

*“28. A modern award cannot exclude a term of the proposed NES or operate inconsistently with a term of the proposed NES.”*

98. Nothing in the submissions that we have advanced has sought to displace this proposition, and any submission which has been misconstrued as allowing for such a scenario we seek to correct. The manner in which Ai Group’s proposed flexibility clause operates is to provide a mechanism for an employer and an employee to vary the terms of the award to suit their individual needs. It does not operate in a manner that would allow variation to the NES. Indeed, even if the terms of a modern award reproduced the provisions of the NES we would contend that any flexibility clause within an award would not be able to vary those terms as the Modernisation Request makes it clear that in such a scenario the provisions of the award are only enforceable as NES entitlements and not as provisions of the modern award.<sup>30</sup>
99. Should such a proposition not be self evident, we would not be opposed to considering in the drafting of the terms of the modern awards what is the most appropriate means of clarifying the status of NES provisions which may be reflected in the award.

### ***Must promote flexible modern work practices***

100. Unlike the clause that has been advanced by the ACTU, which as will be discussed further on, is burdened with archaic concepts and restrictions, Ai Group’s clause engages with the concept of broad ranging flexibility genuinely agreed at the workplace level.
101. Flexible and modern work practices which may be facilitated by Ai Group’s clause include annualised salaries, flexible working hours, work-family balance measures, and a myriad of others.

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<sup>30</sup> Award Modernisation Request; paragraph 27.

***Must be in a form that promotes collective bargaining and does not provide for statutory individual employment agreements***

102. We would submit that Ai Group's model flexibility clause is in a form that does not detract from collective bargaining.
103. The reason why we suggest that such a proposition is sustainable is due to the manner in which our proposed clause engages with the concept of 'no disadvantage' as compared to the 'no disadvantage' test which the Act applies when assessing a collective agreement.
104. As detailed above, Ai Group's model flexibility clause approaches the question of 'no disadvantage' by primarily assessing the monetary elements of the flexibility arrangement against the monetary elements that would apply under the award. We would submit that this is a higher standard than that which applies to the making of a collective agreement.
105. Section 346D(2) of the Act expresses the test that a collective agreement must satisfy in the following terms:

*“(2) A collective agreement passes the no-disadvantage test if the Workplace Authority Director is satisfied that the agreement does not result, or would not result, on balance, in a reduction in the overall terms and conditions of employment of the employees whose employment is subject to the agreement under any reference instrument relating to one or more of the employees.”*

106. We contend that the 'no disadvantage' test framed in these terms allows the Workplace Authority to take into consideration non-monetary matters such as additional breaks in assessing whether the test has been satisfied.

107. Such matters under Ai Group's proposed flexibility clause would have no effect on the question of whether the 'no disadvantage' test had been satisfied. We submit that this differentiation in approaches would create an incentive for an employer to seek to register a collective agreement with employees as opposed to utilising flexibility arrangements under the award should they wish to rely on non-monetary benefits to off-set flexibilities derived from variations to the award.
108. In regards to the issue of ensuring that the flexibility provision does not provide a mechanism for the creation of statutory individual employment agreements we would submit that whilst providing for a broad range of flexibility, the Ai Group proposal is in no way representative of a statutory individual employment agreement.
109. In this respect, we note that the term statutory individual employment agreement is not defined within the Act, however based upon the terms of the Explanatory Memorandum<sup>31</sup> and the Implementation Plan we take such reference to mean Australian Workplace Agreement or a similar instrument via a different name.
110. The Government in reference to explaining the basis upon which it has sought the removal of Australian Workplace Agreements from its industrial relations vision has consistently expressed that they were instruments that were utilised to undermine the award safety net<sup>32</sup>. It has further stated that it is not opposed to employers and employees reaching individual arrangements to reflect their individual needs providing that the safety net is maintained.<sup>33</sup>

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<sup>31</sup> Explanatory Memorandum to the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008*, at Pg6

<sup>32</sup> Gillard MP, Second Reading Speech, *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008*, House of Representatives, 13 February 2008, at 178

<sup>33</sup> Gillard MP, Second Reading Speech, *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008*, House of Representatives, 13 February 2008, at 185

### ***Must provide certainty and stability for the modern award system***

111. Ai Group submits that whilst stability and certainty are critical aspects of the modern award system such principles must not be misconceived as synonymous with prescription and regulation.
112. To the contrary, Ai Group's proposal seeks to ensure certainty and stability through its simplicity. As previously stated, our model flexibility provision does not seek to impose restrictions or conditions on the manner in which a flexibility arrangement that is genuinely entered into without coercion or duress can be expressed. Instead, it allows the employer and employee to decide on the terms of their arrangement subject always to the employee not being disadvantaged by the arrangement.
113. The means of assessing disadvantage is objective and calculable and does not rely on concepts that may be intangible or that are not easily identified and defined.
114. Additionally, our provision requires that once an agreed flexibility arrangement has been established, it must be reduced to writing and a copy provided to the employee and one retained by the employer,<sup>34</sup> this not only ensures certainty in relation to the flexibility arrangement, but also provides certainty in relation to the manner in which the remainder of the award will apply at large.

