

**OUTLINE OF SUBMISSION
TO FAIR WORK AUSTRALIA**



C2010 / 3183

**Application by Minister for review of decision ([2010] FWA
1485) of C Ryan re. approval of the TriMas Operations
Waterview Close Collective Bargaining Agreement 2009**



AUSTRALIAN INDUSTRY GROUP

21 April 2010

OUTLINE OF SUBMISSION

1. Introduction

1. The Australian Industry Group (Ai Group) seeks to make submissions in these proceedings in its own right and on behalf of its member company – TriMas Corporation Pty Ltd. Relevant correspondence from TriMas is set out in ***Annexure A***.
2. The proceedings relate to an application by the Minister for Employment and Workplace Relations for a Full Bench of FWA to review the decision ([2010] FWAA 1485) of Commissioner Ryan to approve the *TriMas Operations Waterview Close Collective Bargaining Agreement 2009*.
3. Ai Group submits that Commissioner Ryan has erred in deciding:
 - That an Individual Flexibility Arrangement (IFA) cannot vary the terms of an enterprise agreement;
 - That an IFA can only vary the “the effect of the terms” of an agreement – that is, the “consequence or result” flowing from the operation of a term of an agreement;
 - That an IFA can only vary the effect of a term of an enterprise agreement “*within the parameters set by the terms of the agreement*”.
 - That situations like that described in the illustrative example immediately after para 867 of the Explanatory Memorandum to the *Fair Work Bill* are not permissible under the *Fair Work Act 2009* (FW Act).

4. Commissioner Ryan's interpretation is vague and uncertain, and would result in it being almost impossible for anyone to work out whether a proposed IFA is lawful or unlawful.
5. In his decision, Commissioner Ryan accepts that it is very difficult to explain and define what he believes the phrase "*varying the effect of an agreement*" means. We submit that the phrase has a broad meaning and can include a variation which modifies the operation of the agreement substantially, as it relates to an individual employee.
6. IFAs were devised by the Federal Government to provide flexibility for employers and individual employees to agree to vary the terms of an enterprise agreement, as they relate to the employee, provided that the employee is better off overall, and subject to a set of safeguards. Every enterprise agreement made under the FW Act is required to include a provision which permits the making of an IFA. A similar provision is included in every modern award.
7. During the development of the FW Act, industry opposed the abolition of Australian Workplace Agreements (AWAs) which had been a feature of the national workplace relations system for over a decade. IFAs were designed to provide the flexibility for agreements to be reached between employers and individual employees, in the absence of AWAs.
8. Ai Group submits that Commissioner Ryan was correct in deciding that Clause 12 in the enterprise agreement is not a valid flexibility term, but for the wrong reasons. Clause 12 specifies only three terms in the enterprise agreement which may be the subject of an IFA – 7.1.10(a), 7.5.1(e)(ii) and 6.4.3 of the *Metal, Engineering and Associated Industries Award 1998* as incorporated as terms of the agreement by clause 5.

9. However, none of these terms are capable of being varied by agreement between the employer and an individual employee.

10. Ai Group also submits that Commissioner Ryan was correct in deciding that the agreement should be approved with the model flexibility term prescribed in Schedule 2.2 of the *Fair Work Regulations 2009* taken to be a term of the agreement.

2. Leave sought to make submissions

11. Section 590 of the FW Act gives FWA the power to inform itself in relation to any matter before it, in such manner as it considers appropriate. This includes granting a party with a substantial interest in the outcome the right to make submissions.
12. Ai Group seeks leave to make submissions in these proceedings on grounds which include the following:
 - Ai Group is a major registered organisation which represents employers in a wide range of industries including manufacturing, construction, ICT, automotive, printing, transport, labour hire and numerous others;
 - Ai Group is a “peak council” within the meaning of the term defined in the FW Act and is formally recognised as a State Peak Council in the NSW Industrial Relations System;
 - The statutory construction of ss.202 and 203 are very important element of the bargaining system under the *Fair Work Act*.
 - Commissioner Ryan’s decision creates doubt about the validity of the Flexibility Terms in various enterprise agreements applicable to Ai Group member companies;
 - Commissioner Ryan’s decision casts doubt upon the validity of a high proportion of the Individual Flexibility Arrangements (IFAs) made to date between employers and individual employees.

- The proceedings are of relevance to thousands of employers who either have enterprise agreements in place or who may wish to bargain in the future;
- Hundreds of Ai Group members are currently bargaining;
- The decision which the Full Bench makes will have a direct and substantial impact on a very large number of Ai Group member companies.

