# Ai GROUP SUBMISSION

Senate Finance and Public Administration Committee

## Inquiry into the Net Zero Economy Authority Bill 2024 and the Net Zero Economy Authority (Transitional Provisions) Bill 2024

19 April 2024

## Introduction

The Australian Industry Group (**Ai Group**) welcomes the opportunity to make a submission to the Senate Standing Committees on Finance and Public Administration during their inquiry into the provisions of the *Net Zero Economy Authority Bill 2024* (**Bill**) and the *Net Zero Economy Authority (Transitional Provisions) Bill 2024* (**Inquiry**).

Although we are strongly supportive of elements of the Bill, we have deep concerns with aspects of Part 5 which deal with various workplace relations matters. This part of the Bill must be substantially amended for it to be reasonable and workable.

Ai Group is a peak national employer organisation representing traditional, innovative and emerging industry sectors. We have been acting on behalf of businesses across Australia for over 150 years. Ai Group is genuinely representative of Australian industry. Together with partner organisations we represent the interests of more than 60,000 businesses employing more than 1 million staff. Our members are small and large businesses in sectors including manufacturing, construction, engineering, transport & logistics, labour hire, mining services, waste services, the defence industry, retail, aged care, civil airlines and ICT.

Ai Group's members will be affected by the transition to net zero emissions in many ways. Some operate facilities that will close due to their age or high emissions, and others provide goods and services to those facilities or are deeply embedded in regional economies that will be affected by those closures.

Some of our members have new opportunities to supply products and services that will be in greater local and global demand as a result of transition, or are part of regional economies that will be transformed by such opportunities.

Most of our members operate in sectors that will not necessarily shrink or grow as a result of the Australian and global climate response, but which will need to transition through new processes, products and practices – with greater or lesser difficulty in different contexts.

This is a major and complex set of economic, social and technological changes and requires a mature and considered response. On the one hand, Australia has made large economic transition before with considerable success. On the other hand, the closure of the Hazelwood power station in 2016-17 underlined the need for greater preparation. The likelihood of closure had been discussed for many years, but affected businesses, employees and policy makers at the State and Federal levels were still caught by surprise by the owner's final decision and the minimal response time it allowed. Catch-up efforts were made, including the subsequent establishment of the Latrobe Valley Authority, but few would contest that a longer lead time, greater coordination and more active planning by all stakeholders would have allowed a much better transition for everyone concerned.

Australia's remaining coal fired power stations, and some of its gas fired power stations, are expected to close over the next decade. Considerable efforts have been made to address energy

system planning aspects of closures. The economic, employment and social aspects deserve similar care, especially given the geographic concentration of coal generation in regions like the Hunter and Latrobe Valleys.

Ai Group has long supported coordinated approaches to navigating these transitions:

(a) In 2019 we joined with other peak bodies to support "the creation of an independent authority to guide planning and implementation of effective and equitable transition policies" in the context of Victoria.

(b) In 2021 we made a joint statement on successful transition that recommended, in part, "Public authorities with a broad mandate and funds to manage transition impacts and facilitate diversification should be established in advance of expected major regional transitions."

(c) In our 2022 climate and energy policy statement we said Australia should:

*"[m]anage impacts of overseas decarbonisation on our exports, regions and sectors. Net zero commitments by major customer economies will take time to play out, but require early preparatory action on regional transition and economic diversification strategies, with a strong local voice supported by national resources."*

The Net Zero Economy Authority (**Authority**) now proposed by the Federal Government is a response to the work and advocacy of many constituencies, including Ai Group, to ensure better management of the economic, social, employment and regional impacts of transition.

The establishment of the Authority is a positive step towards that goal. However, the roles conferred on the Authority are broad, and it may face challenges.

In particular, there are two major challenges facing the Authority in performing its functions.

First, it directly controls very little and must work with a range of other agencies, governments and private entities. This is inevitable, but such coordination is always difficult. The Authority will need great skill, and public and private stakeholders will have to maintain good will, to make progress. Industry looks forward to doing our part to help.

