

C2010 / 2647

**APPEAL BY WOOLWORTHS LTD AGAINST THE
DECISION ([2010] FWA 30) OF COMMISSIONER
SMITH IN AG2009/14435**

**OUTLINE OF SUBMISSIONS OF THE
AUSTRALIAN INDUSTRY GROUP**



5 February 2010

OUTLINE OF SUBMISSIONS

1. Leave sought to make submissions

1. 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.
2. The Australian Industry Group (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 *Fair Work Act* (“FW Act”) and was formally recognised as a State Peak Council in the NSW Industrial Relations System;
 - The statutory construction of s.186(6) is a very important element of the bargaining system under the *Fair Work Act*.
 - Unless Commissioner Smith’s decision is overturned employers will lose the right to choose whether or not they wish to grant compulsory arbitration powers in their enterprise agreement;
 - Commissioner Smith’s decision creates doubt about the validity of a large number of enterprise agreements which have been made under the *Fair Work Act* since July 2009;

- 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.

2. Introduction

3. On 21 January 2010, Commissioner Smith refused to approve the *Woolworths Limited SDAEA Mulgrave Produce and Recycling Enterprise Agreement 2009-2012* (“the Woolworths Enterprise Agreement”). Key aspects of the decision included the following:

- Except for the dispute settlement procedure, Commissioner Smith was satisfied that the agreement met all of the relevant statutory tests for approval.
- The Commissioner held that clause 30.6 of the agreement gives parties to the agreement a “power of veto” to the matter being settled (para [6]). Clause 30.6 relevantly states:

“If after 30.5, there is still no resolution and the employer’s Director of Human Resources and the employee agree or, in instances where the employee elects to be represented by the union, the employer’s Director of Human Resources and the National Secretary of the union agree, the matter may proceed to arbitration by Fair Work Australia.”

- Commissioner Smith decided that s.186(6) requires that access to arbitration is a prerequisite to the approval of an agreement.

4. Ai Group submits that the Commissioner:

- Erred in deciding that it is a prerequisite of the Act that the dispute settling procedure in an enterprise agreement provide for arbitration, and that arbitration cannot be limited to circumstances where all parties agree; and
- Erred in deciding that the dispute settling procedure in the Woolworths Enterprise Agreement did not meet the requirements of the Act to enable approval.

3. Why is this issue important for employers?

5. During the development of the Fair Work legislation, Ai Group and other industry groups were concerned with the prospect of compulsory arbitration being expanded under enterprise agreements.

6. The powers of Fair Work Australia (FWA) to arbitrate under dispute settling procedures in enterprise agreements was a hotly contested issue between industry groups and unions during the development of the legislation.

7. When the *Fair Work Act* was passed by Parliament in March last year, it appeared that the strong representations of employers had been taken on Board by the Federal Government and that FWA would only have the power to arbitrate under the dispute settling procedure in an enterprise agreement, if the parties to the agreement decided to give FWA this power.

8. Ai Group believes that it is entirely legitimate for an enterprise agreement to restrict arbitration to circumstances where all parties have to agree to it, if this is what the parties to the agreement want.
9. The powers given to FWA under dispute settling procedures in enterprise agreements have wide implications for business and the economy. If arbitration is readily available to any party there is less incentive to search for a solution which is acceptable to all parties. The easy access to arbitration may also encourage unions to pursue speculative claims and could lead to the flow-on of arbitrated outcomes across numerous workplaces.
10. Further, the compulsory arbitration of a dispute under an enterprise agreement could have the effect of substantively changing the entitlements and obligations under the agreement. Where this occurs against the will of one of the parties, it remains an agreement in name only.
11. Unless Commissioner Smith's decision is overturned on appeal:
 - Employers, employees and unions will lose the freedom to enter into an enterprise agreement which limits arbitration to circumstances where the parties decide that this is appropriate at the time when a dispute arises;
 - The validity of hundreds of already approved enterprise agreements which contain dispute settling procedures like those in the rejected Woolworths enterprise agreement, is in doubt.

4. Relevant legislative provisions

Section 595

12. FWA's powers to deal with disputes are set out in Section 595 of the Act.
13. Subsection 595(3) permits FWA to deal with a dispute by arbitration "*only if FWA is expressly authorised to do so under or in accordance with another provision of this Act*". The limitation on FWA's arbitration powers under s.595(3) contrasts with the expansive powers available to FWA under subsection 595(2) which enables FWA to deal with a dispute (other than arbitration) as it considers appropriate, including mediation, conciliation, making a recommendation or expressing an opinion.
14. Subsection 595(5) goes on to remove any doubt and states that "*FWA must not exercise any of the powers referred to in subsection (2) or (3) in relation to a matter before FWA except as authorised by this section.*"

Part 6-2 of the Act

15. FWA's powers to deal with disputes are further clarified in Chapter 6 (Miscellaneous), Part 6-2 (Dealing with Disputes), Division 2 (Dealing with Disputes).
16. Section 738 in Division 2 relevantly states:

"738 Application of this Division

This Division applies if:

...

“(b) an enterprise agreement includes a term that provides a procedure for dealing with disputes, including a term referred to in subsection 186(6)”

...

17. Clearly the Woolworths Enterprise Agreement includes a term “referred to in subsection 186(6)” and therefore the provisions of Division 2 apply.
18. Subsection 739(1) in Division 2 provides that s.739 “applies if a term referred to in section 738 requires or allows FWA to deal with a dispute”. Subsection 186(6), which deals with the requirements for dispute settling terms in enterprise agreements, states that agreements are to include a term “that provides a procedure that requires or allows FWA..... to settle disputes” (s.186(6)(1)). Accordingly, the provisions of s.739 apply to the Woolworths Enterprise Agreement.
19. Subsections 739(2) to (6) state:
 - (2) FWA must not deal with a dispute to the extent that the dispute is about whether an employer had reasonable business grounds under subsection 65(5) or 76(4), unless:
 - (a) the parties have agreed in a contract of employment, enterprise agreement or other written agreement to FWA dealing with the matter; or
 - (b) a determination under the Public Service Act 1999 authorises FWA to deal with the matter.