3. Objects of the Act

13. Ai Group submits that Commissioner Ryan has paid insufficient regard to important statutory objects and the purpose of the provisions relating to individual flexibility agreements within enterprise agreements and this has led to an erroneous interpretation of section 202.
14. It is trite law to identify that legislative provisions should be interpreted in a manner consistent with the objects expressed within the statute or section of the statute relevant to the provisions. Furthermore the FW Act expressly requires that FWA must take into account the objects within the legislation in the performance of its functions¹.
15. Ai Group submits that whilst Commissioner Ryan may have considered the objects of the Act and Part 2 – 4, his interpretation of their influence on section 202 and 203 was unreasonably narrow, particularly when one has regard for the purpose and historical context surrounding the introduction of individual flexibility arrangements for modern awards and enterprise agreements.
16. We contend that the notion of flexibility is a fundamental one within the statutory objectives, such a submission is clear from the expressed objectives of the Act and Part 2 – 4 which provide:

“Section 3(a) Object of this Act

The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

¹ Fair Work Act 2009; section 578(a)

(a) Providing workplace relations laws that are fair to working Australians, are flexible for business, promote productivity and economic growth for Australia's future economic prosperity...

Part 2-4 Enterprise Agreements, Section 171(a) Objects of this part

The objects of this Part are:

(a) to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits.”

(Emphasis Added)

17. Ai Group submits that the operation of individual flexibility arrangements must be interpreted with these objectives in mind and that this warrants against the restrictions imposed upon the arrangements by Commissioner Ryan's decision.

4. Principles of statutory construction

18. The modern approach to statutory construction requires consideration of the context of a legislative provision when interpreting its operation.
19. In *Hogan v Riley & Ors* [2009] FMCA 269 (10 July 2009) Neville FM said:

IV. Principles of Statutory Interpretation

79. *The Applicant's case that there was a breach of s.767(3) of the WR Act has an appealing simplicity and economical logic. According to Counsel's submission, the elements of the contravention, under s.767(3)(b), are as follows:*

- i a person must not refuse or unduly delay entry to premises;*
- ii by a permit holder;*
- iii who is entitled to enter premises under an Occupation Health and Safety law; and*
- iv entry is in accordance with s.756 of the WR Act.*

80. *I agree with the Applicant's submission that the elements of the contravention are determined by the terms of the section. So much was said by the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority*. Ms McDonald, Counsel for the Applicant, recounted the majority's judgment this way. In her written submissions of 13th October 2008 (par.7), she said that "it was the court's duty in interpreting any statutory provision to give the words of that provision the meaning that the legislature intended they have, which is usually their grammatical meaning."*

81. *However, it is important to consider the more fulsome observations of the majority (McHugh, Gummow, Kirby and Hayne JJ) in that case. The High Court said (omitting internal citations):*

- ... the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning. In *Statutory Interpretation*, Mr Francis Bennion points out:
- The distinction between literal and legal meaning lies at the heart of the problem of statutory interpretation. An enactment consists of a verbal formula. Unless defectively worded, this has a grammatical meaning in itself. The unwary reader of this formula (particularly if not a lawyer) may mistakenly conclude that the grammatical meaning is all that is of concern. If that were right, there would be little need for books on statutory interpretation. Indeed, so far as concerns law embodied in statute, there would scarcely be a need for law books of any kind. Unhappily this state of being able to rely on grammatical meaning does not prevail in the realm of statute law; nor is it likely to. In some cases the grammatical meaning, when applied to the facts of the instant case, is ambiguous. Furthermore there needs to be brought to the grammatical meaning of an enactment due consideration of the relevant matters drawn from the context (using that term in its widest sense). Consideration of the enactment in its context may raise factors that pull in different ways. For example the desirability of applying the clear literal meaning may conflict with the fact that this does not remedy the mischief that Parliament intended to deal with. (footnotes omitted)

82. In addition to the High Court's clear instruction in *Project Blue Sky*, the earlier High Court decision of *Mills v Meeking* is also relevant to these proceedings. In that case, Dawson J (dissenting, but not on this point) said:

- ... the literal rule of construction, whatever the qualifications with which it is expressed, must give way to a statutory injunction to prefer a construction which would promote the purpose of an Act to one which would not, especially where that purpose is set out in the Act. Section 35 of the Interpretation of Legislation Act [Vic] must, I think, mean that the purposes stated in Pt 5 of the Road Safety Act are to be taken into account in construing the provisions of that Part, not only where those provisions on their face offer more than one construction, but also in determining whether more than one construction is open. The requirement that a court look to the purpose or object of the Act is thus more than an instruction to adopt the traditional mischief or purpose rule in preference to the literal rule of construction. The mischief or purpose rule required an ambiguity or inconsistency before a court could have regard to purpose: *Miller v. The Commonwealth* [1904] HCA 34; (1904) 1 CLR 668 at p 674; *Wacal Developments Pty. Ltd. v. Realty Developments Pty. Ltd.* [1978] HCA 30; (1978) 140 CLR 503 at p 513. The approach required by s.35 needs no ambiguity or inconsistency; it allows a court to consider the purposes of an Act in determining whether there is more than one possible construction. Reference to the purposes may reveal that the draftsman has inadvertently overlooked something which he would have dealt with had his attention been drawn to it and if it is possible as a matter of construction to repair the defect, then this must be done. However, if the literal meaning of a provision is to be modified by reference to the purposes of the Act, the modification must be precisely identifiable as that which is necessary to effectuate those purposes

and it must be consistent with the wording otherwise adopted by the draftsman. Section 35 requires a court to construe an Act, not to rewrite it, in the light of its purposes.