Second, while the Authority has a very wide remit to advance and accelerate the positive opportunities in Australia's transition as well as to address the areas of acute potential dislocation, in practice it will be tempted to focus resources on the latter. Some of Australia's clean development opportunities potentially overlap with coal-fired electricity generation regions, but many do not. Dislocation risk deserves and demands great attention. The challenge will be to give the full range of economic opportunities their due, even where they lie beyond the regions of acute impact. Similarly, aligning the skills of disrupted individuals and communities to these opportunities will be complex, not least because of how skills and employment programs are structured and funded within and across jurisdictions.

These challenges will be operational rather than going to the content of the legislation.

Notwithstanding the benefits of the establishment of the Authority, the proposed Energy Industry Jobs Plan (**Plan**) established under Part 5 of the Bill treads on very sensitive ground. Australia's workplace relations framework for addressing redundancies is the product of many years of difficult and sophisticated work by employers, employees, the Fair Work Commission and governments. It should not be altered lightly, and certainly not without much greater engagement with industry than has occurred to date in relation to the detail of Part 5 of the Bill.

Ai Group recognises that there are significant challenges ahead that must be navigated by Government, industry and employees. All such parties will be impacted by the transition ahead and a co-operative approach to dealing with such matters should be promoted. Nonetheless, there are elements of Part 5 of the Bill that will impose intolerably unclear, unjustified and problematic obligations on employers. Aspects of this Part of the Bill will overlap with, and undermine, longstanding and carefully developed aspects of current workplace relation laws dealing matters related to redundancy. As framed, it is a recipe for disputation with the potential to expose employers to costly proceedings in the Fair Work Commission at a time when they will be facing significant hardships.

Although Ai Group does not support the imposition of many of the additional obligations on employers contemplated by part 5 of the Bill, we have sought to constructively identify a range of sensible changes that should be made to Part 5 of the Bill. These include:

(a) Inserting a new section into the Bill which would provide a mechanism for addressing overlapping industrial obligations where such overlap arises under the Plan. This section should confirm that modern awards/ enterprise agreements / the National Employment Standards (**NES**) in the *Fair Work Act 2009* (Cth) (**FW Act**) would prevail over the relevant component of the Plan to the extent that they deal with the same subject matter.

(b) Clarifying that employers whose operations will not be substantially impacted by closures of power stations or coal mines will not fall within the relevant definitions of '*closing employer*' or '*dependent employer*'.

(c) Amending the definition of '*transition employee*' to ensure that only permanent employees of closing or dependent employers are captured (not casual employees).

(d) Creating an exception to triggering the transfer of business provisions in Part 2-8 of the FW Act when transition employees obtain new employment with another employer under the Plan.

(e) Clarifying the type of information that is to be provided to the CEO as part of the community of interest process and consultation process contemplated under s.55, and ensuring that employee organisations and employer organisations, particularly registered employer associations, are required to be consulted as part of this process

in a consistent manner.

(f) Clarifying when it will be '*reasonable in the circumstances'* for the CEO to apply to the Commission for a community of interest determination under s.56. This should include making it clear that the CEO is required to consider whether any pre-existing industrial instruments can be utilised to facilitate transition employees finding new employment. Similar direction should be provided to the Commission in the context of its assessment of these matters in making a community of interest determination under s.57.

(g) Confirming that any determinations issued by the Commission under the Plan (for example a community of interest determination under s.57 or a determination about s.59 under ss.60 or 61) cannot (in practical effect) apply retrospectively.

(h) Amending s.59 to ensure it describes obligations that may fall on employers rather than requiring them to be complied with. Employers should not be required to comply with these additional obligations unless the Commission has determined that any of these apply.

(i) Clarifying and establishing sensible limits on the obligations that may fall on employers under ss.58 and 59 to provide certainty for employers regarding what is required to for compliance, and clarity around when the obligations will have been met, including:

    (i) Clarification of the factors in s.59(1) regarding the assessment of whether it is unreasonable for a particular employer to comply with the additional obligations.

    (ii) Any career or financial planning advice provided pursuant to ss.59(3) and (4) should be offered out of work hours and without the need for the employer to pay for time spent receiving it. The scope of financial contribution to be made should also be clarified and be made subject to sensible limits.

    (iii) The concept of '*time off*' under s.59 should be clarified: in particular whether it includes ordinary hours, overtime and / or penalty rates, and how it is to be applied to atypical remuneration structures.

    (iv) Remove s.59(5) and leave these matters to the existing framework to regulate, or clarify what an employer is required to do to comply with the obligation to permit the employee to access advice and support from an employee organisation.

