

# ***Workplace Relations Amendment (Work Choices) Bill 2005***

**Submission to the Senate Employment, Workplace Relations  
and Education References Committee**



**November 2005**

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## 1.0 Introduction

The *Workplace Relations Amendment (Work Choices) Bill 2005* (the “Work Choices Bill”) delivers the framework for far reaching and important structural reform of Australia’s workplace relations system.

The Australian Industry Group (Ai Group) believes that the changes are necessary to align the workplace relations system with the circumstances of modern industry, and that they will boost productivity as a key part of the wider economic reform agenda.

The reasons why workplace relations laws are in need of substantial reform centre around the following issues:

- Australia’s existing overly prescriptive regulatory framework;
- The impacts of globalisation and the rapid rise of China and India;
- Demographic challenges, including Australia’s ageing population and inadequate fertility rate, which require that participation in the workforce be increased;
- Changes taking place within Australian workplaces, including increased diversity and growing demands from employees to accommodate their individual requirements and preferences; and
- Australia’s inadequate productivity performance.

Ai Group has examined the legislation and set out our views in this submission. Whilst supporting the objectives, the direction and most of the provisions of the Bill, Ai Group has proposed some amendments to address various problems which we have identified.

For example, Ai Group is concerned about the substantial additional costs which will be imposed on many employers due to the quantum of sick/carer's leave and annual leave for shift workers contained within the Australian Fair Pay and Conditions Standard. Ai Group is also very concerned about the substantial additional costs which are likely to arise due to the Bill's approach to dealing with the very common circumstance where more than one Australian Pay and Classification Scale (APCS) will apply to the same employee. (The Bill requires that the employer apply the more generous APCS).

The provisions of the Bill relating to enterprise agreement making are very important. Enterprise bargaining has been very beneficial for Australian companies and has led to greater efficiency, better workplace relationships and improved productivity and performance. Undoubtedly enterprise bargaining has contributed to the productivity growth which has been a feature of the Australian economy through much of the past 12 years. For employees, enterprise bargaining has also been very important. It has delivered significant real wage increases – far in excess of inflation.

Unfortunately, despite the indisputable success of enterprise bargaining in raising productivity levels and delivering substantial real wage increases, Australia's enterprise bargaining system is now in need of a major overhaul.

Faced with the refusal of unions to focus on enterprise issues and the unions' pursuit of increasingly costly and damaging bargaining claims, many employers have grown disillusioned with the bargaining process and have stopped seeking to use enterprise agreements as a tool to drive productivity improvements. This in turn has led to enterprise bargaining negotiations in many workplaces focussing exclusively on union claims, to the detriment of the employers concerned.

The Work Choices Bill contains a series of measures which are designed to re-invigorate Australia's workplace agreement making system, including:

- Simplified processes for making workplace agreements;
- The removal of barriers to agreement making;
- Enabling agreements to be entered into for longer periods; and
- Requiring that parties focus upon the needs of the employer and employees in the relevant enterprise when negotiating agreements.

One significant concern that Ai Group has about the workplace agreement provisions of the Bill relates to the High Court's *Electrolux*<sup>1</sup> decision. It is essential that the Bill be amended to include an equivalent provision to s.170LI of the WR Act to preserve the outcome of the *Electrolux* decision in which the High Court found that only matters pertaining to the relationship between a particular employer and its employees are able to be included in claims upon which protected action is taken, thus preventing protected industrial action being taken about political or social matters. Ai Group funded the case to protect the integrity of Australia's enterprise bargaining system and to ensure that:

- Parties are only to take protected action in pursuit of matters which pertain to the employment relationship; and
- Parties are unable to include provisions which do not pertain to the employment relationship in workplace agreements.

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<sup>1</sup> *Electrolux Home Products P/L v Australian Workers Union and Others* [2004] HCA 40, 2 September 2005.

Ai Group welcomes the Government's decision to set out a list of prohibited matters for workplace agreements within the Regulations but it is vital that the general requirements arising from the High Court's *Electrolux* decision continue to apply through the retention of a provision along the lines of s.170LI. No list of prohibited matters could ever be exhaustive in codifying those matters which do not form part of the employment relationship.

This submission does not address all provisions of the Bill but rather those provisions which Ai Group views as particularly important.

Given the terms of reference of the Senate Inquiry, as determined by Parliament, this submission does not deal with the following matters:

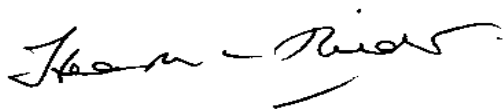
- Secret ballots;
- Suspension / termination of a bargaining period;
- Pattern bargaining;
- Cooling off periods;
- Remedies for unprotected industrial action;
- Removal of section 166A – Restrictions on Certain Actions in Tort, of the *Workplace Relations Act* (“the WR Act”);
- Strike pay;
- Reform of unfair dismissal arrangements;
- Right of entry;
- Award simplification;
- Freedom of association;

- Amendments to section 299 – Offences in Relation to Commission, of the *Workplace Relations Act*; and
- Civil penalties for officers of organisations regarding breaches.

It is essential that the Bill be passed by Parliament and be operational prior to 31 March 2006. On this date hundreds of enterprise agreements in the manufacturing industry expire. The new laws will assist employers and their employees to negotiate agreements which will improve productivity and competitiveness.

Ai Group is one of the largest national industry bodies in Australia representing employers in manufacturing, construction, automotive, printing, information technology, telecommunications, call centres, labour hire, transport and other industries. Ai Group has had a strong and continuous involvement in the workplace relations system at the national, industry and enterprise level for over 135 years.

This submission is made by Ai Group and on behalf of its affiliated organisation, the Engineering Employers' Association, South Australia (EEASA).

A handwritten signature in black ink, appearing to read 'Heather Ridout', with a horizontal line underneath.

Heather Ridout  
CHIEF EXECUTIVE

## 2.0 The Need for Reform

The reforms which will be made through the enactment of the Work Choices Bill are firmly in the National interest (although some amendments to the Bill are needed, as set out in this submission).

Australia's workplace relations system needs to be productive, efficient and flexible. It also, of course, needs to be fair. Fairness though has many different aspects. Minimum wages and conditions need to be fair. At the same time, fairness requires consideration of those employees who risk losing their jobs if companies fail to survive in a fiercely competitive global environment. Fairness also requires that the needs of the unemployed be taken into account. Fairness does not require complexity. In fact fairness is impeded by complexity. Fairness is best promoted by a system which is easily understood so that both employers and employees know what they need to do. Also, fairness is best protected by the preservation of a strong economy and high levels of employment.

Unions and other opponents of reform often argue that the workplace relations reforms implemented over the past decade have led to unfairness in the form of greater income inequality and that further reform will exacerbate this problem. However, ABS statistics released on 4 August 2005 challenge such arguments. The ABS report *Household Income and Income Distribution*, lends strong support to the claim that household income did not become more unequal over the nine years from 1994-05. The report reveals a remarkable stability of measures of inequality over this period. If anything the distribution of income has become less unequal.

The reasons why workplace relations laws are in need of substantial reform centre around the following issues:

1. The existing overly prescriptive regulatory framework;
2. The impacts of globalisation and the rapid rise of China and India;
3. Demographic challenges;
4. Changes taking place in Australian society;
5. Australia's inadequate productivity performance;
6. The need to re-invigorate Australia's enterprise agreement-making system.

## **2.1 The Existing Overly Prescriptive Regulatory Framework**

Australia's existing workplace relations framework is highly complex and riddled with over-prescription. There are six separate workplace relations systems – the federal and five state systems. There are more than 2200 federal awards and further 2000 state awards. In addition to the awards, there is a breathtaking array of intertwined and inconsistent state and federal employment laws. Companies operating across state and territory boundaries need to grapple with:

- The WR Act and Regulations;
- Broad state and territory industrial relations Acts, together with many other specific pieces of legislation dealing with leave and other entitlements;
- Occupational Health and Safety Acts in each state and territory, together with associated regulations, codes of practice and numerous detailed Australian Standards called up in the legislation;
- Workers' compensation legislation in each state and territory;

- Anti-discrimination Acts in every state and territory;
- The Federal *Sex Discrimination Act*, *Racial Discrimination Act* and *Disability Discrimination Act*, plus the *Age Discrimination Act* which was recently enacted despite the fact that age discrimination legislation exists in every state and territory; and
- Training legislation in every state and territory.

The situation would not be quite so bad if the legislation was consistent across the different state and federal jurisdictions but it is not.

Australia needs a simple National workplace relations system which enables companies to work with their employees to implement work arrangements which suit the needs of the both the company and its employees.