Note: This does not prevent FWA from dealing with a dispute relating to a term of an enterprise agreement that has the same (or substantially the same) effect as subsection 65(5) or 76(4) (see also subsection 55(5)).
 - (3) In dealing with a dispute, FWA must not exercise any powers limited by the term.

(4) If, in accordance with the term, the parties have agreed that FWA may arbitrate (however described) the dispute, FWA may do so.

Note: FWA may also deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)).

(5) Despite subsection (4), FWA must not make a decision that is inconsistent with this Act, or a fair work instrument that applies to the parties.

(6) FWA may deal with a dispute only on application by a party to the dispute.”

(Emphasis added)

20. There are a number of key points which arise from subsections 739(2) to (6):

- The option in s.739(2) of enabling parties to agree in an enterprise agreement to FWA “*dealing with a dispute to the extent that the dispute is about whether an employer had reasonable business grounds under subsection 65(5) or 76(4)*” becomes nugatory if the parties have no option other than to include a dispute settling procedure in their agreement which gives FWA (or another independent person) arbitration powers for disputes about any matters arising under the agreement and in relation to the NES.
- Subsection 739(3) clearly contemplates that the parties to an agreement may decide to limit FWA’s powers under the dispute settling term.
- Subsection 739(4) identifies what FWA can arbitrate if, in accordance with the dispute settling term, “*the parties have agreed that FWA can arbitrate*”. This provision becomes meaningless if dispute settlement terms in enterprise agreements must give FWA (or another independent person) arbitration powers.

- S.739(5) reinforces the view that it is the parties who have the right to decide whether FWA will have a dispute settling role, and what it will be.
- If Parliament had intended that arbitration be an indispensable element of dispute settling procedures in enterprise agreements it could have specified this in Part 6-2 of the Act. Instead, the Act specifies that arbitration is simply an option open to the parties.

Subsection 186(6)

21. Section 186(6) is a specific provision which sets out the requirements for dispute settling terms in agreements, as follows:

“Requirement for a term about settling disputes

(6) *FWA must be satisfied that the agreement includes a term:*

(a) *that provides a procedure that requires or allows FWA, or another person who is independent of the employers, employees or employee organisations covered by the agreement, to settle disputes:*

(i) about any matters arising under the agreement; and

(ii) in relation to the National Employment Standards; and

(b) *that allows for the representation of employees covered by the agreement for the purposes of that procedure.*

Note 1: FWA or a person must not settle a dispute about whether an employer had reasonable business grounds under subsection 65(5) or 76(4) (see subsections 739(2) and 740(2)).

Note 2: However, this does not prevent FWA from dealing with a dispute relating to a term of an enterprise agreement that has the same (or substantially the same) effect as subsection 65(5) or 76(4).”

(Emphasis added)

22. The key issues which arise from s.186(6) include the following:

- A dispute settlement procedure in an agreement must either “*require or allow*” FWA or another independent person to settle disputes about matters arising under the agreement and in relation to the NES.
- The term “*settle disputes*” needs to be given meaning in the context of s.595 and Part 6-2 of the Act. The only logical meaning is that the parties have the option to decide whether the agreement will include arbitration powers, and if so, what those powers will be, who will be required or allowed to exercise them, and whether all parties need to agree at the time when a dispute arises.
- If Parliament had intended that arbitration be an indispensable element of dispute settling procedures in enterprise agreements it could have specified this in s.186(6).
- Commissioner Smith’s interpretation that s.186(6) mandates that FWA or another independent person have arbitration powers to settle disputes about matters arising under the agreement and in relation to the NES is inconsistent with the limitations upon the powers of FWA (and other dispute settling persons) under ss.739(2) and 740(2) of the Act. These limitations are highlighted in Note 1 under s.186(6).

Importance of the word ‘for’ and dispute settling procedures in modern awards and workplace determinations

23. In *Ampol Refineries (NSW) Pty Ltd and Australian Institute of Marine and Power Engineers* [Print P8620] (“*Ampol*”) the Full Bench noted that use of the word ‘for’ in section 170LT(8) was relevant in interpreting the provision stating:

“Second, we are of the view that the word “for” in “procedures for preventing and settling” means “with the object or purpose of”. While the word “for” can have various meanings, an examination of dictionary definitions (e.g. The Macquarie Dictionary, 3rd edition, p. 825) indicates to us that the primary and most common meaning of the word is “with the object or purpose of.”¹”

24. In arriving at his decision, Commissioner Smith makes reference to this passage² in *Ampol* and then further in his judgment goes on to say:

*“[35] I pause to note that the provision relating to dispute settlement terms in modern awards in s146, is cast in terms which are different from those relating to agreements. Section 146 uses the phrase “procedures **for** settling disputes (emphasis added). The difference in language between s.146 and s.186(6) may well be important.”*

25. We do not agree with the implication in Commissioner Smith’s reasoning that the absence of the word “for” preceding the words “settle disputes” in s.186(6) has any material effect on the way in which the provision should be interpreted. We submit that the absence of the word “for” when describing the procedure of dispute settlement required by s.186(6) is not to narrow the types of dispute settlement procedures which will comply with the section but rather is merely a function of grammar and language based upon the way in which the rest of the provision is articulated.
26. We further note that the dispute resolution provisions which have been included within all modern awards, and which are required by the terms of s.146 of the *Fair Work Act*, do not provide for compulsory arbitration.