    (v) Clarify the scope of '*training*' referred to in s.59(6) and establish reasonable limits on what it entails. Employees should also be required to provide reasonable notice of when they wish to access time off for this training, and evidence of attendance at such training should be required to be produced to access the entitlement. The scope of financial contribution to be made should also be clarified and be made subject to sensible limits.

(vi) Establish sensible limits on what an employer is required to do to discharge its obligation under s.59(8) to engage with receiving employers.

(vii) Clarify the scope of an employee attending '*activities related to recruitment*' and ensure it is subject to reasonable limits, and require evidence to be produced if the employee accesses time off for this purpose.

(j) Reforming the obligation for employers to provide information to employees about additional obligations arising under s.59 by only requiring that information about obligations determined by the Commission to apply must be provided. A model information statement for each obligation should be prepared so that employers can utilise the relevant parts of this statement for this purpose.

(k) Allow any existing dispute resolution procedure in an enterprise agreement or award to be utilised for the purposes of the Commission's power to issue determinations under ss.60 and 61.

(l) Clarify that employers that are required to provide information to the CEO of the Authority under s.64 are '*authorised by or under an Australian law*' to do so for the purposes of the *Privacy Act 1988* (Cth) by inserting a provision equivalent to s.66(2).

(m) Establish some reasonable limits on the CEO's power to request information under s.64, including the ability for employers to request the time period in which they are required to provide information be extended.

(n) Confirm that the power for the CEO to disclose information under s.66 operates subject to the consent of the relevant employee.

For any questions in relation to climate and clean economy development aspects of this submission, please contact Ai Group Director of Climate Change and Energy Tennant Reed (tennant.reed@aigroup.com.au, 0418 337 930). For questions in relation to workplace relations components, please contact Ai Group Head of Workplace Relations Policy, Brent Ferguson (brent.ferguson@aigroup.com.au, 0407 558 840).

## Overview of the Framework Established in the Bill

The Bill establishes the Plan as well as the Authority. Upon a closure notice regarding part or all of the operations of a gas-fired power station or coal-fired power station being issued, the Plan will apply to '*closing employers'* and '*dependent employers*' (as defined in the Bill).

The issue of the notice triggers the Plan, which involves the following steps:

(a) The CEO of the Authority must conduct a consultation process to identify closing employers and dependent employers, gather information about the employees affected (**transition employees**) and seek expressions of interest from other employers that are

interested in offering employment to the transition employees;

(b) The CEO may then apply to the Commission to seek a Community of Interest Determination (**COI Determination**) in relation to particular employers; and

(c) Once the Commission has made a COID, certain employer obligations aimed at assisting transition employees to find alternative employment apply. Although there are no civil penalties for contravening these additional obligations, the Net Zero Bill establishes various processes that enable the Commission to determine the scope of these additional obligations. A failure to comply with a Commission determination may result in civil penalties.

The Bill also provides for some other mechanisms which will inform the operation of the Plan, including information-gathering powers for the CEO and certain additional functions to support compliance.

## The Existing Legal Framework

The Bill and the Plan it establishes overlap with the existing and long-standing legal framework regarding redundancy and transfer of business. The Bill does not adequately deal with the interaction between the new provisions and these frameworks. In our submission it should not disturb this framework: the Bill should contain a requirement that this framework be considered as a threshold issue in the context of determining the Plan's application in all cases and there should be appropriate mechanism to avoid or deal with overlap with the current regulatory regimes. Relevantly, the Bill should provide for particular actions taken as part of the Plan to be taken to satisfy particular elements of this framework, or for employers to be exempted from aspects of the Plan's coverage or operation in some circumstances because of the operation of existing workplace relations regulation. We return to our proposal for addressing overlap in more detail below.

In this section we set out the relevant elements of this existing legal framework. We return to the impact of elements of the Plan on this framework and how it should be considered in the sections that follow regarding particular components of the Bill.

**Redundancy**

The minimum safety net contained in the National Employment Standards (**NES**) in the *Fair Work Act 2009* (Cth) (**FW Act**), as supplemented by relevant modern awards, already addresses redundancy situations.