## **2.2 The Impacts of Globalisation and the Rapid Rise of China and India**

The rapid industrialisation of China and India presents mammoth challenges for Australian industry. Well over a third of the world's population live in these two countries which are industrialising at a phenomenal rate. Over the past two hundred years many countries have "taken-off" and experienced rapid and sustained economic growth, but never on this scale before. Two giants, both well over 60 times Australia's population are unleashing an economic force that is changing the structure of world production, injecting new sources of demand and challenging the established economic order.

In a few short years, China has moved a very long way down the path of transforming itself into a global manufacturing giant. It currently enjoys huge cost advantages over developed countries and these advantages are likely to remain for many years

to come. China is setting the world price for manufactured goods. Australia must meet this price or our industries will fail, our economy will slow and our choices as a nation will be diminished. Largely as a result of the growth of Chinese manufacturing, some \$6 billion have been wiped off Australia's manufactured export values over the past three years. In addition, imports have taken an increased share of our markets.

The challenge that China represents to Australia's manufacturers is similar to what India represents to Australia's services sector. India is rapidly becoming a global giant in the services sector – particularly in the information and communication technologies (ICT) sector. It is relatively easy to outsource ICT services overseas, far easier than it is for example to establish a manufacturing plant. Massive offshoring of telecommunications services to India has already occurred in other parts of the world. India is not just focusing on low value added products and services. India's success in the telecommunications market has been built on having very good technology and a large supply of well-educated, English speaking workers. Unlike Australia's ageing workforce, the workforce in India is young. The median age of a person in India is 24 years, compared with 36 in Australia. Fifty four per cent of the population in India (ie. 555 million people) are under the age of 22.

It is not all doom and gloom. The industrialisation of China and India present as many opportunities for Australian industry as threats. However, China and India are not hampered by the over-regulation of employment which exists in Australia.

Australia as a medium-sized, open economy is not going to have much influence over the global forces which will play out over the years ahead. Its success, though, will depend on its adaptability and flexibility.

Australia needs a workplace relations system which enables companies to remain highly adaptable and flexible.

## 2.3 Demographic Challenges

In addition to the challenges presented by globalisation, demographic forces will create significant challenges over the years ahead. Australia's population is ageing at a rapid rate. Currently there are about 5 times as many people of traditional working age as there are those over 65. In 40 years time, the Federal Government projects that there will be 40 people over 65 for every 100 people of traditional working age. Unless something very significant is done soon, there will be an enormous burden on the workforce of 2040<sup>2</sup>. The problems associated with Australia's ageing population are compounded by an inadequate fertility rate. To meet these demographic challenges it is essential that we increase the rate of participation of Australians in the workforce.

Workplace relations reform has an important role to play in removing unnecessary labour market rigidities and barriers which discourage participation in the workforce.

## 2.4 Changes Taking Place in Australian Society

The forces of globalisation and demography described above necessitate that further workplace relations reform be implemented. Quite apart from these issues, employees themselves are demanding change. The workplace has become far more diverse and employers face growing pressures to accommodate the requirements and desires of employees. There is pressure on employers to have flexible working conditions to suit individual situations. Women and men with responsibilities to care for young children; people with caring responsibilities towards aged relatives; students of all ages, people wishing to phase into retirement; and persons with disabilities – all have boosted the demand for unorthodox employment arrangements.

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<sup>2</sup> 2002-03 Budget Paper No. 5 – Intergenerational Report – Part II – Australia's Long-term Demographic and Economic Prospects

Australia's existing workplace relations framework is increasingly a barrier inhibiting the variability and adaptability demanded by our workforce and by society more broadly.

## **2.5 Australia's Inadequate Productivity Performance**

A key to Australia's ability to meet the challenges ahead is through greater productivity. Unfortunately, in this regard the recent news is not good and, despite the great strides we have made since the mid-1990s in boosting our productivity, over the past few years these gains seem to have stalled. While economists debate the statistics and what they mean, it is evident that there is growing concern in Australia about our recent sub-standard productivity performance and what should be done to address it.

The productivity outlook is not good and this adds to the case for workplace and other reforms to drive productivity improvements. The solution for Australia is not to tackle the challenges with a low wage strategy. We do not have a comparative advantage in low wage labour. The solution for Australia is to confront the challenges with high productivity.

## **3.0 Preliminary Matters**

*Note: This section of the submission deals with Schedule 1 – Items 1 to 9 and Items 356 to 358 of the Work Choices Bill (pages 4 to 27 and pages 516 to 518) concerning Part I – Preliminary, of the WR Act.*

### **3.1 Objects of the Act**

The objects of the Act, as amended by the Work Choices Bill, are appropriate. The objects continue to emphasise that the primary responsibility for determining matters affecting the employment relationship rests with the employer and employees at the workplace or enterprise level. However, the amended objects also emphasise other important aspects of proposed new workplace relations system such as simplicity, flexibility and economic sustainability.

### **3.2 Exclusion of State and Territory Laws**

Ai Group supports the approach adopted within the Work Choices Bill whereby a predominantly unitary system of workplace relations is created for constitutional corporations, with the WR Act operating to the exclusion of most state workplace relations laws and state awards.

The legislation only allows state laws to operate with regard to particular “non-excluded matters” which are set out in s.7C(3) of the Bill.

Pleasingly, the Bill appears to oust the operation of the Queensland *Industrial Relations Amendment Act 2005* which was enacted in August this year and which prescribes a very extensive and restrictive set of minimum conditions for employees in Queensland covered under state and federal awards and agreements.

In addition to the need for the WR Act to prevail over state laws and state awards, it is vital that federal workplace agreements and federal awards prevail over such laws and awards. This issue is dealt with in s.7D - Awards, Agreements and Commission Orders Prevail Over State and Territory Laws etc, of the Work Choices Bill.

With regard to s.7D of the Bill, Ai Group has the following concerns:

***Concern One: The effect of the Bill on federal award provisions dealing with apprenticeships***

Section 7D(2) of the Work Choices Bill provides that “a term of an award or workplace agreement dealing with any of the following matters has effect subject to a law of a State or Territory dealing with the matter:

- (a) occupational health and safety;
- (b) workers compensation;
- (c) apprenticeship;
- (d) a matter prescribed by the regulations for the purposes of this paragraph”.

Ai Group is concerned that this provision could adversely impact upon federal award provisions dealing with apprenticeships. At the present time, the list of matters set out in (a) to (d) above appears in ss.170LZ and 170VR of the WR Act relating to certified agreements and AWAs respectively, but does not appear in s.152 regarding federal awards. Therefore, at the present time, apprenticeship provisions in federal awards are able to override state training laws, even though apprenticeship provisions in certified agreements and AWAs are not able to.

Apprenticeship provisions have been held by the AIRC to be a form of employment under s.89A(2)(r) of the WR Act<sup>3</sup>. Accordingly, Ai Group assumes that such provisions (other than wage rates which will be incorporated within Australian Pay and Classification Scales<sup>4</sup>) will remain allowable under s.116(l) of the Bill.

The term “apprenticeship”, as used in s.7D(2) of the Bill, is open to different interpretations. Many people associate the term with traditional trade apprenticeships but the term could also be interpreted as referring to “new apprenticeships”.

Section 7D(2) in the Bill, as drafted to include federal awards, will disturb the operation of clauses in federal awards dealing with traditional apprenticeships such as those found in the *Metal, Engineering and Associated Industries Award 1998* and the *Graphic Arts – General Award 2000*. In addition, federal awards which apply to new apprenticeships such as the Technology Cadetship which is recognised within the *Manufacturing and Associated Industries – Skills Development – Wages and Conditions Award 2004*, will be disturbed. All three of these awards contain clauses which state that the award operates to the exclusion of state training laws, to the extent of any inconsistency.

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<sup>3</sup> For example, see SDP Marsh’s decision relating to the simplification of the Metal Industry Award (P9311)

<sup>4</sup> APCSs are dealt with in section 8.1 of this submission

Federal award apprenticeship provisions are beneficial because they enable a Nationally consistent and modern approach to be implemented regarding apprenticeship arrangements in particular industries.

***Concern Two: The lack of clarity concerning the ability of workplace agreements and federal awards to override construction industry long service leave schemes***

CoINVEST – the Construction Industry Portable Long Service Leave Scheme in Victoria – operates in accordance with the *Construction Industry Long Service Leave Act (Victoria) 1997*.

CoINVEST is currently pursuing an aggressive campaign urged on by construction industry unions to force companies in the information and communications technology (ICT) industry and many other industries to register their employees and pay contributions to the scheme. The current level of contributions is 1.5% of gross wages, although this is set to increase in early 2006.

On 6 May 2005, a Full Bench of the Australian Industrial Relations Commission (AIRC) (PR957811) upheld the validity of the long service leave provision contained within Visionstream’s s.170LK certified agreement and held that the legal effect of the provision “*is to render inoperative benefits in the nature of long service leave which might otherwise apply to Visionstream’s employees under State laws.*” The provision states that “*this clause operates to the exclusion of any State law in relation to long service leave or which provides any benefit in the nature of, or in respect of, long service leave*”.