¹ Print P8620; at page 4

² At [26] and [27]

27. The justification for the omission of such a power was made clear by the Full Bench of the Australian Industrial Relations Commission in its Award Modernisation Decision of 19 December 2008³ where it stated:

“[43] We have concluded that it is not appropriate that the dispute resolution provision should contain a requirement that the status quo be maintained. While experience indicates that in many cases it is difficult to ascertain the status quo and that difficulty may itself be a cause of dispute, that is not a sufficient reason for not including such a requirement. A more compelling reason, in our view, is that the nature of the powers which the Commission can exercise in the dispute resolution process is inconsistent with a status quo requirement. Where compulsory arbitration is not in contemplation it would not be appropriate to require one side or the other in the dispute to revert to the pre-dispute situation pending the outcome of the process.”

(Emphasis Added)

28. It is clear from the above extract that the Full Bench decided that the powers which FWA can exercise in the dispute resolution process under modern awards do not contemplate compulsory arbitration. Furthermore, this determination has not been asserted to be inconsistent with s.146 of the *Fair Work Act*.
29. We submit that this interpretation has meaningful relevance to interpretation of the provisions of the *Fair Work Act* which relate to enterprise agreement dispute resolution procedures. *Ai Group* is fortified in this submission given the almost identical language which exists between s.146 and s.273(2) of the *Fair Work Act*. The phrase “*procedure for settling disputes*” appears only twice within the *Fair Work Act*, the first occasion in relation to modern awards at s.146, and the second at s.273(2) in relation to workplace determinations

³ [2008] AIRCFB 1000

30. Workplace determinations are provided for in Part 2-5 of the *Fair Work Act* and are available for FWA to make in connection with particular bargaining situations.⁴ Once in operation a workplace determination functions as a default enterprise agreement.⁵

31. In order for FWA to make a workplace determination there are a range of core and mandatory terms which must be included. These terms include a requirement for the inclusion of a provision relating to the settling of disputes at s.273(2) which states:

“Term about settling disputes

(2) The determination must include a term that provides a procedure for settling disputes:

(a) about any matters arising under the determination; an

(b) in relation to the National Employment Standards.”

32. Ai Group submits that s.273(2) is in all relevant respects identical to s.146 with the only exception being that the s.273(2) refers to a determination and s.146 refers to an award. Given that a Full Bench has already determined that s.146 does not create a requirement for compulsory arbitration, we contend that s.273(2) must be interpreted in an identical manner.

33. In such a context, we submit that it would be entirely incongruous for the legislation to not require compulsory arbitration in dispute settling procedures in workplace determinations made as a result of unsuccessful bargaining, whilst requiring compulsory arbitration in dispute settling procedures in enterprise agreements made between bargaining parties.

⁴ Low-paid workplace determinations (Section 260), Industrial action related workplace determinations (Section 266) and Bargaining related workplace determinations (Section 269).

⁵ Section 279(1)

34. We submit that such is the effect of the decision of Commissioner Smith and if not corrected could lead to situations where a bargaining party opposed to compulsory arbitration could seek to achieve a workplace determination in lieu of seeking an enterprise agreement. Such a result unquestionably cannot accord with the objects of the Act or those of Part 2-4.

5. The Explanatory Memorandum and Other Explanatory Materials

Explanatory Memorandum

35. There are numerous references in the Explanatory Memorandum for the *Fair Work Bill 2008* (“the Explanatory Memorandum”) of relevance to the powers of FWA under dispute settlement procedures in enterprise agreements.
36. The following extract from the Regulatory Impact Statement highlights that the role of FWA under dispute settlement procedures is limited and emphasises mediation, not arbitration:

“r.353. While FWA will not have the same expansive dispute prevention capacity as ACAS, it will provide information and advice to employers and employees and it will have a greater capacity to mediate disputes than the AIRC. The evidence from the UK therefore suggests that the changes to be implemented with the establishment of FWA are likely to result in economic benefits for Australia.”

(Emphasis added)

37. The section below explains s.186(6). If it was intended that dispute settlement procedures would be required to provide for compulsory arbitration then, we submit, that logically such an important issue would have been covered in this section of the Explanatory Memorandum:

“782. Paragraph 186(6)(a) requires FWA to be satisfied that the agreement includes a term that provides a procedure that requires or allows FWA or another person independent of the persons covered by the agreement to settle disputes:

- *about any matters arising under the agreement; and*
- *in relation to the NES.*

783. A disputes procedure could not, for example, provide for disputes to be resolved by:

- *the managing director of the employer; or*
- *a disputes board made up of officials of a union covered by the agreement.*

784. Paragraph 186(6)(b) provides that the term of an agreement that provides a procedure for dealing with disputes must also allow for the representation of employees covered by the agreement when dealing with disputes.

785. The legislative note following subclause 186(6) refers to subclause 739(2) and subclause 740(2) which provide that FWA or a person must not deal with a dispute about whether an employer had reasonable business grounds under certain provisions of the NES (subclause 65(5) or subclause 76(4)).

786. However, an agreement could include a term providing for a right to flexible working arrangements separate to subclause 65(5). The enterprise agreement may also provide for the agreement’s disputes procedure to apply in respect of any such term.”

38. The Explanatory Memorandum explains s.595 of the legislation in the following terms:

“2285. Generally, FWA will make decisions as required under the Bill by informing itself as it considers appropriate (including by obtaining the views of affected persons as appropriate) and making a decision based on that information. In a range of circumstances, FWA will have power to seek to resolve matters between persons in dispute through conciliation or mediation processes. Subject to a range of access criteria, the Act confers some powers on FWA to impose an outcome if the parties cannot agree – in other words, to arbitrate a dispute between the parties.