### ***Additional matters that the Commission is to have regard to***

115. Beyond those matters which we have identified as mandatory obligations which must be reflected within the terms of the model flexibility clause, there are also additional matters which the Commission is to have regard to in the formation of the provisions of modern awards.

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<sup>34</sup> Ai Group proposed model flexibility clause; at X.X.2

116. These matters are contained in section 576B(2) of the Act, which has relevantly been extracted earlier in this submission. Whilst not all of the matters listed within section 576B(2) will have relevance to the development of the model flexibility clause, the following considerations we submit are relevant to the terms of the clause:

- national and international competitiveness;
- protecting the position in the labour market of young people, employees with a disability and employees whom training arrangements apply;
- the need to prevent and eliminate discrimination;
- the need to assist employees to balance their work and family responsibilities; and
- the safety, health and welfare of employees.

117. With regards to these considerations, all are either addressed and satisfied by Ai Group's proposed clause, or alternatively, if not directly addressed, have been omitted due to the availability of other mechanisms either within the Act or through the other terms of modern awards to resolve the issues.

118. To that end we note that the broad and unrestricted flexibility that is available in the Ai Group proposal is one that can only assist the national and international competitiveness of an employer's operations. Whilst ensuring that there is always a safety net for employees, international competitive pressures in particular require that an employer be able to adapt and modify aspects of their business in response to changing situations. The terms of a broad flexibility provision will allow this to occur as an employer will be able to seek agreement with an employee or employee(s) to meet their genuine operational needs.

119. The need to protect the rights and interests of the more vulnerable members of the labour market is also an important consideration, but one which should not be assumed to have not been satisfied merely because there are no additional safeguards within Ai Group's proposed flexibility clause specifically directed at the young, disabled, individuals of non-English speaking backgrounds or those in training.
120. During proceedings, the Textile Clothing and Footwear Union of Australia ("the TCFUA") asserted that the absence of a requirement to provide a translation of a flexibility arrangement to an employee of a non-English speaking background meant that our provision was inadequate in being able to prevent discrimination and exploitation of vulnerable workers.<sup>35</sup>
121. We would reject such a contention and note that if such a proposition was taken to its logical endpoint it would require versions of each modern award translated into multiple languages to accommodate those of non-English speaking backgrounds.
122. This proposition is made on the basis that the terms of the Act that relate to the protection of vulnerable employees apply equally to the performance of the Commission's functions not only in developing the terms of the model flexibility clause but also in relation to the provisions of all modern awards.
123. To contend that there should be a mandatory requirement to translate the terms of any flexibility agreement entered into so as to ensure that the employee has an understanding of it, on the basis that the provisions of the Act mandate such a high level of protection, would require that identical obligations be applied to the terms of all modern awards. Such a notion, we submit, clearly reflects the absurdity of the TCFUA's proposal.

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<sup>35</sup> Transcript 28 May 2008; at PN697-700

124. Additionally, such a requirement is unnecessary in the context of a model flexibility clause as the clause itself provides protection from misapprehension.
125. The terms of Ai Group's proposed clause and the ability to create a flexibility arrangement is hinged off the concept of 'genuine agreement'. We would respectfully contend that in a scenario as foreshadowed by the TCFUA where an employee does not understand the substance of what they are agreeing to, genuine agreement cannot be effected. The flexibility arrangement, in such a situation, would not be valid and the terms of the award would be deemed to apply.
126. Matters related to work and family responsibilities and specifically assisting employees in balancing these responsibilities is also a notion that we contend is dealt with adequately within our proposed clause.
127. Ai Group's model clause is one that is designed to allow an employee to seek agreement in relation to arrangements to meet their individual needs, including needs based upon family responsibilities without restriction. In terms of the examples which are articulated,<sup>36</sup> it expressly considers the availability of flexible arrangements to accommodate an employee's family responsibilities.
128. On the issue of health and safety of employees, Ai Group's proposal not only reflects consideration of such an issue, but furthermore expresses the employer's responsibilities in this regard as a mandatory element of whether the no disadvantage test is satisfied. No flexibility arrangement sought under the terms of Ai Group's model clause would be effective if the employer's obligations in relation to health and safety of employees was compromised as a result of the arrangement.