Despite the Full Bench’s decision, CoINVEST is refusing to accept that there is any inconsistency between clauses in workplace agreements and awards which provide long service leave entitlements and the *Construction Industry Long Service Leave Act (Victoria) 1997*. CoINVEST is claiming that there is no inconsistency between, on the one hand, a provision within

a federal agreement or federal award which requires an employer **to provide leave** to an employee and, on the other hand, a state law which requires employers **to contribute to a trust fund**.

It is in the public interest that CoINVEST's arguments, and similar arguments which may be pursued by others, be negated through careful drafting of the workplace reform legislation. It is unreasonable for companies in sectors such as ICT and manufacturing to be forced to contribute to construction industry portable long service leave schemes, the boundaries of which now extend far beyond the construction industry due to the aggressive pursuit of extended coverage by the CFMEU, ETU, AMWU and other unions.

Through its workplace relations reform legislation, the Federal Government has the opportunity to enable companies in all industries to manage their long service leave entitlements at the enterprise level through provisions within workplace agreements. The Government also has the opportunity to protect companies covered under federal long service leave awards (such as those which operate in the metal, automotive, food and graphic arts industries) from the impact of creeping coverage of the construction industry portable long service leave schemes.

Ai Group proposes that a provision be inserted into s.7D of the Bill which would have the effect of ensuring that a federal award or federal workplace agreement which provides for long service leave entitlements to employees, applies to the exclusion of the following Acts (or any Acts which supercede them): the *Construction Industry Long Service Leave Act 1997 (Vic)*; the *Construction Industry Long Service Leave Act 1987 (SA)*; the *Construction Industry Portable Paid Long Service Leave Act 1985 (WA)*; the *Long Service Leave (Building and Construction) Industry Act 1981 (ACT)*; the *Construction Industry (Long Service) Act 1997 (Tas)*; the *Building and Construction Industry Long Service Payments Act 1986 (NSW)*; and the *Building and Construction (Portable Long Service Leave) Act 1991 (Qld)*.

## 4.0 Australian Fair Pay Commission

*Note: This section of the submission deals with Schedule 1 – Item 10 of the Work Choices Bill (pages 27 to 41) concerning the addition of a new Part IA – Australian Fair Pay Commission, to the WR Act.*

The current system of adjusting award wages is not working effectively. The adversarial nature of the *Safety Net Review* proceedings does not promote sound economic decision-making. The proceedings are initiated by a union ambit claim, with employers then typically responding with their own claims. The *Safety Net Review* cases are consistently resulting in wage adjustments far in excess of both inflation and general productivity improvements. In recent years, safety net adjustments have even exceeded average enterprise agreement outcomes. Such outcomes are not in the public interest.

Setting award wage levels is fraught with the potential for unintended consequences. If the level of wage adjustment is too high, many of the intended beneficiaries are left in a worse position and business is burdened with higher costs at a time when they need to be more competitive than ever. There is no doubt that, on average, low paid workers are far more susceptible to periods of unemployment and underemployment than higher paid workers. Low paid workers frequently and involuntarily move between low wage jobs and periods of unemployment.

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

It is essential that any decision to increase wage rates only be made after a rigorous economic analysis. The establishment of an Australian Fair Pay Commission (AFPC) will enable the necessary economic rigour to be applied to wage setting in Australia. The structure and processes of the AFPC, as set out in the Bill, are appropriate, including that:

- The Chair of the AFPC have high level skills and experience in business or economics;
- Commissioners of the AFPC have experience in business, economics, community organisations and/or workplace relations;
- The AFPC be empowered to adjust: basic period rates of pay; the Federal Minimum Wage (FMW); minimum wages for juniors, employees with disabilities and employees to whom training arrangements apply; basic piece rates of pay; and casual loadings;
- The timing and frequency of wage reviews be determined by the AFPC;
- The AFPC conduct its own research and investigations in addition to hearing from relevant parties; and
- The AFPC continually monitoring wage levels and their effects.

Ai Group has one concern about the AFPC's wage setting parameters, as set out in s.7J of the Bill. That is, that the parameters do not refer to the importance of avoiding inflationary pressures. Currently, in performing its wage setting functions, s.90 of the WR Act requires that the AIRC give "special reference to likely effects on the level of employment and on inflation". Ai Group submits that a fifth factor should be added to those which the AFPC is required to have regard to, along the lines of the following: *"(e) the importance of maintaining low inflation"*.

## 5.0 Australian Industrial Relations Commission

*Note: This section of the submission deals with Schedule 1 – Items 11 to 42 and Item 168 of the Work Choices Bill (pages 41 to 57 and page 371) concerning amendments to Part II – Australian Industrial Relations Commission, of the WR Act.*

The AIRC currently has an important role in Australia it is essential that it continue to have an important role in the future. However, the AIRC's role needs to change to fit the needs of the reshaped workplace relations system. The Work Choices Bill substantially reduces the Commission's powers to arbitrate and to impose outcomes on parties at the enterprise level. This is consistent with the objects of the Act which emphasise that the primary responsibility for determining matters affecting the employment relationship rests with the employer and employees at the workplace or enterprise level.

Ai Group is pleased that the Work Choices Bill preserves a very important role for the AIRC in:

- Maintaining awards;
- Dealing with damaging industrial action;
- Overseeing secret ballots;
- Dealing with applications for the revocation or suspension of union entry permits; and
- Dealing with unfair dismissal and unlawful termination applications.

## 6.0 The Employment Advocate

*Note: This section of the submission deals with Schedule 1 - Items 43 to 48 of the Work Choices Bill (pages 57 to 60) concerning amendments to Part IVA – The Employment Advocate, of the WR Act.*

The Work Choices Bill expands the role of the Employment Advocate, particularly with regard to agreement making.

It is logical for all workplace agreements – whether individual or collective, union or non-union – to be lodged with one body. The existing arrangements whereby the responsibilities for approving / certifying agreements are split between the Employment Advocate and the AIRC are unduly complicated and cumbersome.

Ai Group has not identified any concerns with the provisions of the Bill relating to Part IVA – The Employment Advocate.

## 7.0 Workplace Inspectors and Compliance Powers in the Building Industry

*Note: This section of the submission deals with Schedule 1 - Items 49 to 70 of the Work Choices Bill (pages 60 to 64) concerning amendments to Part V – Workplace Inspectors, of the WR Act and the repeal of Part VA – Compliance etc Powers.*

The proposed changes to Part V – Workplace Inspectors, of the WR Act, arising the Work Choices Bill, are largely technical and consequential. Ai Group has not identified any concerns with these provisions of the Bill.

The Work Choices Bill repeals Part VA – Compliance etc Powers, of the WR Act. This Part was incorporated within the Act as a result of the *Workplace Relations Amendment (Codifying Contempt Offences) Act 2004*. It gives the Secretary of the Department of Employment and Workplace Relations the power to compel individuals to provide information, produce documents and to answer questions relating to building industry investigations, and to delegate this power to the Director of the Building Industry Taskforce. The *Building and Construction Industry Improvement Act 2005* contains powers dealing with these matters, therefore, Part VA is no longer necessary.

## 8.0 The Australian Fair Pay and Conditions Standard

*Note: This section of the submission deals with Schedule 1 - Item 71 (sections 89 to 94ZZB) of the Work Choices Bill (pages 65 to 160) concerning the addition of a new Part VA – The Australian Fair Pay and Conditions Standard, to the WR Act.*

Ai Group supports the establishment of an Australian Fair Pay and Conditions Standard (AFPC Standard) to provide a set of minimum employment entitlements for all employees and also to underpin bargaining. However, Ai Group has significant concerns about some aspects of the proposed Standard, as set out below.

### 8.1 Wage Rates, Classifications and Casual Loadings

The Work Choices Bill establishes a system whereby minimum wages and classifications are set and adjusted by the Australian Fair Pay Commission (AFPC), having regard to any relevant recommendations of the Award Review Taskforce. The AFPC has the power to set and adjust:

- “Basic periodic rates of pay” for classifications – which are, in essence, ordinary time rates of pay;
- “Basic piece rates of pay”;
- The Federal Minimum Wage (FMW);

- Minimum wages for juniors, apprentices, trainees, employees with disabilities; and
- Casual loadings.

Under the system which would be established via the Work Choices Bill, each Australian Pay and Classification Scale (APCS) would prescribe:

- The scope of the APCS;
- Basic periodic rates of pay for employees covered by the APCS (and/or basic piece rates of pay);
- Classification descriptions.

An APCS would also be able to prescribe:

- Casual loading/s;
- Whether or not time spent attending off-the-job training is to be paid; and
- Other incidental provisions.

If pre-reform wage instruments (including both federal and state awards) contain rates of pay then from the date that the reforms commence such instruments are deemed to be “preserved APCSs” (s.90ZD).