83. *As stated by Pearce and Geddes in Statutory Interpretation in Australia, Dawson J's comments apply to s.15AA of the Acts Interpretation Act 1901 (Cth). That well-known section provides: "In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object." In the light of the principles of statutory interpretation just outlined I turn to consider the objects of the WR Act and of Part 15 in particular."*

20. The Federal Magistrates decision was overturned on appeal (*Hogan v Riley* [2010] FCAFC 30 (1 April 2010)) but the Full Federal Court did not take issue with the above analysis of the principles of statutory construction.

21. The broad approach to statutory construction described above has been affirmed by the High Court in a number of other decisions including *Newcastle City Council v GIO General Ltd*² where the Court noted:

"Section 15AB (of the Acts Interpretation Act 1901) permits a liberal use of many forms of extrinsic material. But the section has its limits...

... independently of s15AB, the modern approach to statutory interpretation permits recourse to the extrinsic material in the present case.

In construing a provision such as s40, a court is permitted to have regard to the words used by the legislature in their legal and historical context and, in appropriate cases, to give them a meaning that will give effect to any purpose of the legislation that can be deduced from that context. The context includes

² [1997] HCA 53; (1997) 191 CLR 85

reference to the provision's legislative history and relevant reports of law reform bodies which detail the perceived evil requiring reform. As Brennan CJ, Dawson, Toohey and Gummow JJ pointed out in *CIC Insurance Ltd v Bankstown Football Club*:

'It is well settled that at common law, apart from any reliance upon s15AB of the Acts Interpretation Act 1901(Cth), the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure. Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy.'

(Emphasis Added)

22. Ai Group submits that Commissioner Ryan paid insufficient regard to the historical context of the legislation, in particular the historical features which gave rise to the introduction of IFAs and additionally has drawn incorrect inferences from the context of the provisions within the broader statute. These errors led the Tribunal to an erroneous assessment of section 202 and 203 at first instance.
23. Commissioner Ryan in his judgement focused on the term 'effect' within section 202 and 203 and referred to what he identified as the "*plain language*" of the provisions and case law interpreting the meaning of 'effect'. We contend that consideration of the term within these parameters misdirects the inquiry and that instead the notion of 'effect' can attract a different meaning when one considers it in the context of the purpose of the provisions. In this regard, the

High Court's judgement in *CIC Insurance Ltd v Bankstown Football Club Ltd*³ is relevant where the Court states in reference to the importance of interpretation grounded by context:

“Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in Isherwood v Butler Pollnow Pty Ltd, if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and the objects of the legislation, they may wear a very different appearance.”

(Emphasis Added)

³ [1997] HCA 2; (1997) 187 CLR 384

5. Extrinsic material

24. There is a considerable array of extrinsic materials which support Ai Group's interpretation of ss.202 and 203 of the Act and do not support Commissioner Ryan's interpretation.
25. The Government identified that one of the central aspects of the new workplace relations system was the removal of AWAs. In the Second Reading Speech to the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008* ("the Forward with Fairness Bill") the Deputy Prime Minister stated:

"When the Prime Minister became Leader of the Labor Party and I became Deputy Leader in December 2006, we promised to abolish Australian workplace agreements.

In April last year, we published our workplace relations policy, Forward with Fairness, and confirmed that, if elected, we would abolish Australian workplace agreements.

In August we released our Forward with Fairness policy implementation plan, which reiterated Labor's commitment to abolish Australian workplace agreements while setting out the sensible transitional arrangements a Rudd Labor government would adopt for implementing this key commitment. This policy made it clear that, when Labor's workplace relations system was fully operational, there would be no AWAs and no other statutory individual employment agreements.

All last year, every member now sitting on this side of the House campaigned in electorates all over this country on our commitment to abolish Australian workplace agreements and to introduce Labor's new system.

When the Australian people read our policy documents, or heard the Prime Minister speak, including at our campaign launch, or listened to me debate the

previous Minister for Employment and Workplace Relations they were left without a doubt that central to our workplace relations policy was a commitment to rid Australia of all statutory individual employment agreements.⁴

26. We submit that the introduction of IFAs into the statutory scheme was in direct response to the Government's decision to remove AWAs. This connection is made plain within the Second Reading Speech to the Forward with Fairness Bill where in relation to the modern award system the Deputy Prime Minister noted:

"As part of the award modernisation process the Australian Industrial Relations Commission will be required to develop an award flexibility clause for inclusion in all awards. This clause will, in combination with a simple, modern award arrangements enable employers and individual employees to make arrangements to meet their genuine individual needs so long as the employee is not disadvantaged...