2286. Clause 595 gives effect to this policy. Subclause 595(1) provides that FWA may only deal with a dispute if it is expressly authorised to do so under the Bill. Subclause 595(2) enables FWA to deal with those disputes as it considers appropriate, including by a process of mediation or conciliation and/or by delivering an outcome such as a recommendation or opinion. However, subclause 595(3) specifically provides that FWA may only deal with a dispute by arbitration if expressly authorised to do so under the Bill. For the avoidance of doubt, subclause 595(5) emphasises that FWA can only exercise these powers as authorised under clause 595.

2287. The Bill expressly authorises FWA to deal with the following disputes (by authorising FWA to ‘deal with a dispute’):

- bargaining disputes under Part 2-4;*
- general protections disputes under Part 3-1;*
- right of entry disputes under Part 3-4;*
- stand down disputes under Part 3-5; and*
- disputes arising under a procedure for dealing with disputes in a modern award, enterprise agreement, workplace determination or*

contract of employment under Part 6-2, including procedures required by clause 146 (modern awards), subclause 186(6) (enterprise agreements) and subclause 273(2) as applied by subclause 297(1) (workplace determinations).

2288. *The Bill also authorises FWA, in providing assistance to bargaining representatives for a multi-enterprise agreement in respect of which a low-paid authorisation is in operation, to exercise the powers it could exercise if it were dealing with a dispute (see paragraph 246(2)(b)).*

2289. *FWA will have power to arbitrate a bargaining dispute or a Part 6-2 dispute if the parties have agreed that it may arbitrate, however the parties describe that process (subclauses 240(4) and 739(4)). FWA will also have power to determine right of entry and stand down disputes, whether or not the parties agree (subclauses 505(2) and 526(2)). FWA will not have power to arbitrate general protections disputes. However, FWA will be required to express an opinion about the prospects of success of court enforcement in certain circumstances (see clauses 370 and 375) and to issue a certificate, allowing court enforcement to proceed, in relation to a dismissal dispute which is unlikely to be resolved (see clauses 369 and 371). FWA will not have power to arbitrate in providing assistance for the low paid under clause 246. This is different from FWA making a special low-paid workplace determination under Division 2 of Part 2-5.*

2290. *Subclause 595(4) ensures that, when FWA is dealing with any of these disputes, FWA can exercise any of its powers under Subdivision B. For example, FWA could direct a person to attend a conference under clause 592. However, there is an exception for Part 6-2 disputes. The procedure in the modern award, enterprise agreement, workplace determination or contract of employment can limit the powers that FWA can exercise in dealing with the dispute (see subclause 739(3)).*

39. The above sections of the Explanatory Memorandum go into substantial detail regarding the arbitration powers of FWA under various provisions of the Act. Again, if it was intended that dispute settlement procedures would be required to provide for compulsory arbitration then logically such an important issue would have been covered in the above sections of the Explanatory Memorandum:
40. Division 2 of Part 6-2 is explained in the following sections of the Explanatory Memorandum:

“Division 2 – Dealing with disputes

Subdivision A – Model term about dealing with disputes

Clause 737 – Model term about dealing with disputes

2728. This clause requires the regulations to prescribe a model term for dealing with disputes that could be included in an enterprise agreement. Consistent with the requirements of the Bill for dispute settlement terms (see subclause 186(6)), the model term will provide for the binding resolution of disputes.

2729. In order to be approved by FWA, an enterprise agreement must contain a procedure for the settlement of disputes about matters arising under the agreement and in relation to the NES (see subclause 186(6)). Such a term:

- must provide for FWA or another person who is independent of the parties to deal with a dispute; and*
- must provide for representation of employees in the dispute settlement process.*

2730. This requirement means, for example, that while the initial stages of a dispute resolution process may involve the direct participants, such as the manager and the employee (and his or her representative), the final stage of

the process must involve FWA or any independent person or body, such as professional mediator.

2731. Employers and employees (and their bargaining representatives) can refer to the model term for guidance, and may agree to include the term, or part of it, in a proposed enterprise agreement.

Subdivision B – Dealing with disputes

Clause 738 – Application of this Division

2732. This Division applies where a modern award or enterprise agreement includes a term providing a procedure for dealing with disputes.

2733. Modern awards and enterprise agreements must include a term providing a procedure for settling disputes about matters arising under the modern award or enterprise agreement (as the case may be) and in relation to the NES (these requirements are set out in clause 146 for modern awards and in clause 186 for enterprise agreements). A modern award or enterprise agreement may also provide a procedure for settling other disputes at a workplace. This Division will also apply to those matters.

2734. This Division also applies where a contract of employment includes a term providing a procedure for dealing with disputes, but only to the extent that the term relates to either the NES or a safety net contractual entitlement (as defined in clause 12). The Bill does not require contracts of employment to include a term that provides a procedure for dealing with disputes. Employers and employees can choose to include such terms but, despite anything to the contrary in the contract, this Division only applies to the limited extent described in paragraph 738(c), and does not apply to general workplace disputes.

Clause 739 – Disputes dealt with by FWA

2735. This clause sets out what FWA can and cannot do when dealing with disputes under a term of a modern award, enterprise agreement or contract of employment.