Where two or more APCSs would otherwise cover an employee, the following rules apply (s.90ZA):

- An APCS establishing rates for school-based apprentices, trainees and employees with disabilities prevails over other

APCSs;

- A new APCS prevails over a preserved APCS;
- A preserved APCS derived from a pre-reform federal wage instrument prevails over a preserved APCS derived from a pre-reform state wage instrument;
- An APCS which is made or adjusted on a later date prevails over one which was made or adjusted on an earlier date;
- Where two or more APCSs are made or adjusted on the same day (which will apply to all preserved APCSs because s.90ZA(3) states that all preserved APCSs are deemed to have been made on the day that the reform commences) the APCS **which is the most generous to the employee is to prevail.**

**Ai Group is strongly opposed to the Bill’s approach of levelling all employees up to the highest rates of pay where award coverage (and hence coverage of APCSs) overlaps. Many businesses (particularly small businesses, those in regional areas and those in award-dependent industries such as hospitality and retail) pay award rates of pay and the Bill could result in very substantial increases in wage costs for a large number of employers.**

There are approximately 2200 federal awards. Therefore, there will be a very large number of “preserved APCSs” arising from such awards. Federal awards (and consequently APCSs) overlap extensively and contain inconsistent wage provisions. Significant overlap in federal award coverage exists due to:

- Overlapping coverage of different unions involved in particular industries (NB. The coverage clauses of a high proportion of federal awards is drawn from the eligibility rules of the union parties to those awards);
- Overlapping coverage between federal industry awards and federal occupational awards (NB. Many industry awards contain classifications and rates of pay for clerical employees, salespersons, storepersons and drivers but federal

awards also exist for these occupations with much higher rates of pay);

- Overlapping coverage between federal enterprise awards (which apply to numerous major Australian companies) and federal industry awards.

Ai Group is a party in its own right to more than 100 awards and has an interest in approximately 500 awards.

The problems associated with overlapping coverage were very apparent to Ai Group when the Victorian common rule award system was being developed and Ai Group's efforts in pressing for the problem to be addressed led to the following relevant outcomes:

- Agreement was reached between the Federal and Victorian Governments to amend s.141 of the WR Act (via the *Workplace Relations Amendment (Uniform System) Act 2003*) to include the following wording:

*“In deciding whether to declare a term of an award to be a common rule under subsection (1) or (2), the Commission must take into account the following:*

- (a) the importance of avoiding overlap of awards and minimising the number of awards applying in relation to particular employers;*
- (b) for a declaration under subsection (1)—whether there are other awards applying to work performed in the industry in relation to which the industrial dispute arose, and if so, the extent to which the first-mentioned award is the most relevant and appropriate award for the work performed in that industry”*

The above legislative provision requires the AIRC, in considering applications for a federal award to be declared a common rule, to ensure that overlapping coverage between different awards is avoided and that employers are bound by the most appropriate federal award rather than one, for example, which a union is seeking to have applied because that award has the most generous wage rates and conditions amongst the various awards with competing coverage.

- The following Principle was included within the Statement of Principles which arose from the AIRC’s *Victorian Common Rule Award Case* (PR950653):

*“Principle 4:*

*Overlapping award coverage (eg. where more than one award applies to the same work) and the application of a multiplicity of awards at a single enterprise may create significant practical problems for employers, employees and their representatives. In deciding whether to declare a term of an award to be a common rule under s.141 of the WR Act the Commission must take into account, among other things, the importance of avoiding overlap of awards and minimising the number of awards applying in relation to particular employers.”*

- Agreement was reached between the employer associations involved in the *Victorian Common Rule Award Case* (NB. Ai Group took the lead amongst the employers involved in the Case) and the Victorian Trades Hall Council on an approach to dealing with overlapping award coverage. It was agreed that the following undertaking would be given by unions when applying to the AIRC to have an award declared to operate on a common rule basis and that such undertaking would be referred to by the AIRC in decisions relating to common rule declarations:

*“It is not the intention of (insert relevant union/s) to seek to retrospectively enforce the common rule declaration in circumstances where an employer has been legitimately and appropriately applying another award which also covers the work performed by the employees. This position is advanced without prejudice to the rights of parties to seek the making of “roping-in” awards, irrespective of the common rule declaration by an employer or any rights under Part IX of the Act”.*

The above undertaking enables an employer to continue to use the federal award it was applying prior to the introduction of the common rule award system and protects the employer from union claims for another more generous award to be applied.

The plastics industry is just one example where significant overlap exists in award coverage. The *Metal, Engineering and Associated Industries Award*, the *Rubber, Plastic and Cablemaking Industry Award* and the *Graphic Arts - General – Award* each apply to the plastics industry. Occupational awards such as the *Storage Services – General – Award* (which applies to warehousing staff) could also arguably apply. In addition, there are enterprise awards which apply in the industry. Similar problems of overlap exist in the food, automotive, telecommunications and numerous other industries.

The Bill’s provisions would disturb the agreed approach which has been implemented to deal with the significant overlap in coverage of Victorian common rule awards (because the levelling up approach in the Bill is totally inconsistent with the undertaking secured from the unions) and the Bill would also cause significant problems in other States given the extent of overlap in federal award coverage.

**Ai Group accepts that the Government has given a public commitment that the reform process will not result in individual employees having their award wages reduced. However, the approach taken in the Bill goes far beyond such commitment and could result in a very large number of employees becoming entitled to have their award wages increased substantially. Such an outcome would be very unfair on employers.**

Ai Group acknowledges that the Government intends to establish an Award Review Taskforce to work through the very complicated task of rationalising award structures and classifications, and that the concerns raised by Ai Group are likely to be considered by such Taskforce. However, the proposed timing of the Taskforce's deliberations and the implementation of the outcomes by the AFPC will be far too slow to protect employers from the consequences described above.

As Ai Group understands the Government's intentions, as set out in the Work Choices information paper released on 9 October 2005, the Award Review Taskforce will carry out two projects:

- ***Project One: Rationalisation of wage and classifications structures and casual loadings***

The Taskforce will examine wage rates and classifications in all federal awards and state awards and make recommendations to the Federal Government by the end of January 2006 on how such structures should be rationalised. The Government will then make a decision on the methodology. Following this, the Taskforce will develop a proposal for the initial rationalisation of classification structures and casual loadings by the end of July 2006, for consideration by the *Australian Fair Pay Commission*.

- **Project Two: Rationalisation of federal awards**

The Taskforce will examine current federal awards and make recommendations to the Government by the end of January 2006 on how the awards should be rationalised on an industry sector basis. The Government will then make a decision on the methodology. Following this, the AIRC will be formally allocated the task of undertaking the award rationalisation project.

**It can be seen from the above that it will be late 2006 at the very earliest before employers could achieve any relief from the effects of the levelling up process prescribed within s.90ZA of the Bill.** That is, relief will only be possible once the Taskforce has developed its recommendations and the AFPC has considered such recommendations and implemented a rationalised system of wages and classifications. Given the huge number of preserved APCs which will result from the existing 2200 federal awards and 2000 state awards, there is significant potential for delays to occur, particularly given the fact that the Taskforce has not yet been established.

**Accordingly, Ai Group strongly submits that the rule in s.170ZA(2)(d)(ii) of the Bill needs be amended along the lines of the following:**

*“Where an employer is bound by and is applying the terms of a pre-reform wage instrument on the reform comparison day, then the terms of the preserved APCs arising from that pre-reform wage instrument shall prevail”.*

The above amended rule should remain subject to the rules in (a), (b) and (c) as set out in the Bill.

The above approach is fair on both employer and employees. It preserves existing wage rates for employees, consistent with the Government's commitment. However, it prevents employers being required to apply vastly different wage and classification structures within their businesses which would be disruptive and very costly for many employers. In effect, it largely preserves a status quo position regarding wage rates and classifications for employers and employees bound by federal awards until such time as a new rationalised wage rates and classification system has been developed by the AFPC, taking into account the recommendations of the Award Review Taskforce.

## 8.2 Maximum Ordinary Hours of Work

The *WorkChoices* document prescribes an average 38 hour week but enables an employer to require an employee to work a reasonable number of additional hours.

Given that the hours of work provisions in the Bill apply to both award and non-award employees, including senior managers and professional staff, Ai Group submits that the following factor needs to be added to those set out in s.91C(5) relating to the requirement to work reasonable additional hours:

“(f) *the employee's compensation*”.