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<sup>36</sup> Ai Group proposed model flexibility clause; at X.X.4

129. The final issue goes to the matter of representation rights of registered organisations. In this regard, a number of unions in the course of the consultation proceedings<sup>37</sup> have criticised Ai Group's proposed clause on the basis that it does not provide for any expressed Union involvement in the process.

130. Whilst we acknowledge that such a contention is accurate, we would submit that a model flexibility provision that is targeted at direct engagement between an employer and its employees is reflected as a clear intention of the Government. We say this on the basis of the terms of the Deputy Prime Ministers Second Reading Speech where she states:

*“Our plan is based on employers and employees working out at the enterprise level what suits them the best.”<sup>38</sup>*

131. A notion which is also supported by the objects of the Act contained at Section 3. Specifically, the following:

*“The principal object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:*

...

*(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 or enterprise level;...*”

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<sup>37</sup> Transcript 28 May 2008; at PN705

<sup>38</sup> Gillard MP, Second Reading Speech, *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008*, House of Representatives, 13 February 2008, at 185

132. Additionally, we submit that whilst there is nothing within the terms of our proposal which expressly articulates the ability for an employee to seek representation, there is nothing which precludes it. The employee can of course choose to obtain advice from his or her union before signing the agreement.
133. We submit that when assessed objectively and critically, the terms of the model flexibility clause as advanced by Ai Group not only reflect all aspects of the mandatory criteria that the Commission is required to reflect within the terms of a modern award, but the clause balances appropriately those additional matters which the Commission is required to have regard to.

### **ACTU's proposed clause**

134. By contrast, we would submit that the terms of the ACTU's flexibility clause fails a number of the mandatory principles which the Act reflects must be contained within a term of a modern award. Additionally, in relation to those matters which must be considered but may require a balancing of various interests, we submit that the balance achieved within the ACTU's model is entirely inappropriate and in some instances operates at the sacrifice of those mandatory principles.
135. In Ai Group's oral submissions and written outline of submissions we expressed the view that the primary deficiency which plagued the ACTU's flexibility clause was one that operated at a conceptual level. This conceptual defect was as a result of the misconception that the model flexibility clause for modern awards was intended to be a reincarnation of the notion of facilitative provisions which already existed within awards.
136. In the context of these submissions we maintain such a view and whilst not seeking to repeat verbatim the contentions already put to the Commission in Ai Group's prior submissions, we will articulate with more precision,

referencing both the Modernisation Request and the Act why the ACTU's conception in this regard is erroneous. Additionally, we also intend to analyse the ACTU clause in detail and identify the areas in which it is deficient when assessed against the criteria in the Act relating to the terms of modern awards.

### ***Facilitative Provisions and the Model Flexibility Clause***

137. In its most simplistic form, Ai Group's submission in respect of the intended interplay between the model flexibility clause and existing facilitative provisions within awards is that the introduction of the model clause is intended to operate over and above the flexibilities contained within the award system currently.

138. To that end, whilst not expressly stated within either Part 10A of the Act or the Modernisation Request, we contend that such an inference can be revealed through application of general principles of interpretation and also through consideration of the history of facilitative provisions.

139. The term 'facilitative provisions' has been a commonly used phrase which has been attributed to award terms which allow for deviation from the general manner in which they apply within certain parameters and under certain conditions, dating back to the Commission's structural efficiency decisions of the late 1980's.

140. Within the *Safety Net Adjustment and Review – September 1994 decision*<sup>39</sup> the Commission sought to define the notion of facilitative provisions in the following manner:

*“A ‘facilitative provision’ is that part of an award clause which enables agreement at enterprise level to determine the manner in which that clause is applied at the enterprise. A facilitative provision normally provides that the*

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<sup>39</sup> (1994) 56 IR 114

*standard approach in an award provision may be departed from by agreement between an individual employer and an employee or the majority of employees in the enterprise or part of the enterprise concerned. Where an award clause contains a facilitative provision it establishes both the standard award condition and the framework within which agreement can be reached as to how the particular clause should be applied in practice.*"<sup>40</sup>