... A simple, modern award system with opportunities for individual flexibilities will remove the need for any individual statutory employment agreements and the associated complexity and bureaucracy attached to those agreements.⁵

(Emphasis Added)

27. Although the Deputy Prime Minister's comments were made in relation to the flexibility arrangements to be contained within modern awards, we contend that they are equally relevant to the flexibility arrangements required by section 202 and 203 of the FW Act for enterprise agreements.

⁴ House of Representatives – Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008; 2nd Reading Speech – 13 February 2008; at 177

⁵ House of Representatives – Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008; 2nd Reading Speech – 13 February 2008; at 182

28. This contention we submit is supported by the manner in which individual flexibility arrangements for modern awards and enterprise agreements are referred to jointly within a range of extrinsic material relating to the FW Act.

29. For example, in the Senate Education, Employment and Workplace Relations Committee Report into the Fair Work Bill 2008, the Committee Majority noted under the title 'Flexibility':

"1.39 While Coalition senators and employer groups have raised questions about the sufficiency of flexibility of the system, the committee majority is mindful that flexibility has to be balanced with fairness. It is clear from some of the evidence to be discussed later that 'flexibility' often has different meanings for employees and employers. Measures to achieve genuine flexibility to meet the needs of individual employee and employers – without sacrificing minimum standards – is inherent in the framework of the bill. The bill ensures that employees are better able to balance their work and family life. There are individual flexibility arrangements in awards, and flexibility terms must be contained in enterprise agreements. These arrangements are subject to protections to ensure they are genuinely agreed and do not undermine the safety net of employment standards.

... ..

1.43 The committee majority believes that there is sufficient provisions in the legislation to allow wide scope for negotiation of flexible working arrangements."

(Emphasis Added)

30. Similar comments are made in the Regulatory Impact Statement in the Explanatory Memorandum to the *Fair Work Bill 2008* where in reference to the content of enterprise agreements it states:

“r.151 In order to facilitate more flexible employment relationships, enterprise agreements will also be required to include an individual flexibility arrangement and a consultation clause where major change is considered. Where no such provisions are included, the respective model term prescribed by the regulations is taken to be a term of the agreement. It is intended that the model term to be prescribed will be based upon the model flexibility term developed by the AIRC for inclusion within modern awards. These provisions will allow employers to enter into individual flexibility arrangements with employees where this is to the benefit of the employer and employee.”

(Emphasis Added)

31. The Explanatory Memorandum provides considerable detail regarding the intent of ss.202 and 203 of the FW Act as set out below:

“Division 5 – Mandatory terms of enterprise agreements

Clause 202 – Enterprise agreements to include a flexibility term, etc.

860. Subclause 202(1) requires an enterprise agreement to include a flexibility term which:

- enables an employee and his or her employer to agree to an arrangement (an individual flexibility arrangement) varying the effect of the agreement in relation to the employee and the employer in order to meet the genuine needs of the employee and employer; and*
- complies with the requirements of clause 203. The flexibility term must specify which terms of the enterprise agreement can be varied by an individual flexibility arrangement.*

Illustrative example

Danae is employed full time as a graphic designer at Pax Designs Pty Ltd. The Pax Designs Pty Ltd Enterprise Agreement 2010 enables an individual

flexibility arrangement to be made between the employer and its employees in relation to the span of ordinary hours to be worked.

Danae has school aged children that she wishes to pick up from school two days per week. She negotiates an individual flexibility arrangement with her employer that she will work longer hours three days per week, so that she can leave at 3pm on the other two days to pick up her children. Danae will still work the equivalent of full time hours.

861. Where there is an individual flexibility arrangement under a flexibility term in an enterprise agreement, the agreement has effect in relation to the employee and the employer as if it were varied by the flexibility arrangement and the arrangement is taken to be a term of the agreement. This means, for example, that if an employer contravened a term of an individual flexibility arrangement the employer would contravene a term of the agreement – so the individual flexibility arrangement can be enforced as a term of the agreement.

862. The individual flexibility arrangement does not change the effect the agreement has in relation to the employer and any other employee and does not have any other effect other than as a term of the agreement (subclause 202(3)). For example, an individual flexibility arrangement would not have any effect as a contract in its own right or as a variation to an employee's contract of employment.

863. The model flexibility term that is prescribed by the regulations will be taken to be a term of the agreement where an enterprise agreement does not include a flexibility term that complies with the requirements under clause 203 (subclause 202(4)).