Following the handing down of the AIRC's *Reasonable Hours Decision*, Ai Group entered into negotiations with the ACTU and the Association of Professional Engineers, Scientists and Managers Australia (APESMA) and agreement was reached on the addition of the above factor in reasonable hours clauses in awards applying to professional staff, to reflect the fact that it

is common for professionals and senior staff to be required to work long hours but to receive compensation for such hours in their salary package. Such agreement was endorsed by the AIRC through numerous award variations which reflect the agreement. (For example, see subclause 21.5 in the *Information Technology Industry (Professional Employees) Award*). It is not reasonable for an employee to refuse to work additional hours if he or she has been paid a salary which takes into account the requirement to work those additional hours. The other factors set out in the *Reasonable Hours Decision* and in s.91C(5) of the Bill fail to adequately deal with this issue. The addition of this factor in s.91C(5) is essential to address common working hours and salary arrangements for senior staff but the addition of this factor will not disadvantage lower level staff.

### **8.3 Annual Leave**

Ai Group submits that the following amendments need to be made to the Bill:

- ***Clarification regarding maximum amounts of annual leave***

The Bill needs to clarify that “nominal hours worked”, as defined in s.92A, cannot exceed 38 hours for the purposes of annual leave accruals. “Nominal hours worked” exclude reasonable additional hours but it needs to be very clear that where an employee is required to work more than 38 hours, no more than four weeks of annual leave can accrue (or five weeks for certain continuous shift workers). The approach taken within the Bill of applying a formula to the number of “nominal hours worked” (s.92D) to arrive at the amount of annual leave necessitates this amendment to protect employers. If the Bill permitted the “nominal hours worked” by an employee to be greater than 38 hours, the formula in s.92D of the Bill will result in more (potentially substantially more) than four weeks of annual leave per annum accruing.

- ***Additional leave for seven day shift workers***

The Bill entitles employees who work on shifts which are continuously rostered 24 hours a day for 7 days a week and who regularly work Sundays or holidays to receive an additional week of annual leave.

The Government's decision is disappointing and inexplicable given that an additional week of annual leave for shift workers is not a standard entitlement across all industries, but rather an entitlement which exists only in a minority of industries (eg. it applies in the Metal and Engineering Industry but not in the Graphic Arts Industry). Also, two Full Benches of the AIRC over the past few years have decided that such an entitlement is not appropriate for the call centre industry. (See the *TeleTech, Salesforce and Salmat* case, PR961600 and the *Global Telesales* case, PR931316). Further, on 16 September 2005, the *Contract Call Centre Industry Award* was varied by consent between Ai Group and the ACTU, ASU, NUW and CPSU to remove the entitlement to the extra week of leave for shift workers, given the decision of the Full Bench in the *TeleTech, Salesforce and Salmat* case.

Rather than an additional week of annual leave for shift workers being incorporated within the AFPC Standard, Ai Group submits that this issue would more appropriately be dealt with by adding it to the list of "protected award conditions" in bargaining, as set out in s.101B of the Bill.

If the Government proceeds to include an extra week of leave for shift workers within the AFPC Standard then we strongly submit that the entitlement should not extend beyond that contained within the *Metal, Engineering and Associated Industries Award 1998* ("the Metals Award").

That is, the additional week of leave should only apply to seven day shift workers who are rostered to work regularly on Sundays **and** public holidays (not Sundays **or** holidays as the Bill provides for).

- ***Annual leave accruals during periods of workers compensation***

An amendment needs to be made to the Bill to exclude workers compensation leave from the definition of “paid authorised leave” to ensure that annual leave does not accrue indefinitely during periods of workers’ compensation. It is not uncommon for employees to be absent on workers’ compensation leave for several years and it would be unfair on employers for annual leave to accrue indefinitely during such periods. Awards typically deal with this issue by including a cap on the amount of time that an employee is able to be absent on workers’ compensation leave before annual leave stops accruing. (For example, paragraph 7.1.5(a) of the Metals Award allows an employee to take a total of 152 hours of leave for the purposes of sickness or accident, including both paid sick/carer’s leave and workers’ compensation leave, before annual leave stops accruing).

## **8.4 Personal / Carer’s Leave**

Ai Group is very concerned that the Government has decided to impose significantly more generous personal/carer’s leave entitlements upon employers at a time when many employers are struggling to deal with absenteeism problems and intense competitive and cost pressures.

The paid sick/carer's leave entitlement under many federal and state awards (eg. the federal *Metal, Engineering and Associated Industries Award 1998*, the *Graphic Arts – General Award 2000*, the *NSW Clerical and Administrative Employees (State) Award*) is:

- Five days in the first year of employment; and
- Eight days in second and subsequent years.

The above standard was recently focussed upon by the AIRC during the *Family Provisions Case* (NB. The reformatted Metals Award personal leave clause is annexed to the decision) but the quantum of the sick/carer's leave entitlement was not increased, although access to the entitlement was broadened for caring purposes.

Ai Group submits that the above award standard should be incorporated within the AFPC Standard in lieu of the proposed 10 day per annum entitlement. Alternatively, if the award standard is not adopted, then the standard in Schedule 1A of the WR Act of eight days per annum should be adopted.

Furthermore, Ai Group submits that the following amendments need to be made to the Bill:

- ***Clarification regarding maximum amounts of personal leave***

The Bill needs to clarify that “nominal hours worked”, as defined in s.93A, cannot exceed 38 hours for the purposes of personal leave accruals. “Nominal hours worked” exclude reasonable additional hours but it needs to be very clear that where an employee is required to work more than 38 hours, no more than 10 days per annum of personal/carer's

leave can accrue. The approach taken within the Bill of applying a formula to the number of “nominal hours worked” (s.93F) to arrive at the amount of personal leave necessitates this amendment to protect employers. If the Bill permitted the “nominal hours worked” by an employee to be greater than 38 hours, the formula in s.93F of the Bill will result in more (potentially substantially more) than 10 days per annum of personal leave accruing.

- ***The current payment rule in the Bill is inappropriate***

There is a longstanding and widely implemented principle that employees are not entitled to shift loadings, allowances, weekend penalties, overtime penalties, disability allowances etc during periods of personal/carer’s leave. The rationale for why the courts have adopted this approach is obvious. Employees absent from work on a particular day do not suffer the disabilities and inconveniences associated with working nights, weekends, overtime, in confined spaces etc on that day and therefore should not be entitled to compensation associated with such disabilities. (See the decision of the High Court of Australia in *Graham v Baker*, 106 CLR 340 (at p.346). Dixon CJ, Kitto J and Taylor J said “wages’ are payable to an employee who, by reason of illness, is absent from work, the amounts which he receives during the period of his absence are his ordinary wages and not something in addition thereto or of any additional character”).

Ai Group opposes the payment rule in s.93G of the Bill which would require an employer to pay an employee on paid personal/carer’s leave “the amount which the employee would reasonably have expected to be paid by the employer if the employee had worked during that period”. The payment rule for personal/carer’s leave should be similar to the payment rule for annual leave, as set out in s.92G of the Bill. That is, an employee on personal/carer’s leave should be paid “at a rate which is no less than the employee’s basic periodic rate of pay”.

## 8.5 Compassionate Leave

Ai Group is concerned that the Government has decided to extend the concept of bereavement leave, which is a standard entitlement within federal awards, into one of compassionate leave, which is not a common award entitlement in the private sector.

Also, for the reasons set out above regarding personal/carer's leave, Ai Group opposes the payment rule in s.93S of the Bill which would require an employer to pay an employee on compassionate leave *"the amount which the employee would reasonably have expected to be paid by the employer if the employee had worked during that period"*. The payment rule for compassionate leave should be similar to the payment rule for annual leave, as set out in s.92G of the Bill. That is, an employee on compassionate leave should be paid *"at a rate which is no less than the employee's basic periodic rate of pay"*.

## 8.6 Parental Leave

Ai Group has identified one significant concern about the parental leave provisions of the Work Choices Bill, as set out below.

The existing federal award test case standard for parental leave requires that where an employee is pregnant and where, in the opinion of a registered medical practitioner, illness or risks arising from the pregnancy or hazards connected with the work make it inadvisable for the employee to continue in her present job, the employee is to be transferred to a safe job **if the employer deems it practicable**. If transfer to a safe job is not deemed practicable by the employer, the standard award clause enables the employee to elect, or the employer to require, the employee to commence **unpaid** parental leave.

Section 94F of the Bill provides a far more generous entitlement to employees than the standard award entitlement by requiring that, if the employer does not deem it practicable to transfer a pregnant employee to a safe job then the employee is entitled to commence parental leave immediately and be **paid** *“the amount which the employee would reasonably have expected to be paid by the employer if the employee had worked during that period”* until the birth of the child.

This provision is likely to operate unfairly for employers in the lead, chemical, manufacturing, construction, mining and other industries where it will often not be feasible to transfer a pregnant employee to a safe job due to the unavailability of meaningful safe work which the employee could perform.

In general, employment in the industries cited above is male-dominated and many progressive employers in these industries are implementing programs to increase the number of females employed. The paid leave entitlement in s.94 of the Bill would provide a significant disincentive for employers in hazardous industries to employ females.