- *Subclause 595(1) provides that FWA may only deal with a dispute if it is expressly authorised to do so under the Act, and subclauses 595(2) and (3) set out how FWA may deal with disputes. For the purpose of subclause 595(1), subclause 739(1) expressly authorises FWA to deal with disputes.*

2736. *Where such a term requires or allows FWA to deal with a dispute, it can exercise all of its powers under Subdivision B of Division 3 of Part 5-1 (see subclause 595(4)), unless those powers are limited by the term (subclause 739(3)). FWA has general powers under clause 590 to inform itself as it sees fit, including the power to require parties to attend, conduct a conference and take evidence. Clause 595 provides that FWA can deal with a dispute before it as it considers appropriate, including by mediation, conciliation, making non-binding recommendations and expressing an opinion.*

2737. *Under subclause 739(4) FWA can make a binding decision in relation to a dispute if, in accordance with a term in a modern award, enterprise agreement or contract, the parties have agreed to this, whether the term refers to arbitration, final determination, making an award or order or something similar. For example, a term of an enterprise agreement could authorise FWA to arbitrate or determine (however described) a dispute under that enterprise agreement, resulting in a binding determination.*

- *Subclause 595(3) provides that FWA may only deal with a dispute by arbitration if expressly authorised to do so under the Bill. For the purpose of that provision, subclause 739(4) expressly authorises FWA to deal with a dispute by arbitration.*

2738. *Unless the dispute resolution process term provides otherwise, an arbitrated decision of FWA about a dispute will be appealable in accordance with clause 604. Similarly, if FWA holds a hearing in relation to a matter, the hearing would ordinarily be held in public. This is because all of FWA's powers and procedures under this Bill apply in relation to disputes under this Division unless limited by the parties in the term.*

2739. *Despite anything to the contrary in a modern award, enterprise agreement or contract of employment, FWA cannot make a binding decision that is inconsistent with the parties' rights or obligations under the Bill (including the regulations) or a fair work instrument (such as an enterprise agreement) that applies to them (subclause 739(5)). These rights and obligations can only be finally determined by a court.*

- *For example, FWA could not make a binding decision that would modify the way the NES or a modern award apply in a particular workplace or to determine that requirements of the Bill do not apply.*
- *This maintains the integrity and stability of the safety net, by ensuring that NES or a modern awards cannot be modified other than in accordance with the processes provide in the Bill so that it does not apply differently in relation to particular workplaces or employees.*

2740. *FWA can only deal with a dispute where requested by a party to the dispute. This means that FWA cannot intervene in a dispute without being asked to do so by at least one of the parties (subclause 739(6)).*

2741. *Under subclause 739(2), FWA cannot exercise any of its powers or otherwise consider, review or question whether an employer had reasonable business grounds to refuse a request by an employee for flexible working arrangements (see subclause 65(5)) or extension of unpaid parental leave (see subclause 76(4)).*

2742. *However, if an enterprise agreement provides a right to flexible working arrangements (including by reference to a State law) or a right to request extension of unpaid parental leave that supplements the entitlements under the NES, the dispute settlement procedure in the agreement would apply to this right.*

Clause 740 – Disputes dealt with by persons other than FWA

2743. A term about a procedure to settle a dispute in a modern award, enterprise agreement or contract of employment can confer functions on an independent third party other than FWA to assist the parties with a dispute. Such a person can deal with the dispute by arbitration and make a binding decision where, in accordance with such a term, the parties have agreed to this (subclause 740(3)).

- *Unlike FWA (which can exercise its general powers unless otherwise limited), an independent third party provider can only assist the parties to resolve their dispute in accordance with the powers that are expressly conferred by the term.*

2744. *Despite anything to the contrary in a modern award, enterprise agreement or contract of employment:*

- *under subclause 740(2) an independent third party who deals with a dispute cannot consider, review or question whether an employer had reasonable business grounds to refuse a request by an employee for flexible working arrangements (subclause 65(5)) or extension of unpaid parental leave (subclause 76(4)); and*
- *under subclause 740(4) the person cannot make a binding decision that is inconsistent with the parties' rights or obligations under the Bill (including the regulations) or a fair work instrument (as noted above, these rights and obligations can only be finally determined by a court)."*

41. The above extracts, particularly the emphasised sections, reinforce Ai Group's submission that dispute settlement provisions in enterprise agreements are not required to give FWA or another independent party, compulsory arbitration powers.

Evidence given by the DEEWR to the Senate Inquiry into the *Fair Work Bill*

42. During the Senate Committee Inquiry into the *Fair Work Bill 2008*, the first day of public hearings was devoted to hearing evidence from senior officials of the Department of Education, Employment and Workplace Relations (DEEWR) – the Government Department which drafted the Bill. Hansard shows that such evidence began at 9.06am on 11 December 2009 and concluded at 3.33pm that day.
43. DEEWR’s evidence included the following evidence from Ms Natalie James, Chief Counsel, Workplace Relations Legal Group and Mr David De Silva, Branch Manager, Workplace Relations Legal Group (page 55 and 56 of Hansard):

“Senator FISHER—I had thought we were going to go through chapter by chapter, which we have essentially done, but we have not dealt with chapter 6 ‘Miscellaneous’ in the whole. To what extent do you consider you have addressed incidental issues? That begs the question: why have we got a separate chapter 6 dealing with miscellaneous issues? Would you care to comment in a technical and operational way?”

Ms James—I am happy to briefly go over the contents of that, if you wish. The first part of chapter 6, part 6-1, deals with multiple actions. These provisions are effectively what are commonly described as antidoubledipping provisions. We were talking earlier about the fact that sometimes there are multiple remedies available for the same sort of conduct. As per the current act the bill provides for a set of provisions that effectively ensure you only get one remedy for one set of conduct. That is what part 6-1 is about. That deals with overlap between particularly different remedies available for termination, unfair dismissal and the general protections, for example, and also overlap between

the remedies in this framework and the remedies that may be available in other legislative frameworks, other Commonwealth or state laws.