864. It is intended that the model term to be prescribed will be based upon the model flexibility term developed by the AIRC for inclusion in modern awards. If FWA approves an enterprise agreement and the model flexibility term is taken to be a term of the agreement, FWA must note in its decision to approve the agreement that the model flexibility term is included in the agreement (subclause 201(1)).

Clause 203 – Requirements to be met by a flexibility term

865. This clause provides the requirements that are to be met by a flexibility term. Subclause 203(1) provides that a flexibility term must meet the requirements of the clause.

866. Subclause 203(2) provides a content requirement for a flexibility term. The flexibility term must set out the terms of the enterprise agreement which may be varied by an individual flexibility arrangement. Which particular terms of the enterprise agreement may be varied will be a matter for bargaining. The employer is required to ensure that an individual flexibility arrangement must only be about matters that would be permitted matters if the arrangement were an enterprise agreement. Permitted matters are defined in subclause 172(1). An individual flexibility arrangement must not include a term that would be an unlawful term as defined in clause 194.

867. The flexibility term must require that the employee and the employer genuinely agree to any individual flexibility arrangement (subclause 203(3)). Genuinely agree is not defined here and bears its ordinary meaning. It must also require the employer to ensure that any individual flexibility arrangement must result in the employee being better off overall than if there was no individual flexibility arrangement. It is the employer's responsibility to ensure that this is the case (subclause 203(4)).

Illustrative example

Josh works as a membership consultant at a gymnasium. Under the enterprise agreement applying to his employment, the ordinary hours of work are 37 ½ hours each week to be performed in a span between 8am and 6pm each day. Hours worked outside this span attract penalty rates. Josh's employer usually requires membership consultants to work from 9am to 5.30pm.

In his spare time, Josh coaches an under-12s footy team. To do this, he needs to be able to leave work at 4pm on Tuesdays and Thursdays each week. He wants to start work at 7.30am on these days, but usually this would attract a penalty under the terms of the agreement. The agreement allows the

employer and an employee to make an individual flexibility arrangement that varies the terms of the agreement dealing with hours of work and penalty rates.

Josh approaches his employer and asks whether the employer will make an individual flexibility arrangement with him under which the employer agrees that Josh can work from 7.30am to 4pm on Tuesdays and Thursdays. Josh agrees that he will not be paid a penalty on these days, even though he starts work at 7.30am. Josh is genuinely happy to agree to this arrangement because it enables him to balance his work and personal commitments. The employer agrees to this arrangement.

The employer must ensure that Josh is better off overall under the individual flexibility arrangement than under the agreement. Often this will require the employer to make a comparison of the relevant financial benefits that the employee would receive under the agreement, and the agreement as varied by the individual flexibility arrangement. In Josh's case, however, he has agreed under the individual flexibility arrangement to give up a financial benefit (penalty rates) in return for a non-financial benefit (leaving work early). It is intended that, in appropriate circumstances, such an arrangement would pass the better off overall test. Because the better off overall test is being applied here to an individual arrangement, it is possible to take into account an employee's personal circumstances in assessing whether the employee is better off overall. Relevant factors in Josh's case that suggest the individual flexibility arrangement is likely to pass the better off overall test are:

- Josh initiated the request for the individual flexibility arrangement, suggesting that he places significant value on being able to leave work early to coach the footy team;*
- Josh genuinely agreed to the arrangement;*
- the period of time falling outside the span of hours is relatively insignificant. It is only one hour out of the 37 ½ hour ordinary week that Josh works.*

868. Because the value that a particular employee may place on a non-monetary benefit is important, it is less likely that an employee would be better off overall where the employer has initiated a request to agree an individual flexibility arrangement under which the employee gives up a monetary benefit in exchange for a non-monetary benefit. Similarly, it is less likely that an individual flexibility arrangement would result in an employee being better off overall where the monetary benefit given up by the employee had a substantial value, or if the value of the monetary benefit was, in the view of a reasonable person, disproportionate to the non-monetary benefit for which it was exchanged.

869. Subclause 203(5) requires the employer to ensure that the flexibility term does not require that an individual flexibility arrangement must be consented to, or approved, by any other person. For example, a flexibility term could not require that an individual flexibility arrangement only be made where a union or a majority of employees in an enterprise agree. The only exception is where the employee is under 18 and a parent or guardian must sign the individual flexibility arrangement (subparagraph 203(7)(a)(ii)).

870. The flexibility term must require the employer to ensure that any individual flexibility arrangement must be able to be terminated by either the employee or employer by giving written notice of not more than 28 days (paragraph 203(6)(a)). Where both the employee and employer agree in writing to the termination of the individual flexibility arrangement, there is no requirement that 28 days' notice must be given and a termination can be made at any time (paragraph 203(6)(b)). This provides protection for the employer and employee so that either is able to terminate an individual flexibility arrangement at any time, whether the other agrees or not.