Some manufacturers in the lead industry employ predominantly female process workers and the Bill is likely to operate very unfairly for such companies.

The Bill needs to be amended to remove the paid leave entitlement in s.94.

## 9.0 Workplace Agreements

*Note: This section of the submission deals with Schedule 1 – Item 71 (sections 95 to 105K and section 168) of the Work Choices Bill (pages 160 to 209 and page 371) concerning the addition of a new Part VB – Workplace Agreements, to the WR Act and the repeal of Part VIB – Certified Agreements, Part VID – Australian Workplace Agreements (AWAs) and Part VIE – No-Disadvantage Test.*

Enterprise bargaining has been extremely important for Australian companies and has led to greater efficiency, better workplace relationships and improved productivity and performance. The enterprise focus has assisted companies to transform and effectively compete in global markets. There has been a significant amount of change for companies to contend with as businesses have reshaped, downsized and restructured so as to survive the rigors of competition. The process has been essential although in some cases difficult. The overall outcome, however, has been greater efficiency, better workplaces and improved productivity and performance. Undoubtedly enterprise bargaining has contributed to the productivity growth which has been a feature of the Australian economy through much of the past 12 years.

For employees, enterprise bargaining has also been very important. It has delivered significant real wage increases – far in excess of inflation.

Unfortunately, despite the indisputable success of enterprise bargaining in raising productivity levels and delivering substantial real wage increases, Australia's enterprise bargaining system is now in need of a major overhaul.

Faced with the refusal of unions to focus on enterprise issues and the unions' pursuit of increasingly costly and damaging bargaining claims, many employers have grown disillusioned with the bargaining process and have stopped seeking to use enterprise agreements as a tool to drive productivity improvements. This in turn has led to enterprise bargaining negotiations in many workplaces focussing exclusively on union claims, to the detriment of the employers concerned.

In mid-2005, Ai Group conducted a survey about workplace relations reform. More than 700 companies responded. The results highlight the need for change. 68 percent of employers said that the existing workplace relations system had a neutral impact on their ability improve productivity. 13 percent said that the system had a negative impact. Only 19 percent said that the existing system had a positive impact on their ability to improve productivity. The survey highlights that changes need to be made to the workplace relations system to restore the role of enterprise bargaining as a significant driver of productivity improvements.

The Work Choices Bill contains a series of measures which are likely to re-invigorate Australia's workplace agreement making system, including:

- Simplified processes for making workplace agreements;
- The removal of barriers to agreement making;
- Enabling agreements to be entered into for longer periods; and

- Requiring that parties focus upon the needs of the employer and employees in the relevant enterprise when negotiating agreements.

Ai Group supports the content of Part IV – Workplace Agreements, of the Bill, with the following amendments:

- ***Division 2 – Types of Workplace Agreements***

- The definition of a “multiple-business agreement” in s.96E of the Bill should not include agreements covering one or more parts of single businesses carried on by one employer. Such agreements should not be subject to unnecessary restrictions because they apply only to one employer. On this point, the Bill is consistent with the current WR Act but should still be amended.

- ***Division 5 – Lodgment***

- Section 99 of the Bill requires that agreements be lodged with the Employment Advocate within 14 days of approval by the employees. A maximum penalty of 30 penalty units (\$3,300) applies for non-compliance. Under the WR Act, agreements are generally required to be lodged within 21 days but the AIRC has the power under s.111(1)(r) to extend this period, and commonly does. The most common cause of delays in filing certified agreements is the time that unions take to approve agreements through their Governing Councils. Some agreements have a large number of union parties and it would be virtually impossible to meet the 14 day requirement. Ai Group submits that:

- The Employment Advocate should have the power to extend the 14 day period in appropriate circumstances.

- There should be no penalty for late lodgment.
  - There should be no penalty for failing to lodge an agreement which has been approved. From time to time circumstances change after an agreement has been approved by employees and prior to lodgment. All parties may wish to amend the agreement and re-submit it to the employees for approval. It is inappropriate for parties in such circumstances to be in breach of the Act and to face a penalty.
  - Parties should be able to make minor amendments to an agreement after initial approval and prior to lodgment (eg. correction of typographic and/or formatting errors) in appropriate circumstances without being in breach of the Act. Currently, the AIRC adopts a practical approach to this issue and the Employment Advocate should be permitted to continue such practical approach.
- Section 99D requires that an employer ensure that a copy of the receipt issued by the Employment Advocate when an agreement is lodged be given to every employee covered by the agreement within 21 days. A penalty of 30 penalty units (\$3,300) applies for non-compliance. The requirement to provide a copy of the receipt to employees is administratively burdensome and unnecessary. For example, it may be difficult for employers to provide copies of the receipt to employees on leave or workers' compensation. The Bill should simply require that an employer take reasonable steps to inform employees that the agreement has been lodged.

- **Division 7 – Content of Workplace Agreements**

- Ai Group is pleased that the Government has accepted the submissions which Ai Group has made for the past five years and has decided that workplace agreements will be permitted to continue for up to five years. This is consistent with developments in the USA where five year agreements are now very common even though three years was the most common term in that country several years ago<sup>5</sup>.

However, Ai Group is very concerned that the Bill reduces the maximum term for union greenfields agreements from three years to one year. Such agreements are used most commonly in the construction sector. This would expose companies to protected industrial action during the period of construction of any significant project, if a greenfields agreement is used. **Union greenfields agreements should have a maximum term of five years.**

- Section 101C enables companies to incorporate the terms of a federal award or prior federal workplace agreement into a new workplace agreement only if such industrial instrument regulated the employment of the employees to be covered under the workplace agreement immediately prior to the agreement coming into force. Whilst this provision provides sufficient flexibility for the first round of agreements under the Work Choices legislation, it would appear to prevent second and subsequent agreements referring to the terms of awards. This is an unnecessary restriction on the content of agreements and would result in second and subsequent workplace agreements under the Work Choices legislation being far more detailed than would otherwise be necessary. It would also expose companies in some unionised workplaces to a potential loss of flexibility and/or increased costs in areas that are settled and would not have otherwise been raised during the agreement negotiations.

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<sup>5</sup> In the US, agreements of even longer than five years are permitted. Lucent Technologies recently reached agreement with several unions on an employment agreement which continues for seven years and seven months. 10 year agreements in the US are not unheard of.

- Ai Group welcomes the Government's decision to set out a list of prohibited matters for workplace agreements in the Regulations. However, it is vital that the general requirements arising from the High Court's *Electrolux* decision continue to apply. That is:
  - Parties should be unable to take protected industrial action in pursuit of matters which do not pertain to the employment relationship; and
  - Matters which do not pertain to the employment relationship should not be able to be included in workplace agreements.

**The inclusion of a provision along the lines of s.170LI of the WR Act in the Work Choices Bill is essential. The list set out in the Work Choices information paper released by the Government in October is not exhaustive and does not deal with a large number of claims made by unions in recent years which do not pertain to the employment relationship (eg. payroll deduction of union dues, claims to limit salaries of company executives, claims for companies to contribute to union training funds, claims for companies to only use Australian-made supplies, and numerous others). Indeed it would be impossible to draft a definitive list of all matters which do not pertain to the employment relationship.**

- In the *WorkChoices* document released in October 2005 it is stated that clauses which restrict “the use of independent contractors or on-hire arrangements”<sup>6</sup> will be prohibited Section 4(2) of the Bill confines the term “independent contractor” to a natural person. Such a restriction is too narrow for the purposes of prohibited content in workplace agreements. The clauses typically pursued by unions, which restrict the engagement of contractors, apply to independent contractors who are natural persons, as well as to contracting firms. Consistent with the broader definition of “independent contractor” which applies under the freedom of association provisions of the Bill, such broader definition should apply for the purposes of prohibited content.

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<sup>6</sup> *WorkChoices a New Workplace Relations System*, October 2005, p.23.

## 10.0 Industrial Action

*Note: This section of the submission deals with Schedule 1 – Item 71 (sections 106 to 114B) and Item 193 of the Work Choices Bill (pages 209 to 282) concerning the addition of a new Part VC – Industrial Action, to the WR Act and the repeal of Part VIIIA – Payments in Relation to Periods of Industrial Action.*

Much of the content of Part VC – Industrial Action, of the Bill relates to matters which Parliament has decided will not form part of the Inquiry.

With regard to the matters within the terms of reference of the Inquiry, Ai Group supports the content of Part VC of the Bill but proposes the following amendments:

- Section 108F(6) of the Bill should be amended to require a high degree of specificity regarding notices of protected action. This section of the Bill simply provides that a notice of protected industrial action “*must state the nature of the intended action and the day when it will begin*”.