Under the NES, an employee is entitled to redundancy pay from their employer where their employment is terminated at the employer's initiative, because it no longer requires the employee's job to be done by anyone, or because of the insolvency or bankruptcy of the employer.[1] The amount of redundancy pay is calculated based on the employee's period of service with the employer and

[1] Section 119(1) of the FW Act.

their base rate of pay for ordinary hours of work.[2] The NES creates some exceptions to this general requirement. These include:

(a) Where the employer obtains other acceptable employment for the employee, it can apply to the Commission to vary the amount of redundancy pay the employee is entitled to;[3]

(b) Where the employer cannot pay the amount, it can apply to the Commission to vary the employee's redundancy pay;[4]

(c) Where the employee has less than 12 months' continuous service with the employer;[5]

(d) Where the employer is a small business employer;[6]

(e) Some transfer of employment situations, depending upon whether the second employer recognises the employee's period of service with the first employer;[7]

(f) If the employee refuses an offer of employment made by another employer on substantially similar terms and conditions which are no less favourable than the employee's terms and conditions with the first employer, and the employee's service would be recognised with the second employer;[8]

(g) Certain classes of employee are exempted, including certain fixed term employees, an employee whose employment is terminated because of serious misconduct, a casual employee, an employee to whom a training arrangement applies and an employee prescribed by the regulations as one to which the redundancy framework does not apply;[9]

(h) Where an industry-specific redundancy scheme in a modern award or enterprise agreement applies to an employee.[10]

Importantly, under this framework the employer is incentivised to assist the employee to obtain acceptable alternative employment. If the Commission finds that the employer's actions meet this threshold, then it may reduce the employer's redundancy pay obligation. In undertaking this task, the Commission must assess whether the employer has '*obtained*' other employment for the employee and further whether this employment is *'acceptable*'. To meet the threshold of '*obtain*' the employer must play a significant role in finding the alternative employment. It requires the employer '*to procure another employer to make an offer of employment, which the individual may*

[2] Section 119(2) of the FW Act.
[3] Section 120(1)(b)(i) of the FW Act.
[4] Section 120(1)(b)(ii) of the FW Act.
[5] Section 121)(1)(a) of the FW Act.
[6] Section 121(1)(b) of the FW Act.
[7] Section 122(1) and (2) of the FW Act.
[8] Section 122(3) of the FW Act.
[9] Section 123(1) of the FW Act.
[10] Section 123(4)(c) of the FW Act.

*or may not accept as a matter of his or her choice*'.[11] Whether or not the alternative employment is *'acceptable'* is to be determined objectively and involves consideration of matters such as pay, hours of work, seniority, fringe benefits, workload and speed, job security as well as other matters.[12]

In addition, this framework recognises that in some circumstances an employer will not be in a financial position to pay redundancy pay, and provides for the Commission to reduce the amount owing due to the employer's insolvency or bankruptcy.

Modern awards supplement the NES redundancy framework. Awards contain redundancy clauses that provide for transfer to lower paid duties on redundancy, what happens if an employee leaves during the redundancy notice period, and providing a '*job search entitlement*' where an employee is entitled to time off without loss of pay for up to one day each week of the minimum notice period for the purpose of seeking other employment.[13] If employees take up this opportunity, they must produce evidence of their job search activities upon request of the employer in order to receive pay.

At the workplace level, many enterprise agreements provide for alternative redundancy schemes that may be more generous that what is contained in the relevant modern award and / or the NES. Some agreements may have been approved on the basis that redundancy conditions were traded off for other, more beneficial conditions in accordance with the preferences of the employees at the relevant enterprise. In any event, an enterprise agreement reflects an agreed outcome for that particular enterprise and should not be undermined.

The redundancy framework in the NES and modern awards reflects the rigorous '*test case standard*'.[14] In the *Termination, Change and Redundancy Case* (**TCR 1**) the Australian Conciliation and Arbitration Commission (**Conciliation and Arbitration Commission**) considered a claim by the Australian Council of Trade Unions (**ACTU**) for a nationally consistent, federal approach to redundancy (amongst other issues). The case was heard at a time when there had been numerous retrenchments in industry because of a range of factors including economic downturn and the introduction of new technology.[15] The Conciliation and Arbitration Commission ultimately scaled back the ACTU's claim in its final decision. Many elements of the existing framework are based on this decision, including the following:

(a) Employers can apply to the Commission to modify their redundancy obligations when they do not have the capacity to pay;[16]