871. The flexibility term must require the employer to ensure that any individual flexibility arrangement must be in writing and signed by the employee and the employer (subparagraph 203(7)(a)(i)). Where the employee is under 18 years the individual flexibility arrangement must be signed by a parent or guardian (subparagraph 203(7)(a)(ii)). A copy of an individual

flexibility arrangement must be given to the employee within 14 days after it is agreed (paragraph 203(7)(b)).

Clause 204 – Effect of arrangement that does not meet requirements of flexibility term

872. This clause provides for what happens when an employer and employee agree what they intend to be an individual flexibility arrangement, but the arrangement does not meet the requirements set out in clause 203. The clause makes clear that the arrangement has effect as if it were an individual flexibility arrangement.

873. This ensures that an employee retains any benefits that she or he is receiving under the arrangement. If an employee believes she or he is being disadvantaged by the arrangement, the employee can unilaterally terminate the agreement with 28 days notice and bring action in a court for compensation and penalties for breach of the terms of the enterprise agreement.

874. The legislative note under subclause 204(1) makes clear that certain failures to comply with clause 203 may contravene the general protections in Part 3-1.

- For example, if an employer applied coercion to an employee to make an individual flexibility arrangement, the employee is unlikely to have genuinely agreed to the individual flexibility arrangement ((subclause 203(3)).*
- In addition, the employer may contravene clauses 343 and 344. Clause 343 prohibits the application of coercion to induce an employee not to exercise a workplace right (relevantly, the right to the benefit of the enterprise agreement). Clause 344 relevantly prohibits the application of undue influence or undue pressure on an employee to compel them to enter into an individual flexibility arrangement.*

32. We submit that an understanding of the historical context which saw the removal of individual statutory agreements from Australia's workplace relations system, coupled with unequivocal commentary within a range of extrinsic materials regarding the relevance of IFAs in creating flexibility, leads to the view that IFAs are intended to provide a considerable degree of flexibility.
33. In none of the relevant extrinsic materials is the notion that IFAs operate with only limited flexibility, or flexibility confined by the terms of the modern award or enterprise agreement articulated. Indeed, the only restrictions which the extrinsic materials place upon IFAs are the requirements that they meet the needs of the employer and employee, that the employee not be disadvantaged and that the arrangements are genuinely agreed to. We submit that none of these principles are offended by adopting an expansive definition of 'effect'. Furthermore, the restrictive notion of 'effect' which has been adopted by Commissioner Ryan conflates the purpose for which IFAs were introduced and prevents them from functioning in the manner that the legislature intended.

6. The common understanding of ss.202 and 203

34. Ai Group submits that Commissioner Ryan's narrow interpretation of ss.202 and 203 is inconsistent with the common understanding of employers, employees and others within the community of the flexibilities available under IFAs.
35. For example, Commissioner Ryan's interpretation directly conflicts with the content of the Fair Work Ombudsman's Best Practice Guide on the Use of Individual Flexibility Arrangements (***Annexure B***).
36. Employers and employees who have relied upon the FWO's Best Practice Guide, and the other advisory materials which have been distributed by the FWO, the Government, industry associations and others, and who have entered into IFAs in good faith would be placed in a very difficult situation if Commissioner Ryan's decision is upheld.
37. It is likely that a high proportion of the IFAs made to date would be unlawful if Commissioner Ryan's narrow interpretation of the legislative provisions prevails.

7. Correct meaning of 'effect'

38. We submit that the notion of 'effect' was not intended to operate as a limitation on the manner in which IFAs operate. Section 203 of the FW Act identifies the requirements of an IFA and we submit that the significant aspect of section 203(2)(a) is not the notion of 'effect' but rather that the flexibility term must, "set out the terms of the enterprise agreement" which may be subject to an IFA. This submission we contend is supported by the Explanatory Memorandum to the *Fair Work Bill 2008* which states in relation to subclause 203(2):

"866. Subclause 203(2) provides a content requirement for a flexibility term. The flexibility term must set out the terms of the enterprise agreement which may be varied by an individual flexibility arrangement. Which particular terms of the enterprise agreement may be varied will be a matter for bargaining. The employer must ensure that an individual flexibility arrangement must only be about matters that would be permitted matters if the arrangement were an enterprise agreement. Permitted matters are defined in subclause 172(1). An individual flexibility arrangement must not include a term that would be an unlawful term as defined in clause 194."

(Emphasis Added)

39. In the alternative, even if the term 'effect' was intended to have an integral meaning within the context of sections 202 and 203, we contend that it is capable of definition without limiting the scope of flexibility available under IFAs.