141. This definition has since been relied upon and utilised by the Commission in a number of substantial proceedings including the *Third Safety Net Adjustment and Section 150A review – October 1995*<sup>41</sup>, *Re Award Simplification Decision – Hospitality Industry – Accommodation, Hotels, Resorts and Gaming Award 1995*<sup>42</sup> and the *Metals Industry Award Case*.<sup>43</sup>
142. In such a context we would contend that it is trite to say that the term 'facilitative provision' has an ordinary and commonly understood meaning within industrial relations circles - a meaning which has remained unaltered for at least fifteen years.
143. With such an observation in mind, we note that whilst the term 'facilitative provision' has an established meaning it has not been used either within the terms of Part 10A of the Act nor the Modernisation Request to guide the Commission in its framing of the flexibility clause. Furthermore, such a term is also nowhere to be found in either the Deputy Prime Minister's Second Reading Speech<sup>44</sup> or the Explanatory Memorandum to the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008*.
144. We would submit that the absence of the utilisation of such a term, in reference to the work that is intended to be done by the model flexibility clause, particularly given its established and long standing meaning, is not

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<sup>40</sup> (1994) 56 IR 114; at 136

<sup>41</sup> (1995) 61 IR 236; at 254.

<sup>42</sup> (1997) 75 IR 272; at 302.

<sup>43</sup> Print P9311

<sup>44</sup> Julia Gillard MP, Second Reading Speech, *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008*, House of Representatives, 13 February 2008; at 177-186

only relevant but also reflective of an intention that the form, substance and principles that underlie the utilisation of both concepts should not be unduly intertwined.

145. The distinction intended by the Government in relation to the model flexibility clause and existing facilitative provisions is also evident, we submit, when one considers the language that is used to describe the model flexibility clause. In this respect we submit that the clause is intended to have a broad sphere of operation, and its intended objects go beyond those contemplated by facilitative provisions.

146. Earlier within this submission, particularly in relation to articulating the merits of our clause, we have identified the principles which we say underlie the introduction of a model flexibility provision within modern awards, including:

- its ability to respond to the genuine individual needs of an individual employer and employee;
- its need to assist an employee to balance their family responsibilities; and
- its need to be in a form which is as simple as possible for an employer and employee to understand.

147. We would contend that such notions fundamentally reflect a broader scope of application than that which has historically applied to facilitative provisions.

148. Whilst not focused at diametrically opposed aims, it is clear that the model flexibility clause is intended to have far broader objectives than those which have applied to facilitative provisions. We say that these broader aims, in particular its objective of being able to reflect the genuine needs of individual employees and the family responsibilities of employees, requires a broad and non-prescriptive flexibility.

## ***Deficiencies of the ACTU's drafting***

149. In relation to the specific terms which the ACTU have drafted to reflect their proposed model flexibility clause, we would submit that not only is it unnecessarily prescriptive, complex and onerous, all of which are concepts that offend the principles for modern awards expressed within the Act - but additionally, because of these deficiencies, it creates a range of unanswered questions and contradictions that make it unworkable in practice.

150. Clause #1 of the proposal commences with the phrase:

*"#1 The following clauses of this award provide a standard entitlement which may be modified, within the limits specified in the clause, by entering into an award flexibility arrangement:*

*Clause Title*

*Clause Number*

*#*

*#"*

151. It is evident from this provision that the ACTU intends that the flexibility available under the model flexibility clause will operate within strict limits. For some award clauses flexibility will be allowed, and for others it will be strictly off-limits. Put another way, under the ACTU's model, the 'boundaries' or scope for award flexibility will in some cases be no flexibility at all.

152. We would submit as a proposition, this is diametrically opposed to the conception of flexibility that is intended to be enabled by the model flexibility clause.

153. Additionally we note that whilst the ACTU is seeking to advance as a concept that some clauses within a modern award will be 'out of bounds' for flexibility arrangements, it has not sought to identify in any way what subject matter will, or even may, be 'untouchable'. No doubt the unions will contend that the specific details of clauses that will reside in their list will vary from award to

award but given the fact that they have not even broadly identified categories of matters which may not be subject to flexibility arrangements they are in our respectful submission asking the Commission to sign a 'blank cheque' on the question of award flexibility.

154. Should the Commission accede to such an approach, we would submit that the practical effects could potentially be that the list of 'untouchable' provisions becomes so long, or rather, in the context of the ACTU clause the number of provisions which would feature in its "Clause #1" be so limited, that it effectively would render the award flexibility clause useless.
155. By way of insight into this scenario, the Shop Distributive and Allied Employees Association in its written outline of submission in relation to the consultation proceedings<sup>45</sup> articulated its view that the flexibility arrangement could only be entered into in relation to four subject matter, stating:

*"The Government has very clearly and precisely stated four areas in which a flexibility arrangement could be entered into. These arrangements that the proposed flexibility clause could apply to are limited to: Rostering and hours of work, Rates of pay, Provisions that certain award conditions may not apply where an employee is paid above a fixed percentage as set out in the award and an arrangement to allow the employee to start and finish work early to allow the them to collect their children from school without the employer paying additional penalty rates for the early start. In our view it is clear that the Government did not intend the clause to apply beyond these areas."<sup>46</sup>*

156. Whilst we reject such a contention, it does in our view provide sobering insight in relation to the potential effects of a flexibility clause which invites the exclusion of flexibility from particular provisions of the award as its first proposition.