As highlighted by the Full Federal Court in the *Davids Distribution* case,<sup>7</sup> protected action notices are designed to ensure that the party to whom protected industrial action is directed is “able to take appropriate defensive action”. S.108F of the Bill should be amended to clarify that notices of protected action are required to identify:

- The specific date and time when industrial action will commence, and industrial action should only be protected if it actually commences at that specified time;
- That the use of vague terminology such as “rolling stoppages” does not meet the requirements of the legislation;
- The intended duration of the industrial action; and
- The specific nature of the industrial action (eg. a strike, an overtime ban etc).

There is a great deal of inconsistency amongst Federal Court and AIRC decisions regarding the degree of specificity required in protected action notices<sup>8</sup>. The scope for inconsistency would be substantially reduced if the above amendments were made to the Act, which would make it clear that a high degree of specificity is required.

The decision of SDP Marsh of the AIRC in *Air International Interior Systems v AFMEPKIU*<sup>9</sup> highlights why the current provisions are open to abuse by unions seeking to use vague terms such as “rolling stoppages” to avoid specifying the intended time when industrial action will commence.

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<sup>7</sup> *Davids Distribution Pty Ltd v NUW* [1999] FCA 1108

<sup>8</sup> For example, the following decisions deal with this issue: *Davids Distribution Pty Ltd v NUW* [1999] FCA 1108, *PWB Anchor Ltd v AFMEPKIU* [2000] FCA 1482, *PWB Anchor Pty Ltd v AFMEPKIU* (No 2) [2000] FCA 1491, *Adelaide Brighton Cement v AWU*, [2002] FCA 601, and *Air International Interior Systems v AFMEPKIU*, 6 September 2004, PR951697.

<sup>9</sup> PR951697, 6 September 2004,

- Part VC of the Bill should be amended to prevent coercion where there are inappropriate hidden interests during bargaining.

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

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

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

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

To address such inappropriate behaviour, a provision along the lines of the following should be incorporated within the Bill, firstly, as a precondition for the taking of industrial action and, secondly, as a ground for suspension or termination of the bargaining period:

*“An organisation of employees is taken to have not “genuinely tried to reach an agreement” with the employer unless it has disclosed to the employer and to the employees who would be bound by the proposed agreement, in writing, any direct or indirect financial benefit that the organisation may derive from any term sought in the proposed agreement.*

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

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

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

## 11.0 Awards

*Note: This section of the submission deals with Schedule 1 – Item 71 (sections 115 to 121) of the Work Choices Bill (pages 282 to 317) concerning the addition of a new Part VI – Awards, to the WR Act.*

The new objects in Part VI – Awards, of the Work Choices Bill emphasise that importance of Australia’s award system being simplified and rationalised. Ai Group supports these objects. The idea that the existing 2200 federal awards are needed to preserve a fair safety net is nonsense.

While award simplification has been useful in updating the content of existing awards, little had been done to date on rationalising the coverage of different awards. The coverage of a high proportion of industry awards still reflect the eligibility rules of former unions which had long since amalgamated into larger organisations.

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

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

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

Ai Group supports the reform approach taken within Part VI – Awards, of the Work Choices Bill but proposes the following amendments:

- Section 116(1)(e) of the Bill should be drafted so as not to preclude the current common award provisions that allow for the substitution of metropolitan public holidays with equivalent regional holidays. (For example, the substitution of Bendigo Cup Day for Melbourne Cup Day which is addressed in paragraph 7.5.1(b) of the Metals Award and in numerous other awards. The relevant public holiday is described as “Melbourne Cup Day or a local equivalent”).
- Section 4(2) of the Bill confines the term “independent contractor” to a natural person. Such a restriction is too narrow for the purposes of 116B(g). The award clauses typically pursued by unions which restrict the engagement of

contractors apply to independent contractors who are natural persons, as well as to contracting firms. Consistent with the broader definition of “independent contractor” which applies under the freedom of association provisions of the Bill, such broader definition should apply for the purposes of s.116B(g).

- It is important that s.116H(4) not oust the operation of facilitative provisions which allow agreement to be reached with the majority of employees and then for the minority of employees to be required to adhere to the agreed arrangement. Such provisions are very common in respect of the implementation of 12 hour shifts and other hours of work arrangements. (For example, see paragraph 6.1.4(c) of the Metals Award and 22.7.7 of the *Telecommunications Services Industry Award 2002*). Employers need to be able to implement consistent shift arrangements across their businesses where processes (eg. production lines) require such consistency. 116H(3) and (4) should be amended along the lines of the following:

*“(3) Award facilitative provisions which only provide for agreement to be reached with the majority of employees shall have effect so that agreement can also be reached between the employer and an individual employee. Where an agreement is reached by the majority of employees it may be applied to all the employees in the workplace or section/s to which the agreement applies. This does not in any way restrict the application of an individual agreement”.*

*(4) A facilitative provision may only operate in respect of an allowable award matter or a preserved award term. A facilitative provision is of no effect to the extent that it does not comply with this provision.”*

## 12.0 Transmission of Business Rules

*Note: This section of the submission deals with Schedule 1 – Item 71 (sections 122 to 170BI) of the Work Choices Bill (pages 317 to 341) concerning the addition of a new Part VIAA – Transmission of Business Rules, to the WR Act.*

Transmission of business applies where all or part of a business moves from one entity (the transmitter) to another (the transmittee). It can have significant legal, industrial and commercial implications.

Transmission of business is a longstanding feature of all market economies. However, it has assumed a special significance in Australia over recent years as a consequence of a massive restructuring of the private sector and the corporatisation, privatisation, outsourcing and mainstreaming of all or part of the activities of governmental departments, statutory corporations and public utilities.

Most Australian businesses are restructured or rearranged in entirely good faith to remain competitive, and with the intention of providing ongoing employment for employees who may otherwise become redundant.

Globalisation has also meant that businesses do not need to limit their restructuring within national borders. Firms based in Australia can outsource or transmit part of their business overseas. A good example is the rapidly expanding call centre sector where Australian firms have the option of outsourcing their call centre operations to foreign locations such as India,

Korea, South East Asia, North America and parts of Europe, thereby using local workers with English language skills to service Australian customers. Capital and jobs are fluid, and do not need to be invested, created or maintained in Australia.

This begs the immediate question of the wisdom of any legal regime which places unfair and unwieldy restrictions upon the ability of firms in Australia to outsource or transmit their businesses (or parts of them) in order to remain globally competitive. Ultimately, there is a risk that investment and jobs will move off-shore in the event that the legislative framework imposes illogical and inequitable outcomes upon the ability of employers in Australia to manage their businesses in the context of transmission of business.

The transmission of business rules in the Work Choices Bill limit the circumstances where awards and agreements applicable to a transmitter become binding upon a transmittee, thus providing more flexibility for a transmittee to implement employment arrangements appropriate for its business. The Bill provides that:

- If no employee of the first employer accepts employment with the second employer then the awards and agreement/s binding upon the first employer will not transfer to the second employer;
- If any employee/s of the first employer accept employment with the second employer then the award/s and agreement/s of the first employer transmit to the second employer but:
  - The award/s and agreement/s only apply to the employees who transfer to the new business; and
  - They apply for a maximum period of 12 months.

Ai Group has one concern about the provisions of Part VIAA of the Bill. Section 129 requires an employer who is the successor, transmittee or assignee of the whole or part of a business to give a formal notice to an employee transferring employment to the new employer, setting out information relating to the terms and conditions of employment of the transferring employee if an AWA, collective agreement or award applies.

Section 129A of the Bill obliges an employer to file a copy of a notice given pursuant to s.129 of the Bill with the Employment Advocate.

The requirement to give this notice to employees and to file it with the Employment Advocate is not necessary in view of the common law and statutory obligations applying to the new employer. The requirement is an unnecessary additional regulation upon an employer.

## 13.0 Minimum Entitlements of Employees

*Note: This section of the submission deals with Schedule 1 – Item 72 of the Work Choices Bill (pages 341 to 349, plus pages 368 to 371) concerning amendments to Part VIA – Minimum Entitlements of Employees, Division 1 – Entitlement to Meal Breaks, Division 2 – Equal Remuneration for Work of Equal Value, Division 4 – Orders and Proceedings and Division 5 – Parental Leave, of the WR Act and the repeal of Schedule 14 – Parental Leave.*

Most awards (other than awards applying to professional staff) contain meal break provisions. The meal break provision in the *Metal, Engineering and Associated Industries Award* (clause 6.3) is relatively standard and provides that:

- an employee must not be required to work for more than five hours without a break for a meal; and
- by agreement between an employer and the employees, the five hour period can be extended to six hours.

Award-free staff and award-covered professional staff do not typically have designated meal breaks. These issues are usually left to be resolved at individual enterprises although, of course, OHS laws operate to ensure that employees do not work for unsafe periods without a break. In non-award areas it is very common for an employee to work for more than five hours before a meal break is taken.