(b) Providing for consultation between employers and employees about potential

[11] *FBIS International Protective Services (Aust) Pty Ltd v MUA and Fair Work Commission* [2015] FCAFC 90 cited in *Ready Workforce (A Division of Chandler Macleod) Pty Ltd t/a Chandler Macleod v Mr Andrew Lowe and others* [2022] FWCFB 173 at [45].
[12] *Clothing & Allied Trades Union of Australia v Hot Tuna Pty Ltd* (1988) 27 IR 225 at 230-231.
[13] See, for example, clause 32.3 of the *Mining Industry Award 2020*.
[14] *Termination, Change and Redundancy Case* [1984] 8 IR 34.
[15] *Termination, Change and Redundancy Case* [1984] 8 IR 34, at 36.
[16] *Termination, Change and Redundancy Case* [1984] 8 IR 34, at 61.

terminations due to redundancy;[17]

(c) As to the issue of assisting redundant employees to find alternative employment, the Conciliation and Arbitration Commission was not of the view that awards should prescribe any requirements to assist with retraining (because employers generally tried to accommodate this type of thing), but did provide for a framework where employees were transferred to lower paid duties on redundancy.[18] In addition, the Conciliation and Arbitration Commission was prepared to include in awards a requirement for the employer to provide up to one day off without loss of pay each week of the notice period for the purpose of seeking out alternative employment.[19] It did not consider that it was appropriate for awards to contain terms requiring additional training opportunities and helping with relocation – these were matters more appropriately determined on a case-by-case basis, instead of in all cases;[20]

(d) The purpose of redundancy pay was not to tide the employee over during a period of unemployment or during the search for a new job: this was the purpose of unemployment benefits.[21] Instead, redundancy pay is compensation for non-transferrable credits and the inconvenience and hardship imposed on employees;[22]

(e) The Conciliation and Arbitration Commission foreshadowed the ability for an employer to apply to reduce the obligation to pay severance pay because of assisting employees to find alternative employment, and that it did not envisage severance payments being made in cases of succession, assignment or transmission of a business;[23] and

(f) In rejecting the ACTU's claim that where redundant employees can only find alternative employment at a lower wage, if at all, an employer should provide income security for a period of time, the Conciliation and Arbitration Commission considered this would constitute '*double counting*' in light of such employees already being entitled to assistance in this regard from employers and noted that '*[t]he burden of assisting employees who lose their jobs should not fall solely on employers. The responsibility is, in part, a community responsibility…*'.[24]

Given that these components of the existing scheme are based on the test case standard, they should not be undermined by a new scheme.

**Transfer of Business**

The FW Act sets out a comprehensive framework that applies to transfer of business situations (as

[17] *Termination, Change and Redundancy Case* [1984] 8 IR 34, at 64.
[18] *Termination, Change and Redundancy Case* [1984] 8 IR 34, at 67.
[19] *Termination, Change and Redundancy Case* [1984] 8 IR 34, at 68.
[20] *Termination, Change and Redundancy Case* [1984] 8 IR 34, at 69.
[21] *Termination, Change and Redundancy Case* [1984] 8 IR 34, at 73.
[22] *Termination, Change and Redundancy Case* [1984] 8 IR 34, at 73.
[23] *Termination, Change and Redundancy Case* [1984] 8 IR 34, at 75.
[24] *Termination, Change and Redundancy Case* [1984] 8 IR 34, at 78.

defined), when employees transfer to a new employer.[25] These situations may cause a transferable instrument (including an enterprise agreement, workplace determination or named employer award) to transfer to the new employer. Depending on the circumstances, these instruments may apply to the transferring employee and any new employees of the new employer. This is a potentially significant consequence, particularly if the new employer already has its own workplace instrument and is keen for this to cover all of its workforce. The potential to engage this part of the FW Act already arises in industry when there is movement of employees from one employer to another.

In order for employers to have confidence in the application of the Plan, the Bill should provide for an exception to Part 2-8 of the FW Act as it relates to transition employees finding new employment. We revisit this in further detail where it arises in the context of the Plan below.