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<sup>45</sup> Exhibit SDA1

<sup>46</sup> Shop, Distributive and Allied Employees Association Submissions in relation to Award Modernisation – Exhibit SDA 1; at pg8.

157. Given the manner in which the ACTU and individual unions perceive the intertwining of existing facilitative provisions with the model flexibility clause, there is also the real risk that a flexibility clause drafted in this manner would operate so as to reduce the amount of flexibility currently in awards. Indeed, the ACTU in its oral submissions identified that in their view, the terms of existing facilitative provisions may be reviewed in the light of the model flexibility clause, saying:

*“At the time of making the modern award, in addition to finalising the flexibility procedure to meet the specific needs of the industry, the extent of the flexibilities available under a range of award conditions would need to be determined... This consideration may result in existing flexibilities being left as they are, such as time off in lieu of overtime, or in some modification to them.”<sup>47</sup>”*

158. Such a result we submit would be contrary to all that the Government has articulated in relation to the operation of the model flexibility clause.

159. Clause #1 of the ACTU proposal also specifies:

*“Award flexibility arrangements may only be made with existing employees and may not be made a condition of engagement.”*

160. To place such a restriction on the operation of a flexibility arrangement, we contend is unnecessary. Additionally, whilst we do not believe that it is appropriate for the model flexibility clause to import the restrictions found within many facilitative provisions, we note that a restriction of this nature goes beyond even the ‘safeguards’ that would exist in facilitative provisions. Furthermore, as will be explained in greater detail below, such a restriction is unworkable in the context of the majority flexibility arrangements within the ACTU’s proposal.

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<sup>47</sup> Transcript 27 May 2008; at PN55

161. Clause #2 of the ACTU proposal identifies the concept of flexibility arrangements that may be enacted by a majority of employees in the following terms:

*"#.2 Where a majority of the employees in the business (or a part of the business) and their employer wish to modify the application of the standard award provision to employees in the business (or part of the business concerned), within the limits specified in the relevant award clause, they may enter into a majority award flexibility arrangement."*

162. Ai Group submits in respect of this provision that it is clearly not one intended to be available under the model flexibility provisions envisaged by the Government.

163. Within the modernisation request the stated function of the flexibility clause is *"to enable an employer and individual employee to agree on arrangements to meet (their) genuine individual needs.<sup>48</sup>"* There is no mention of majority approval nor of the mechanism being available to employees en masse as a collective unit.

164. The concept of majority flexibility provisions as reflected in the ACTU proposal further offends the terms of the Modernisation Request when it becomes clear that:

- some clauses within the modern award are intended to be 'majority only' flexibility clauses<sup>49</sup> which prevent an individual from being able to seek a flexibility agreement; and
- that majority flexibility arrangements will override the wishes of the individual and bind all employees within the business or part of the

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<sup>48</sup> Award Modernisation Request; paragraph 10.

<sup>49</sup> ACTU proposed model flexibility clause; Clause #3(a)

business that approved the flexibility arrangement<sup>50</sup>, not just those employees who endorsed it.

165. Additionally, as foreshadowed above, the manner in which a majority flexibility agreement which has been reached under the ACTU's proposal interacts with the requirement that *"an award flexibility provision may only be made with existing employees and may not be made a condition of engagement"* is also perplexing.
166. Given the fact that a majority flexibility arrangement applies to all employees of the business or part of the business, a new employee entering the business after the majority flexibility arrangement was made would be subject to its terms. This appears to be directly at odds with the requirement that a flexibility arrangement cannot be made a *"condition of employment"* as for this new employee working in accordance with the arrangement would be a condition of their employment.
167. Beyond the litany of restrictions that have already been articulated within the ACTU's proposed clause, Clause #3 of the ACTU proposal identifies further restrictions to the ability for an employee to obtain an individual agreement with their employer. These restrictions relate to:
- prohibition on an employee seeking individual agreement in relation to specific award provisions which require the sanction of the majority before an individual flexibility provision can be reached;
  - prohibition on an employee seeking individual agreement in relation to a subject matter which the employer had previously sought majority agreement which had been rejected;

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<sup>50</sup> ACTU proposed model flexibility clause; Clause #4(e)