40. Commissioner Ryan cites the Macquarie Concise Dictionary 5th Ed to define the term ‘effect’ as *“that which is produced by some agency or cause; a result; a consequence.”*⁶ ‘Effect’ however is capable of many definitions, and the Macquarie Dictionary⁷ also defines the term as “the state of being effective or operative; operation or execution”. It is our submission that this definition reflects the legislative intent and that ‘effect’ should be defined in reference to the ‘operation’ of the enterprise agreement. Such a definition allows for an employee and employer to agree to an IFA *“varying the effect (operation) of the agreement”* which could include variation to the application of a particular provision of the agreement or a re-writing of a term of the agreement.
41. We submit that this definition is also not inconsistent with the manner in which ‘effect’ is used elsewhere in section 202. Specifically 202(2)(a) and 202(3)(a)&(b) which respectively provide:

“202(2) If an employee and employer agree to an individual flexibility arrangement under a flexibility term in an enterprise agreement:

(a) the agreement has (effect) operation in relation to the employee and the employer as if it were varied by the arrangement;...

202(3) To avoid doubt, the individual flexibility arrangement:

(a) does not change the (effect) operation the agreement has in relation to the employer and any other employee; and

(b) does not have any (effect) operation other than as a term of the agreement.”

⁶ At [43]

⁷ The Macquarie Dictionary Online © Macquarie Dictionary Publishers Pty Ltd.

42. In support of a narrow conception of the scope of IFAs, Commissioner Ryan also makes reference to other aspects of the FW Act, most notably the provisions relating to variation of enterprise agreements saying:

“[71] This interpretation of s.202 and 203 is consistent with and supported by other provisions of the Act.

[72] Terms of an enterprise agreement can be varied but only in compliance with Subdivisions A and B of Division 7 of Part 2-4 of the Act.

[73] Parliament has specifically provided the legislative regime for varying the terms of an enterprise agreement in Division 7 of Part 2-4. With such explicit provisions for the varying of enterprise agreements in Division 7 of Part 2-4 there can be no justification or need to try and read into s.202 and 203 a power to vary the terms of an enterprise agreement.”

43. Whilst Parliament may have provided for a comprehensive regime to vary the terms of enterprise agreements, such variation can generally⁸ only be enacted with collective approval⁹. Given the importance of individual flexibility which is reflected in the legislation it would be erroneous in our submission to assume that a collective mechanism for varying enterprise agreements was intended to ‘cover the field’ and prevent variation by individual agreement through an IFA.
44. This is particularly so when one considers that s.203(5) of the FW Act expressly prohibits a flexibility term requiring the approval or consent of another person.

⁸ Section 217 and 218 allow for variation to an enterprise agreement to remove ambiguity or uncertainty and as result of a referral from HREOC. Such variations do not require approval by employees collectively.

⁹ Section 211

45. From our rejection of Commission Ryan’s narrow conception of the notion of ‘effect’, it also falls that Ai Group opposes the proposition that the statutory provisions applying to IFAs require any variation of an enterprise agreement to remain within the parameters of the terms of the agreement. Commissioner Ryan relevantly articulates this view as follows:

“[63] However the plain language of s203(2)(a) provides for a significantly lesser possibility, namely varying the consequences or result flowing from the operation of a term of an enterprise agreement but where the varied result or consequence remains within the sphere of operation of the terms of the agreement...

... ..

[79] In the absence of clear language in s202 or 203 which permits the variation of the terms of an enterprise agreement through an IFA then consistent with the plain language of those provisions they must be limited to arrangements which whilst varying the consequences of the operation of the term of the agreement still remain within the parameters set by the terms of the agreement.”

(Emphasis Added)

46. We submit that this analysis is unsupported when one again has regard to the purpose of IFAs, the context of their legislative history and the objects of the Act. Furthermore, it is our submission that such a limitation would also be inconsistent with determinations made by the Full Bench of the AIRC in relation to the equivalent provisions within modern awards. In this regard we refer to the following statement contained within the Full Bench’s decision¹⁰ creating the model flexibility term for modern awards where they say:

¹⁰ [2008] AIRCFB 550

“[176] Before leaving the matters to be included in the model clause there is another question to be considered – whether limits should be put on the flexibility available in relation to the particular award terms we have specified. That approach has some attraction in that it would provide some additional protections for employees. The difficulty with the proposal is that the limitations might not be appropriate in all circumstances and their adoption might lead to unfairness to employers and employees in some cases. Bearing in mind that the clause will have the potential to apply in a very broad range of cases it would be undesirable to place limits on what the parties might agree as appropriate to their needs.”

8. The correct result but for the wrong reasons

47. Ai Group submits that Commissioner Ryan was correct in deciding that Clause 12 in the enterprise agreement is invalid and that such term must be replaced by the model flexibility term in Schedule 2.2 of the *Fair Work Regulations 2009*, but for the wrong reasons.
48. Clause 12 specifies only three terms in the enterprise agreement which may be the subject of an IFA – 7.1.10(a), 7.5.1(e)(ii) and 6.4.3 of the *Metal, Engineering and Associated Industries Award 1998* (“the Metals Award”) as incorporated as terms of the agreement by clause 5.
49. However, none of these terms are capable of being varied by agreement between the employer and an individual employee.