Part 6-2 contains specific provisions that deal with dispute settlement. These are not the only provisions concerning dispute settlement in the act, but they set out the nature of the different sorts of disputes that can be dealt with by Fair Work Australia. Proposed section 738 refers to disputes under awards, disputes under agreements and also notes that some disputes arising from contracts of employment may also be dealt with under this division. It enables Fair Work Australia to deal with these disputes and talks about how it may deal with these disputes. In particular, it refers to the fact that Fair Work Australia may only arbitrate such disputes where the parties agree and also that any result of such an arbitrated outcome must not be inconsistent with the act or a Fair Work instrument that applies to the parties.

There are provisions in other parts of the legislation such as proposed section 186(6) that set out the requirements for a dispute settlement clause in agreements: all agreements must provide for a dispute settlement process. Proposed section 146 similarly requires awards to have a dispute settlement process. Proposed section 595 deals in more detail with Fair Work Australia's powers when dealing with disputes. It also talks about Fair Work Australia dealing with disputes by mediation or conciliation or by making recommendations or expressing opinions, so they are options available to Fair Work Australia. It also notes that Fair Work Australia may deal with a dispute by arbitration only if it is expressly authorised to do so under a provision of this legislation, which includes by agreement, if that is what occurs in an enterprise agreement.

That is part 6-2.

Senator FISHER—*Why is 6-2 a separate section?*

Ms James—*That is a good question. David.*

Mr de Silva—*It is in a separate section because as we put the bill together there was a question of where it should go. Parts of it could go into the Fair*

Work of Australia bit because a lot of it is done by Fair Work Australia. However, 6-2 also provides for a third party to be an independent DR provider, in which case it could not go into Fair Work Australia—

Senator FISHER—*An independent dispute resolution provider?*

Mr de Silva—*Yes. Basically, you could split it or you could have it all together, and the decision was made to have it all together in one part, which is easier to follow and to understand.*

Ms James—*It easy in 'Miscellaneous' because it does not firmly strictly belong anywhere else; it links in with parts that do belong elsewhere. The provisions about the dispute settlement clause in an agreement are in the agreements part. What these provision are doing, by and large, is setting out some limitations about dispute settlement and also dealing with disputes that might be settled by someone other than Fair Work Australia. They do not belong in Fair Work Australia and neither do they belong in the chapter dealing with terms and conditions of employment, so they are here.*

Senator FISHER—*Okay. Do they largely, in a technical and operational way, replicate or differ from what is in the current act?*

Ms James—*They do differ from what is in the current act. There is, if you like, a default dispute settlement procedure in the event that people do not have a procedure in their workplace agreement. People can put as a procedure pretty much whatever they like in their workplace agreement. In the event that they do not, there is a procedure in the act. That procedure does not allow one party to take another party to a tribunal.*

Senator CAMERON—*This is Work Choices?*

Ms James—*Yes, in the current Workplace Relations Act as amended by the Work Choices amendments. What the two sets of provisions have in common is that there is no automatic compulsory arbitration of disputes. What the current WR Act does not permit which the bill would permit is that one party can take the matter to Fair Work Australia for conciliation or mediation*

irrespective of whether the other party wants to go there or not. I should say that, by and large, the dispute settlement procedures do require an attempt to first deal with the matter at the workplace level. I guess that is what I mean about the linking in of the dispute settlement procedure to the powers of Fair Work Australia. People will agree to what they will agree to in workplace agreements, and where Fair Work Australia comes into the picture will depend on the terms of such a clause. Similarly with awards, it will depend on what the award provision says in relation to the settlement of disputes. In the case of awards, for example, there can be no determined outcome in that context; and there can only be a determined outcome under an agreement if the parties have put that in their clause and agree to that."

(Emphasis added)

44. Accordingly, the evidence given to the Parliament by the Government Department which drafted the legislation is abundantly clear. Parties have the flexibility under enterprise agreements to decide whether or not to give FWA an arbitration role under their dispute settling procedure and, if so, whether they wish arbitration to be limited to circumstances where all parties agree.

Relevant speeches given by the Deputy Prime Minister and Minister for Employment and Workplace Relations

45. Around the time when the Fair Work Bill was being finalised the Hon Julia Gillard MP, Deputy Prime Minister and Minister for Employment and Workplace Relations gave a number of speeches explaining the purpose and key provisions of the Bill.
46. The following section has been extracted from a speech which the Deputy Prime Minister gave to the Australian Labour Law Association's Fourth Biennial Conference on 14 November 2008:

“Disputes under awards, the NES and enterprise agreements

Under the Fair Work Bill, Fair Work Australia will be able to exercise a full suite of alternative dispute resolution powers, such as: calling compulsory conferences of the parties; conciliating; mediating; expressing opinions; informing itself about the circumstances of the dispute and making recommendations.

Importantly, one party will be able to request Fair Work Australia to become involved in this way.

Fair Work Australia will also be able to determine a binding outcome concerning the issues in dispute where the parties agree. Any orders made can't be inconsistent with the NES or awards.”

47. Accordingly, the public statements of the responsible Minister around the time when the Bill was being finalised and introduced into Parliament confirm that the intention of the Government is that FWA only have compulsory arbitration powers under an enterprise agreement where the parties to the agreement choose to give FWA that power.

6. Federal Government’s Fair Work Principles

48. The Fair Work Principles, which form part of the Federal Government’s procurement policy and apply to suppliers to the Federal Government, require that enterprise agreements made on or after 1 January 2010 contain a dispute resolution procedure which, amongst other things, provide that if a dispute is not resolved there is a capacity for an independent third party to settle the dispute via a decision binding on the parties.