- prohibition on an employee seeking an individual flexibility agreement if more than 50% of the employees already have an individual flexibility agreement about the same matter.
168. We would submit that these restrictions are entirely inappropriate and that the ACTU has advanced no basis for them.
169. In respect of the ability for a majority of employees in particular circumstances to have what is tantamount to a right of veto over a flexibility arrangement that an individual employee might genuinely seek, we contend is a proposition that is offensive to the premise that underlies the model flexibility clause.
170. In reference to the prevention of an employee from achieving a flexibility agreement due to a majority of employees previously disapproving it, we submit that not only are our comments from the preceding paragraph also apt, but furthermore, there is no framework around such a restriction. For example, would a negative vote by the majority prevent the creation of an individual agreement for all time, or until all those who voted against it had left the business, or until the business conditions significantly changed? We would submit that it is highly unclear as to how this provision would operate in practice and reflective of an ill-conceived and ill thought out approach.
171. Similar comments can also be attributed to the restriction on seeking an individual flexibility arrangement if more than 50% of employees already have an individual flexibility agreement about the same matter. We are not in a position to understand on what basis this restriction has been advanced, and why 'the early birds should get the worm' as it were.
172. Furthermore, there is no clarity to the notion of what constitutes '*the same matter*' so as to activate the prohibition. Would it require that the prior flexibility arrangements be in identical terms? Or does it operate more broadly so that should 50% of employees reach individual arrangements about flexible hours

of work (albeit in different terms), the next employee seeking to also reach an agreement about flexible hours of work would be prevented from doing so.

173. We would submit that if one looks at the terms of the restrictions alone, it becomes apparent how unclear and convoluted the ACTU's proposal is. It provides very little certainty or stability to both employers and employees about the arrangements they may enter into, requirements which we submit are essential to any such provision.

174. This instability and uncertainty is compounded by the expression of two expiry or termination provisions within the ACTU proposal. These are contained in Clause #4 in the following terms:

*"#.4 An award flexibility arrangement:*

*...*

*(d) expires at a time and in the manner provided for by the arrangement;*

*...*

*(g) may be cancelled in good faith at any time by either party by giving reasonable notice, and ceases to operate at the end of the notice period."*

175. The essence of such a provision we say is that it serves to provide no certainty or stability for either an employer or employee in relation to the flexibility arrangements they enter into. In such circumstances we also contend that it would actually operate as a disincentive for employers and employees to reach flexibility arrangements at all because of the instability.

176. The notion of 'reasonable notice' is also a matter which is capable of causing significant disputation between the parties. As this Commission would no doubt be aware the common law jurisdiction in relation to reasonable notice is one that can be highly complex and where what is 'reasonable' can vary

significantly from case to case. We would respectfully submit that by inviting such a concept into a termination of flexibility provision it can only create significant uncertainty about how the provision is to operate and further will invite an increase in disputation between employers and their employees. Principles we submit that are contrary to the objects of the Act and Part 10A.

177. On the notion of industrial disputation, the ACTU model clause provides at Clause #8 a right for disputes about award flexibility arrangements to be dealt with via the dispute resolution procedure within the award. We would have serious concerns if this process could be used to impose an outcome on either an employer or employee in relation to reaching the terms of an actual agreement.
178. Whilst we acknowledge that the ability to have disputes resolved is an important and relevant consideration for a model flexibility clause, we would also submit that the very premise that flexibility arrangements rest upon is the idea that they are reached between an employer and employee on the basis of *'genuine agreement'*. Such a notion we contend is not reconcilable with a third party arbitrating the formation of the agreement. For that reason, the Ai Group proposal expressly states that access to the dispute settlement procedure of the award shall only be available after an agreement has been reached<sup>51</sup>. We would urge the Commission to impose similar requirements in relation to any disputes procedure it devises to assist in the resolution of flexibility agreement disputes.
179. We submit that it is imperative that a model flexibility clause operate in a manner that invites its utilisation. To that end simplicity and clarity are essential elements which must be reflected.

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<sup>51</sup> Ai Group proposed model flexibility clause; Clause X.X.3

180. In this regard we also submit that the ACTU's proposal contains a range of onerous, unnecessary and complex documentary and union notification requirements that are contrary to this objective.
181. In terms of the union notification requirements the ACTU's proposal expresses mandatory union involvement in negotiations and reviews of flexibility proposals in particular circumstances.<sup>52</sup> This mandatory involvement arises even if the employee is not a union member or does not want the union to represent them. In circumstances where an employee is not a union member or alternatively is a union member and has become dissatisfied with their representation, requirements such as these would serve as a further layer of disincentive for an employee to seek a flexibility arrangement.
182. The final matter we would seek for the Commission to consider in light of the ACTU's proposal is in relation to the question of disadvantage. As has already been articulated, Ai Group acknowledges and supports that the proposition that a model flexibility clause cannot and should not be used to disadvantage the employee. Indeed, if there are two structural pillars to the operation of the flexibility clause one is the necessity for it to allow genuine individual agreement, whilst the other is to ensure that the employee is not disadvantaged.
183. Whilst some parties have criticised the approach adopted by Ai Group in assessing disadvantage, we would respectfully submit that the manner in which the concept is engaged with within the ACTU's proposal should garner far more criticism.
184. 'Disadvantage' as a term is referenced three times within the ACTU's proposed clause, the first occasion within Clause #1 in the following terms:

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<sup>52</sup> ACTU proposed model flexibility clause; Clause #5(d), #6(g) and #7

*“Award flexibility arrangements must only be used to promote the genuine needs of the employer and its employees and must not be used to disadvantage or discriminate against employees or a group of employees, whether directly or indirectly.”*

185. The second reference is at Clause #6(b) where it states:

*“#6 If the parties agree to enter into a flexibility arrangement, the employer must:*

*...*

*(b) ensure that the arrangement does not disadvantage the other party, or other employees;...”*

186. With the third occasion at Clause #7 specifying:

*“#7 The parties must regularly review the operation of award flexibility arrangements to ensure that employees are not disadvantaged by their use.”*

187. Despite these three references, nothing within the ACTU’s proposal seeks to identify the basis upon which ‘disadvantage’ will be assessed. Indeed, whilst Clause #6 imposes a positive obligation on an employer to ‘ensure’ that disadvantage has not occurred, there is no guidance to the employer in relation to how they are supposed to answer that question.

188. Ai Group contends that this is a matter of considerable substance in terms of the practical operation of the provision. It is for that reason that both Ai Group and indeed ACCI’s models both provide assistance to the parties in how to assess the question of disadvantage. The absence of any such ‘terms of reference’ within the ACTU clause represents a further and fundamental error on behalf of the ACTU in engaging with the critical propositions found with the Modernisation Request and the Act.

189. We respectfully submit that the proposed ACTU model flexibility clause be disregarded by the Commission in its deliberations.

## **6. Additional matters not elsewhere dealt with**

190. This section of our submission seeks to address a range of additional matters that have arisen in the course of the consultation proceedings which have not been dealt with elsewhere. They relate either to matters raised by the Bench which Ai Group was requested to respond to in the context of these submissions, or alternatively are in response to issues raised by the Commission and other parties which Ai Group feels it is important to respond to.

### **Relationship between Ai Group's proposed flexibility clause and annualised salary arrangements contemplated by s576J(1)(f) of the Act**

191. In its oral submissions, Ai Group advanced the proposition that the definition of 'relevant period' within Ai Group's proposed model flexibility clause was particularly relevant as it allowed for flexible remuneration arrangements including annualised salaries and all up rates of pay which were allowable award matters.<sup>53</sup>

192. In response to this proposition His Honour, the President, asked the following question:

*"JUSTICE GIUDICE: Mr Mead, while you've been interrupted a couple of times, I also had a question about 576J which you might like to have a look at. It provides for annualised salary. Your proposal seems to provide for monthly salary, I just wondered if there was any inconsistency between a proposal for*

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<sup>53</sup> Transcript 27 May 2008; at PN384

*calculating an all in salary over a period shorter than 12 months and the allowable award matter.<sup>54</sup>*”

193. Given the nature of the question we did not respond at that time, but rather sought to take the question on notice and deal with it in the context of these written submissions, which was agreeable to the Bench.

194. We have since had an opportunity to consider the President’s question and the terms of section 576J of the Act and have formed the view that the concept of a ‘relevant period’ as contemplated by Ai Group’s proposal is not at odds with the allowable award matter identified by the President.

195. Section 576J of the Act articulates those matters which are allowable award matters for modern awards. Specifically, sub-clause (1)(f) provides:

*“(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, or salaries, and other monetary entitlements; and*

*(iii) include appropriate safeguards to ensure that individual employees are not disadvantaged.”*

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<sup>54</sup> Transcript 27 May 2008; at PN390