Section 170AA – Meal Breaks, in the Work Choices Bill provides that an employer (not covered by an award or workplace agreement) must not require an employee to work for more than five hours without a meal break. This provision is unduly inflexible and should be removed from the Bill. It fails to take account of common work patterns for award-free staff which involve work periods of more than five hours.

Apart from the meal break issue, Ai Group has not identified any concerns with the provisions of Divisions 1, 2, 4 and 5 of Part VIA of the Bill.

## 14.0 Termination of Employment

*Note: This section of the submission deals with Schedule 1 – Items 81 to 166 of the Work Choices Bill (pages 349 to 368) concerning amendments to Part VIA – Minimum Entitlements of Employees, Division 3 – Termination of Employment, of the WR Act.*

Parliament has decided that the unfair dismissal provisions of the Work Choices Bill will not form part of the Inquiry. Accordingly, Ai Group makes no submissions on these provisions.

Ai Group supports the provisions of the Bill relating to the unlawful termination sections of the WR Act.

## 15.0 Dispute Resolution Processes

*Note: This section of the submission deals with Schedule 1 – Item 168 of the Work Choices Bill (pages 371 to 385) concerning the addition of a new Part VIIA – Dispute Resolution Processes, to the WR Act.*

Under the provisions of the Bill, the AIRC's powers in relation to the settlement of disputes would change substantially. The AIRC would not have the power to arbitrate to settle a dispute unless all parties involved in the dispute agreed.

If a dispute settling procedure is not included in a workplace agreement, the model process referred to in Part VIIA of the Bill would be deemed to apply (s.101A). Also, the model process would apply as a term of all federal awards (s.116A). Under the model process, dispute resolution commences at the workplace level and then, if unresolved, proceeds to Alternative Dispute Resolution (ADR). The parties would be able to choose between seeking the assistance of the AIRC or referring the matter to a private ADR provider.

Ai Group supports these sections of the Bill.

## 16.0 Compliance

Note: This section of the submission deals with:

- *Schedule 1 – Items 169 to 193 of the Work Choices Bill (pages 385 to 394) concerning amendments to Part VIII - Compliance, to the WR Act and the repeal of Part VIIIA – Payments in Relation to Periods of Industrial Action.*
- *Schedule 1 – Items 194 to 205 of the Work Choices Bill (pages 448 to 451) concerning amendments to Part XI – Offences, of the WR Act.*
- *Schedule 1 – Items 205 to 207 of the Work Choices Bill (page 451) concerning amendments to Part XII – Costs, of the WR Act.*
- *Schedule 1 – Items 223 to 239 of the Work Choices Bill (pages 457 to 460) concerning amendments to Part XIV – Jurisdiction of the Federal Court and Federal Magistrates Court, of the WR Act.*

Parliament has decided that much of the Bill's content pertaining to compliance and related matters will not form part of the Inquiry.

As regards compliance generally, Ai Group welcomes any expansion of the jurisdiction of the Federal Magistrates Court as a step towards reducing the load of the Federal Court of Australia and thus providing cheaper and more convenient remedies to parties.

Ai Group welcomes the retention of s.347 - Costs Only Where Proceedings Instituted Vexatiously etc, of the WR Act in largely similar terms in the Bill. Over the years, Ai Group has pursued and funded many major High Court and Federal Court cases relating to workplace relations matters of great importance. Its ability to do so is significantly assisted by s.347 which has enabled Ai Group to maintain some control of the costs incurred in proceedings such as the *Electrolux* and *Emwest* cases.

## 17.0 Right of Entry

*Note: This section of the submission deals with Schedule 1 – Item 193 (sections 197 to 238) of the Work Choices Bill (pages 394 to 422) concerning the addition of a new Part IX – Right of Entry, to the WR Act and the repeal of the existing Part IX.*

Parliament has decided that the right of entry provisions of the Work Choices Bill will not form part of the Inquiry. Accordingly, Ai Group makes no submissions on these provisions.

## 18.0 Freedom of Association

*Note: This section of the submission deals with Schedule 1 – Item 193 (sections 239 to 274) of the Work Choices Bill (pages 423 to 448) concerning the addition of a new Part XA – Freedom of Association, to the WR Act and the repeal of the existing Part XA.*

Parliament has decided that the freedom of association provisions of the Work Choices Bill will not form part of the Inquiry. Accordingly, Ai Group makes no submissions on these provisions.

## 19.0 Registration and Accountability of Organisations

*Note: This section of the submission deals with Schedule 1 – Items 265 to 354 of the Work Choices Bill (pages 486 to 516) concerning amendments to Schedule 1B – Registration and Accountability of Organisations, of the WR Act and the repeal of Schedule 1A.*

Ai Group strongly supports the retention of the current form of registration of employer and employee organisations in as near a form to the current form as is possible, given the new constitutional underpinning of the legislation.

The current system of registration of representative organisations operates extremely well in allowing large groups of employers and employees with respective common interests to pursue such interests in an efficient and practical manner. It also encourages accountability by representative groups in the manner in which industrial interests are pursued and it allows large groups of individual employers and employees to speak with one voice on behalf of their members in industrial matters. One of the enduring successes of the Australian workplace relations system has been the system of registration of representative bodies.

The High Court of Australia accepted the constitutionality of this system in the case of the *Jumbunna Coal Mine and the Victorian Coal Miners' Association*, 1908 6 CLR 309 based on the practical need for such a system, and the reasons set out in that judgment apply just as much today as they did when the decision was originally made.

## 20.0 Transitional Arrangements for Parties Bound by Federal Awards

*Note: This section of the submission deals with Schedule 1 – Item 359 of the Work Choices Bill (pages 518 to 583) concerning the addition of a new Schedule 13 – Transitional Arrangements for Parties Bound by Federal Awards, to the Workplace Relations Act.*

Ai Group recognises the technical difficulties inherent in the scope of amendments addressed by the Bill and is of the view that the scheme which has been adopted to deal with unincorporated bodies covered by federal awards is fair and practical given all considerations.

## 21.0 Transitional Arrangements for Existing Pre-reform Federal Agreements etc

*Note: This section of the submission deals with Schedule 1 – Item 360 of the Work Choices Bill (pages 583 to 599) concerning the addition of a new Schedule 14 – Transitional Arrangements for Existing Pre-reform Federal Agreements etc, to the WR Act.*

Ai Group is of the view that the provisions of the Bill which set out the transitional arrangements for existing pre-reform federal agreements etc are fair and practical.

## 22.0 Transitional Treatment of State Employment Agreements and State Awards

*Note: This section of the submission deals with Schedule 1 – Item 360 of the Work Choices Bill (pages 599 to 631) concerning the addition of a new Schedule 15 – Transitional Treatment of State Employment Agreements and State Awards, to the WR Act.*

Ai Group acknowledges the technical difficulties involved in the changes sought to be achieved in this part of the legislation and confirms that it believes that the scheme adopted to transfer qualifying employers from relevant state systems to the federal system is a fair and practical system.

Ai Group does note, however, that there appears to be omissions from the Bill as compared with the schemes set out in the document issued by the Government in early October and titled “*WorkChoices A New Workplace Relations System*” .

On page 58 of the *WorkChoices* document, dealing with the end of the federal transitional period of a former state award, the statement is made:

*“ if the parties have not made a new federal agreement during this period, they will move to the appropriate federal award for their industry. The Award Review Taskforce will make recommendations on the most appropriate federal award for state employees consistent with the overriding requirement that benefits will not be cut. The AIRC will be tasked with determining the most appropriate federal award having regard to the Taskforce’s recommendations.”*

Ai Group has been unable to find these provisions in the Bill and there appears to be a hiatus as to the industrial coverage of parties covered by notional agreements preserving state awards at the expiration of the transitional period (see pages 614 to 631 of the Bill).

It may be that it is intended to deal with these matters by regulation but Ai Group submits that it is matter that should be dealt within the body of the legislation rather than by regulation.

There also appears to be a lack of prescription relating to the post-transitional position of parties covered by preserved state agreements and the duration of the transitional period relating to those agreements (see pages 600 to 614 of the Bill). Once again, Ai Group submits that these are matters that should not be dealt with by regulation but should be covered in the body of the legislation.

## **23.0 School Based Apprentices and School Based Trainees**

*Note: This section of the submission deals with Schedule 3 – School Based Apprentices and Trainees, of the Work Choices Bill (pages 666 to 673) concerning the addition of a new Part XVII – School Based Apprentices and Trainees, to the WR Act.*

Ai Group supports the provisions of the Bill, as set out in Schedule 3, concerning school based apprentices and school based trainees.

## **24.0 Renumbering the Workplace Relations Act 1996**

*Note: This section of the submission deals with Schedule 5 – Renumbering the WR Act 1996 (pages 685 to 697).*

The renumbering of the WR Act would be very beneficial. Given the numerous amendments made to the Act over the years the existing numbering system is highly illogical and confusing.