49. In his decision, Commissioner Smith identifies that his views on the obligations imposed by s.186(6) are reinforced by the terms of the Fair Work Principles saying:

“[43] Finally, and to add weight to what are essential ingredients, I am further fortified in my conclusion by a document issued by the Department of Education, Employment and Workplace Relations in January 2010 entitled “Fair Work Principles”. In this document there is a review on the subject of dispute resolution procedures. Under the heading Policy Requirement the following is recorded:

“5.2.5 For a procedure to be considered a ‘genuine dispute resolution procedure’ it must include as a minimum:

- The ability for employees to appoint a representative in relation to the dispute;*
- In the first instance procedures to resolve the dispute at the workplace level;*
- If a dispute is not resolved at the workplace level, the capacity for a party to the dispute to refer the matter to an independent third party for mediation or conciliation; and*
- If the dispute is still not resolved, the capacity for an independent third party to settle the dispute via a decision binding on the parties.”*

50. Ai Group does not support the conclusions reached by Commissioner Smith and indeed we would submit that the requirements expressed within the Principles more logically lend themselves to the contrary view in relation to compulsory arbitration.

51. It is submitted that rather than providing an indication of the legislative intent that underpins the *Fair Work Act*, the Principles are intended to operate in addition to legislative requirements.
52. Furthermore, had the Federal Government intended that s.189(6)(a) of the Act require dispute settlement clauses to include compulsory arbitration, then clearly the quoted requirements under the Fair Work Principles are entirely redundant as an enterprise agreement could not be approved unless this requirement was met.
53. In addition, the phrase “*genuine dispute resolution procedure*” (which appears in quotations in Fair Work Principle 5.2.5) is not found anywhere within the *Fair Work Act*. It is erroneous to therefore rely upon this phrase when interpreting the language of the Act including s.186(6).

7. Model Term for Dealing with Disputes for Enterprise Agreements

54. In addition to making reference to the dispute resolution procedures contemplated by the Fair Work Principles, Commissioner Smith also considered the operation of the model dispute resolution procedure which is found in Schedule 6.1 of the *Fair Work Regulations 2009*:

[40] Returning to the consideration by the Bench in Ampol, it noted that there was a model dispute settlement clause contained in the then regulations which was referable to Australian Workplace Agreements.

[41] Again, a clear distinction exists. Regulations under the present Act contain a model dispute settlement provision which is directly referable to agreement making. The model clause contains the following:

- (5) *Fair Work Australia may deal with the dispute in 2 stages:*
- (a) *Fair Work Australia will first attempt to resolve the dispute as it considers appropriate, including by mediation, conciliation, expressing an opinion or making a recommendation; and*
 - (b) *if Fair Work Australia is unable to resolve the dispute at the first stage, Fair Work Australia may then:*
 - (i) *arbitrate the dispute; and*
 - (ii) *make a determination that is binding on the parties.*

[42] *This reinforces, in my view, the construction I prefer as to the meaning and operations of s.186(6). Again, whilst it is not necessary to use the model clause nonetheless, there are, in my view, essential ingredients.”*

55. We submit that the significance placed upon the terms of the model clause is entirely disproportionate to its relevance in reflecting the legislature’s intent with regard to dispute resolution procedures. In this regard we note that when the *Fair Work Act* was passed by Parliament in March 2009, to the best of Ai Group’s knowledge the *Model Term for Dealing with Disputes for Enterprise Agreements* had not been drafted.
56. Additionally, we submit that the parallels Commissioner Smith has sought to draw between the regulations relating to Australian Workplace Agreements (AWAs) made under the WR Act and the effect of the regulations made under the *Fair Work Act* misapprehends the distinctly different status afforded to the respective regulations.

57. The regulations which were considered in respect of AWAs in *Ampol* were relevant to the interpretation of the notion of settlement of disputes because they were deemed to operate if an AWA failed to contain a dispute settlement procedure⁶. In relation to the model dispute resolution schedule which forms part of the *Fair Work Regulations* no such deeming provision operates.
58. We submit accordingly that the provisions of Schedule 6.1 should not provide the same guidance to FWA in relation to dispute settlement procedures within an enterprise agreement as that which was attributed to similar regulations in *Ampol*. Such a submission we believe is made all the more compelling on the basis that the *Fair Work Regulations* do contain particular provisions which are deemed to apply if absent from an enterprise agreement⁷. In contrast, the *Model Term for Dealing with Disputes for Enterprise Agreements* is not deemed to be included if omitted, and parties are free to use or ignore it.

8. Relevant FWA Decisions

59. Since the commencement of the *Fair Work Act*, FWA has approved many hundreds of enterprise agreements. In a substantial number of those agreements, we contend, compulsory arbitration by either FWA or another independent person is not a feature of the dispute settling procedure.
60. At the hearing of this proceeding at first instance⁸ Woolworths Limited, through its representative, sought to draw Commissioner Smith's attention to a number of these agreements including:

- *Big W Store Agreement 2009* [2009] FWAA 1124;

⁶ Pre Workchoices *Workplace Relations Act*; s170VG(3)

⁷ *Fair Work Act 2009*; s202(4) in relation to the model flexibility term & s205(2) in relation to the model consultation term

⁸ AG2009/14435 – Transcript 7 January 2010; At PN86 – PN96

- *Woolworths Limited trading as Big W Discount Department Stores - Northern Region Distribution Centre Enterprise Agreement 2009-2012 [2009] FWAA 793*; and
- *Woolworths Limited Brisbane regional distribution centre maintenance Agreement 2009 [2009] FWA 137*.

61. In responding to this submission, Commissioner Smith questioned whether those agreements had been processed on the papers “*without any discussion with the parties*”⁹, a matter for which Woolworths was not in a position to definitively respond at that time.

62. We submit that regardless of how the enterprise agreements were approved, the statutory criteria remain the same and FWA must be satisfied that each proposed agreement complies with the requirements of the Act including s.186(6). In each of the three cases referred to above different members of FWA found that the absence of compulsory arbitration did not fall foul of section 186(6).