196. From the extracted provision we contend that whilst ‘*annualised wages*’ is clearly identified as an allowable award matter, so too is the notion of a ‘*salary arrangement*’ which we submit, whilst guided by the same principles, is a concept that can be assessed over a shorter period of time than a 12 month period.
197. On this basis we submit that Ai Group’s proposal which defines a ‘relevant period’ as being a period capable of being of less than 12 months’ duration, is not in conflict with the allowable award matter.
198. Further, even if the averaging of remuneration over a “relevant period” of less than 12 months is not held to fit within the allowable matter of “*annualised wage or salary arrangements*”, such remuneration arrangements would be permissible under the allowable matters of: minimum wages, overtime rates, penalty rates and/or allowances. There is nothing within these allowable matters which excludes averaging arrangements. Numerous existing awards contain remuneration averaging arrangements in reliance on the existing allowable award matters.
199. Ai Group’s proposition in relation to the ability to create all up rates of pay and salary arrangements through the utilisation of the flexibility clause also yielded a question from His Honour, Deputy President Watson, in the following terms:

*“SENIOR DEPUTY PRESIDENT WATSON: Mr Mead, as AIG and its members envisages what is the relationship if any between section 576J(f) one of the matters which may be dealt with an award annualised wage or salary arrangements and the reference to annualised salaries within the flexibility provision that you’re proposing?”<sup>55</sup>”*

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<sup>55</sup> Transcript 27 May 2008; at PN381

200. In seeking to clarify the question we submit that the proposition that His Honour was asking us to consider was whether the terms of our flexibility clause would provide any greater flexibility than that which would be available under the terms of an annualised wages or salary arrangement provision of a modernised award.
201. To clarify this matter we submit that it is not likely that many circumstances will arise where an employee and employer would want to enter into a different annualised wage arrangement to the one that has been designed for the relevant award. That said, it may suit an individual employee's needs to enter into a different arrangement and provided that it does not disadvantage him or her such arrangements should not be prohibited. This issue is not easily addressed in the abstract. It would depend very much on how flexible the relevant award clause is in catering for annualised wage arrangements and other remuneration averaging arrangements that individual employees may regard as beneficial.
202. Ai Group's proposed flexibility provision will of course have important work to do in modern awards in which no annualised wage arrangements are provided for. As previously stated, the terms of section 576J fall within the category of matters which whilst permitted to be included within modern awards, do not represent mandatory provisions which must be reflected. Accordingly, it may be that some modern awards are created without any provision for annualised wage arrangements. In such circumstances, Ai Group's model flexibility provision would provide a mechanism for an employee or employer to seek such an arrangement to meet their genuine individual needs.

## **Interrelationship between the model flexibility clause and a collective agreement**

203. In reviewing the transcript of proceedings Ai Group noted that there were a number of questions raised by Her Honour, SDP Acton, concerning the relationship that an award model flexibility provision would have with a collective agreement.<sup>56</sup> We have given some consideration to this issue in light of the current legislation and comments from the Government and believe that the following points are relevant.

204. Under section 349 of the Act:

*“An award has no effect in relation to an employee while a workplace agreement operates in relation to the employee.”*

205. Accordingly, we submit that an award flexibility clause would have no effect in relation to an employee covered by a collective agreement.

206. Should the agreement incorporate by reference the terms of the award, including the terms of the flexibility clause, these would operate as terms of the agreement not as terms of the award under the current legislation.

207. Even if award flexibility provisions were not operative in a workplace due to the effect of the relevant collective agreement, it is the Government’s stated intention to ensure that all collective agreements contain a flexibility clause, as set out in the following extract from Labor’s Implementation Plan:

*“Under Labour’s new collective enterprise bargaining system all collective agreements will be required to contain a flexibility clause which provides that an employer and individual employee can make a flexibility arrangement...”*

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<sup>56</sup> Transcript 29 May 2008; at PN1740-1746

*The matters covered and the scope of the flexibility clause will be considered by Fair Work Australia when approving the collective agreement to ensure...*

...

- *an individual employee cannot be disadvantaged with respect to the collective agreement by entering into an individual flexibility arrangement.”*

## **Other matters raised for consideration**

208. In our oral submissions Ai Group expressed the view that in the context of these proceedings, whilst parties have raised numerous issues, it was important that any decision flowing from the proceedings should be confined to the three matters listed for consultation before the Commission, namely:

- (a) the list of priority industries/occupations;
- (b) the timetable for the completion of the priority industries/occupations;  
and
- (c) the model flexibility clause.

209. Whilst we acknowledge the ambitious timeline that is required for this process we would submit that a cautious approach is required in articulating any principles for modernisation, rationalisation of industries, content of awards or any of the various other matters parties may have raised throughout the consultation process.

210. Although Ai Group has been proactive in its involvement in the award modernisation process, we freely acknowledge that there are a plethora of issues that we are aware of that we have not had an opportunity to give sufficient consideration to at this early stage in the modernisation process.

211. We will continue to work with other parties to resolve any issues as they arise, and in the event that issues of commonality across the priority industries do arise, as we have already stated we would seek the ability for the Full Bench to be reconvened to ventilate these issues.