## Addressing Overlapping Industrial Obligations

The Plan creates significant overlap with the existing industrial relations legal framework described above throughout the process it establishes. For example, in the context of the CEO applying to the Commission for a COI Determination, the CEO is required to have regard to '*the existing supports that are available to facilitate transition employees…to find other employment*' (s.56(4)(b)) and the '*capacity of those employers to redeploy those…employees*' (s.56(4)(e)). Similarly, in deciding whether to name particular closing or dependent employers in a COI Determination, the Commission must also consider these matters (see s.57(3)). Closing and dependent employers that have been named in a COI Determination are also required to consider '*relevant enterprise agreements or other industrial instruments*' in determining the extent to which it would be unreasonable to pursue any of the additional actions in s.59. There are also further instances where the Plan establishes overlap with the existing legal framework.

The way that this overlap is addressed under the Plan should be clarified. It is potentially highly problematic, and both unworkable and unfair for the Plan to create overlapping industrial obligations but not include a mechanism for dealing with how this overlap is to be clarified and addressed. Employers should not be faced with a situation where they are potentially covered by multiple, potentially conflicting frameworks, particularly at a time where they are facing imminent reduction or ceasing of part or all of their operations.

An additional section should be inserted into Part 5 of the Bill which clarifies when such overlap may arise and how it should be addressed under the Plan. This section should contain a mechanism that ensures that where a subject matter or obligation arising under the Plan is already dealt with under a modern award that covers an employee and employer or under the NES, that the relevant aspect of the Plan should not apply to that employer. That is, the NES or award-based obligation would apply instead of the Plan in relation to that subject matter. The reference to modern award-covered employees/employers only is deliberate (as distinct from a reference to employees/employers to whom an award applies): if an employer and its workforce have, through enterprise bargaining,

[25] Part 2-8 of the FW Act.

decided that particular award-based entitlements should no longer apply (or that different entitlements apply instead), it is inappropriate that this situation be disturbed through the operation of the Bill.

Addressing overlap in this way, through a clear mechanism that confirms that relevant industrial instruments will prevail over the Plan where applicable, will ensure it is clear to employers, employees and the community at large how the Plan interacts with the existing legal framework.

Where particular areas of overlap arise in the context of particular sections of the Plan, we have suggested how the mechanism for addressing overlap we have described above would apply in those circumstances to resolve the overlap.

## Definitions in the Net Zero Bill

**Employer definitions**

The various components of the Plan apply to different categories of employer, depending upon whether they are closing employers, dependent employers or receiving employers.

Closing employer is defined in s.6(1)( and (2) and includes owners or operators of all or part of a coal-fired or gas-fired power station that is the subject of a closure notice, regardless of whether they employ employees to work at the power station. This also includes their associated entities who either employ employees to work at the power station and / or operate a coal mine that provides coal for use at the relevant coal-fired power station.

Dependent employer is defined in s.6(3) and (4) as a corporation that:

(a) has a commercial relationship with a closing employer and will (or will be likely to) cease a substantial part of their operations at or nearby the power station as a result of the eventual closure of the power station. The Explanatory Memorandum to the Net Zero Bill (**EM**) explains that '*dependent employers*' in this category may include coal mines that supply fuel to the relevant power station's operation, maintenance contractors that maintain the power station's equipment and service contractors providing services like security, cleaning or on-site canteen operations;[26]

(b) has a commercial relationship with (and employ employees to perform work at) a coal mine that supplies coal to a coal-fired power station operated by a closing employer, where a substantial part of those operations will cease as a direct result of the power station closure. The EM explains that this category is intended to capture employers whose employees work on-site at a coal mine, regardless of whether those employees are directly employed by the coal mine.[27]

[26] EM at [1.91].
[27] EM at [1.92].

The EM clarifies the scope of the definitions of dependent employer as follows (emphasis added):

> 1.93 The definitions of 'dependent employer' are not intended to capture businesses that will not be substantially impacted by the closure of the relevant power station or have the ability to redeploy people within their other regional operations, or other businesses in the same geographic area that will be indirectly impacted by the closure of the power station. The inclusion of the words 'or will be likely to' reflects that at the time the power station signals its intention to close, it may not be clear at that point whether that closure will have a substantial impact on a dependent employer. By constraining the definition to constitutional corporations, it is also not intended to capture individual contractors or family partnerships as a dependent employer. These businesses will have access to other supports provided by Government.