63. Another occasion where this issue has been raised and a view expressed in relation to it is in the matter of *SEMA Group Pty Limited [2009] FWA 1153* which was before Commissioner Larkin. Ai Group’s Mr David Bray represented the company. In that matter, whilst a decision was made to not approve the agreement for different reasons, the Commissioner stated in relation to the question of whether the *Fair Work Act* allowed a dispute settlement procedure to omit the use of compulsory arbitration:

“[25] Previously in this decision I provided a summary of the submission on this point. Mr Bray argued that s.186(6) did not require an arbitral process for dispute resolution procedures in an agreement. My preliminary view, after considering the argument and having regard to other provisions of the FW Act

⁹ AG2009/14435 – Transcript 7 January 2010; At PN97

and the Explanatory Memorandum to the Fair Work Bill 2008, would be that Mr Bray has a strong argument.”

64. The views expressed by Commissioner Larkin, whilst not determinative, align with a significant number of decisions regarding the requirements of section 186(6).

9. The AIRC’s *Ampol* decision

65. As outlined earlier, Commissioner Smith, we submit, has imputed incorrect assumptions into the legislature’s omission of the word “for” in section 186(6) so as to allow departure from the principles articulated in *Ampol*.
66. Further, we submit that Commissioner Smith has misapplied key aspects of the decision in *Ampol* which are relevant.
67. Ai Group contends that the Full Bench decision in *Ampol* continues to be authority for the proposition that enterprise agreements are not required to provide for compulsory arbitration to be approved.
68. In *Ampol* the Full Bench considered the language in other sections of the pre-Workchoices *Workplace Relations Act 1996* (“the WR Act”) to assist in interpreting the provisions of s170LT(8). In particular they identified the terms of s.91 of the WR Act and stated:

“First, we think that the terms used in s.91 support the view that procedures for preventing and settling are not ones that guarantee the preventing or settling of disputes. Section 91 provides:

“In dealing with an industrial dispute, the Commission shall, where it appears practicable and appropriate, encourage the parties to agree on

procedures for preventing and settling, by discussion and agreement, further disputes between the parties or any of them, with a view to the agreed procedures being included in an award.”

We draw attention to the words “by discussion and agreement” which follow the words “for prevention and settling”. Section 91, we think, envisages that a process based solely on discussion and agreement constitutes a procedure for preventing and settling disputes. If the legislature had intended that arbitration should be an indispensable element of such procedures it could have so specified.”

69. Commissioner Smith, in considering the relevance of *Ampol*, identified:

“[33] To begin, there is no directly comparable section in the Act to match s.91 of the pre-workchoices Act.”

70. The omission of such a section from the Act, much like the omission of the word “for” in section 186(6), is not identified conclusively by Commissioner Smith as leading to the irrelevance of *Ampol*, but to the extent that any inference is drawn about the intended meaning of “settle disputes” from the absence of a provision equivalent to s.91 of the WR Act, we say this reasoning is flawed.

71. In much the same way that the Full Bench in *Ampol* considered other sections within the legislation to interpret the correct meaning of section 170LT(8), there are numerous sections in the *Fair Work Act* which support a construction of s.186(6) to not require compulsory arbitration including:

- Section 146;
- Section 273(2);
- Section 595; and

- Sections 738 to 740.

72. Similarly, in much the same way as the Full Bench in *Ampol* highlighted that if the “*legislature had intended that arbitration should be an indispensable element of such procedures it could have so specified*”, under the FW Act this point carries equal weight.

73. Another key element of Commissioner Smith’s reasoning for his departure from the principles in *Ampol* is his assessment that the *Fair Work Act* does not have the possibility of a matter in dispute not settling. Relevantly he states:

“[36] The next matter which was addressed by the bench in Ampol was the possibility of a matter not settling in circumstances where the Commission may not have had the power to arbitrate a matter or the Commission may not have approved of itself exercising such power. No such possibility arises under the current Act.”

(Emphasis added)

74. We respectfully disagree with Commissioner Smith’s analysis of the Act and submit that there are many circumstances where FWA will either not have the power to arbitrate a dispute under an enterprise agreement or alternatively will be capable of refraining from arbitrating should it so choose, including the following two.

75. The first circumstance relates to disputes pertaining to a request for flexible work arrangements or extension of parental leave in accordance with the National Employment Standards. Section 739(2) makes explicit that dealing with a dispute in relation to these matters is beyond FWA’s jurisdiction unless the parties agree.

76. The second situation relates to the discretion presented by s.186(6)(a) which in describing the role provided to FWA contemplates a procedure which “requires or allows FWA, or another person...” (emphasis added) to settle a dispute.
77. We submit that use of the word “allows” is distinct from the term “requires” within s.186(6)(a) and should appropriately be interpreted as providing permission to intervene as opposed to obliging intervention. Accordingly, its consistency with the notions referred to in *Ampol*, relating to the operation of s170LW of the WR Act which provided for intervention by the Commission “if the Commission so approves”, are significant.
78. Such an interpretation of the term “allows” is also consistent with the way in which the word is used in the paragraph immediately following s.186(6)(a) regarding the representation of employees

“186(6) FWA must be satisfied that the agreement includes a term:
(a)
(b) that allows for the representation of employees covered by the agreement for the purpose of that procedure.”

79. Given these factors, Ai Group submits that, as was found in *Ampol*, the phrase “to settle disputes” is incapable of meaning guaranteed settlement as there are a number of circumstances where FWA is precluded from or provided discretion to intervene.
80. The distinctions sought to be drawn by Commissioner Smith between the legislative schema which existed at the time *Ampol* was determined and that which is present within the FW Act are not sustainable.