Paragraph 7.1.10(a)

50. Paragraph 7.1.10(a) of the Metals Award states:

“7.1.10 Leave Allowed Before Due Date

7.1.10(a) *An employer may allow an employee to take annual leave either wholly or partly in advance before the leave becomes due. In such case, a further period of annual leave will not commence to accrue until after the expiration of the 12 months in respect of which the annual leave or part of it had been taken before it accrued.”*

51. We submit that the above clause was in operation during an era when leave was only able to be taken after each 12 months' of service and did not become due until the end of the 12 month period. Nowadays such a clause conflicts with the annual leave provisions of the National Employment Standards (NES) which provide for the ongoing accrual of leave (s.87(2)) and the right of employees to take accrued leave at any time with the agreement of their employer, which must not be unreasonably withheld (s.88).
52. Paragraph 7.1.10(a) of the Metals Award has no effect as a term of the enterprise agreement as it conflicts with the NES. It does not validly supplement the NES because the term is detrimental to the employees covered by the agreement. (See s.55 of the FW Act).
53. As paragraph 7.1.10(a) of the Metals Award has no effect as a term of the agreement, the requirement in s.203(2)(a) has not been met. The "terms" of the agreement which can be varied by an IFA must be set out in the flexibility term.

Paragraph 7.5.1(e)

54. Paragraph 7.5.1(e) of the Metals Award states:

"7.5.1(e) Substitution of Public Holidays by Agreement at the Enterprise

- (i) By agreement between the employer and the majority of employees in the relevant enterprise or section of the enterprise, an alternative day may be taken as the public holiday in lieu of any of the prescribed days.*

(ii) An employer and individual employee may agree to the employee taking another day as the public holiday in lieu of the day which is being observed as the public holiday in the enterprise or relevant section of the enterprise.”

55. Clause 12 in the enterprise agreement states that paragraph 7.5.1(e)(ii) is subject to an IFA, but then goes on to state that *“The facilitative provisions and the flexibility term in the award are not incorporated in this agreement, despite any term of this agreement to the contrary.”*

56. Paragraph 7.5.1(e)(ii) is a facilitative provision. It is listed in Clause 2.2 – Facilitative Provisions, of the Metals Award.

57. Paragraph 2.2.3(a) of the Metals Award states:

“2.2.3(a) Subject to paragraphs (b) and (c) of this subclause, the following facilitative provisions can be utilised upon agreement between the employer and the majority of employees in the workplace or a section or sections of it OR, the employer and an individual employee.

<i>4.2.3(b)(viii)</i>	<i>Period for Casual Election to Convert</i>
<i>5.11.1(b)</i>	<i>Payment of Wages</i>
<i>6.1.1(b)</i>	<i>Ordinary hours of Work for Day Workers on Weekends</i>
<i>6.1.1(c)</i>	<i>Variation to Spread of Hours for Day Workers</i>
<i>6.1.4(a) & (b)</i>	<i>Methods of Arranging Ordinary Working Hours</i>
<i>6.2.1</i>	<i>Shift Definitions</i>
<i>6.3.1(b)</i>	<i>Working in Excess of Five Hours without a Meal Break</i>
<i>7.5.1(e)</i>	<i>Substitution of Public Holidays</i>

58. Given that paragraph 7.5.1(e)(ii) of the agreement is a facilitative provision and that the agreement deems such provisions to be “*not incorporated in this agreement, despite any term of this agreement to the contrary*”, the requirement in s.203(2)(a) has not been met. The “terms” of the agreement which can be varied by an IFA must be set out in the flexibility term.

Subclause 6.4.3

59. Subclause 6.4.3 of the Metals Award states:

“6.4.3 One in, All in does not Apply

The assignment of overtime by an employer to an employee is to be based on specific work requirements and the practice of "one in, all in" overtime must not apply.”

60. This award clause, by its nature, is incapable of meaningful variation by agreement between an employer and an individual employee.
61. A “one in, all in” system of overtime results in all employees being offered overtime if any employee is offered overtime. The provision has effect in respect of every employee covered by the agreement and changing the provision to implement a “one in, all in” system of overtime would require that the agreement be varied for every employee. A variation to the provision, as it relates to just one employee, would still proscribe the “one in, all in” system of overtime for every other employee and, hence, prevent such a system being implemented.

Clause 12 of the agreement is not valid

62. For the reasons set out above, clause 12 of the agreement does not set out any terms of the agreement which are capable of being varied by agreement between the employer and an individual employee, and hence is not a valid flexibility term.
63. Accordingly, such term should be replaced with the model flexibility term in Schedule 2.2 of the *Fair Work Regulations 2009*.