We support the proposition that the Plan should not apply to employers whose operations will not be substantially impacted by closures of power stations or coal mines. However, in our view this intention should be made clearer, such as by way of a legislative note or carve out being expressly provided for in s.6 or elsewhere in the Bill.

A receiving employer is a corporation that gives an expression of interest to the CEO of the Authority as part of the consultation process conducted by the CEO once a closure notice is issued, and is named in a determination issued by the CEO.

**Employee definitions – *the need to exclude casuals***

The Plan applies to '*transition employees'* of closing and dependent employers as defined in s.7. In relation to closing employers, transition employees are employed to perform work at the power station or at a coal mine which supplies coal to the relevant coal-fired power station. In relation to dependent employers, transition employees are employed to perform work in the business operations that will, or be likely to, cease, or in the business operations carried on at the relevant coal mine.

Parts of the plan also apply to '*participating employees*' of closing and dependent employers, which definition is satisfied where the transition employee has expressed an interest to the employer in finding other employment.

These definitions do not further define '*employee*' for the purposes of the Plan. It appears that they would capture casual employees.

Given the raft of significant additional obligations that will fall on employers under the Plan, it is highly inappropriate that casual employees are included. In circumstances where casual employees do not have any right under the existing industrial relations framework to continuing employment, or to redundancy entitlements, the employer should not be required to provide any outplacement or financial planning and career advice to these employees as part of the Plan. The definitions of '*transition employee'* in the Plan should be modified to ensure *only* permanent employees of the closing or dependent employer are captured.

## Threshold Requirements in the Plan

**Conducting a Community of Interest Process and Applying to the Commission for a Community of Interest Determination**

Division 2 of Part 5 of the Bill establishes a framework for the CEO of the Authority to apply to the Commission to make a COI Determination once a closure notice is issued in relation to a closing employer / dependent employer. Being identified in a COI Determination is the catalyst for the activation of the employer's obligations to employees as part of the Plan.

Before applying to the Commission, the CEO is first required to '*undertake a community of interest process'* (**COI Process**) upon becoming aware of a trigger situation, defined to include a notice that relate to the closure of the whole, or a part, of a coal-fired or gas-fired power station (s.55).

Subsection 55(1) provides that a COI Process involves the CEO '*identifying'* closing employers and dependent employers (both of which terms are defined in s.6 of the Bill with a view to capturing the owner or operator of the relevant power station are captured, regardless of the labour structures)[28], identifying the number of transition employees of closing and / or dependent employers and '*obtaining details relating to the employment of those employees',* identifying an estimate of how many will become participating employees, *and* '*seeking expressions of interest*' from other employers that may be able to offer alternative employment to the transition employees.

It is not clear precisely what information is required to be provided to the CEO by employers to meet the obligations in ss.55(1)(d) and (e). To the extent that the CEO may utilise its information gathering powers set out in Division 5 of Part 5, we refer to our submissions below in relation to that part of the Bill.

The Bill should create an exception to triggering the application of Part 2-8 of the FW Act when transition employees obtain new employment with another employer under the Plan. Section 55(1)(c) requires the CEO to seek expressions of interest from other employers in offering employment to transition employees. The EM clarifies that there is no capacity to compel their involvement in the Plan.[29] It is however foreseeable that employers may be reluctant to express an interest in offering employment to these employees because of the risk that it may inadvertently give rise to a transfer of business for the purposes of Part 2-8 of the FW Act. This is an unacceptable risk for employers to take on in these circumstances.

As part of the COI Process, the CEO must also undertake a consultation process involving prospective new employers being consulted about the number and location of jobs and the skills required for those jobs that may be able to be offered (s.55(3)). This is a broad and non-specific obligation and should be clarified, in particular, as to how it applies in relation to the types of information that should be provided. The EM refers to '*the quantity and types of jobs that the receiving employer*

[28] EM at [1.86].
[29] EM at [1.271].

*may be able to offer to suitable transition employees*'.[30] This is not apparent from the text of the Bill, nor is the person who makes the assessment of what is suitable.

There is an unreasonable and unjustified inconsistency in the obligation imposed on CEO in relation to engagement with unions and relevant employer organisations.

Subsections 55(4) and (5) require the CEO to consult employee organisations that are entitled to represent the transition employees, and employer organisations (as defined in the FW Act). The EM states that these subsections provide the CEO with flexibility to consult in a manner appropriate to the circumstances.[31] However this is not borne out in the relevant subsections. The CEO '*must*' consult with relevant employee organisations but must only consult with relevant employer organisations '*as the CEO considers appropriate*' – that is, the CEO is not required to consult with relevant employer organisations if they do not consider it appropriate to do so.

There is no basis for this inconsistent approach in relation to engagement with unions and employer associations. There may be circumstances where consultation with a union will be inappropriate. This may include, for example, circumstances where there are no members of a relevant union affected by a closure. The Bill should be amended to provide consistency in the requirement to consult employer organisations and employee organisations by requiring consultation with employee organisations '*as the CEO considers appropriate*'.

Alternatively, if the distinction between employee and employer organisations is to be maintained, we submit that registered employer organisations should be treated in the same manner as employee organisations, and be required to be consulted in all instances.

**Section 56 – Application to the Commission for a community of interest determination**

After completing the COI Process, the CEO of the Authority may apply to the Commission to make a COI Determination. Subsection 56(3) requires the CEO's application to only name particular employers if satisfied that it is '*reasonable in the circumstances to do so*'.

The only guidance provided in the Bill about when this threshold might be met is contained in subsection 56(4) which sets out matters to which the CEO must have regard when considering whether to make an application to the Commission. The matters relevantly include '*the existing supports that are available to facilitate transition employees…to find other employment*' and '*the capacity of [the employers] to redeploy those transition employees in other business operations of those employers or in business operations of associated entities*' and '*the capacity of other employers in the same geographic area…to offer employment to those transition employees'*. It does not set out the relevance of these factors, or how they should be taken into account by the CEO when deciding whether to make an application to the Commission or not. This should be clarified in the relevant sections of the Bill. The EM states (emphasis added):

[30] EM at [1.273].
[31] EM at [1.274]

*1.281 Consideration of these factors would help target the Plan to closures where it is most needed, and not set up redeployment plans where the number of employees is small, pre-existing redeployment measures are in place or where the local labour market can effectively transition those employees without additional government intervention.*

In our submission it is appropriate that the CEO consider factors such as whether there are existing modern awards or enterprise agreements that would facilitate redeployment of employees (as contemplated in the EM) as early as possible under the Plan. As discussed earlier in this submission, redundancy frameworks will already apply in many instances and should not be replaced by the scheme set out in the Plan. In our submission, in the circumstances contemplated by the EM it would be appropriate to leave it to the relevant industrial instruments if they establish processes for employees to be redeployed or assisted to find alternative employment instead of seeking to activate the Plan by applying for a COI Determination.

Section 56 should be clarified to reflect the EM by requiring the CEO to expressly consider whether any relevant pre-existing industrial instruments can be utilised to facilitate transition employees finding new employment. We refer to our earlier submission in relation to how overlap should be addressed in relation to this point.

Given that the Plan's framework can involve multiple applications to the Commission, and the resulting time and resources that brings with it, it is appropriate that the question of whether any existing industrial instruments (modern awards and enterprise agreements) apply is considered as early in the process as possible, with a view to avoiding applying to the Commission in the first place.

**Section 57 – Commission to make a COI Determination**

Given that the Commission issuing a COI Determination which names a particular closing or dependent employer is the catalyst for the remaining elements of the Plan coming into force with respect to those employers, it is vital s.57 establishes a clear, fair framework for how and when employers will be so identified.

Ai Group supports the Commission being required to provide an opportunity for the entities specified in s.57(1) of the Bill to be heard in relation to an application. It is not clear whether additional closing or dependent employers identified by a union for the purposes of s.57(1)(e) (but otherwise not named in the CEO's application to the Commission) could ultimately be named by the Commission in the COI Determination. The EM does not provide assistance on this point. To the extent that this provision effectively establishes a back door process for employers to be named in a COI Determination without first participating in the COI Process initiated by the CEO, or being subject to the CEO's discretion about whether or not it is appropriate in the circumstances for the employer to be named in an application to the Commission, it is unfair and inappropriate. It is the role of the Authority and its CEO to identify closing and dependent employers and apply to the Commission to seek a COI Determination in relation to those employers only once the processes in ss.55 and 56 have been completed.

In deciding whether to name particular closing or dependent employers in a COI Determination, like the CEO of the Authority, the Commission must be satisfied that it is '*reasonable in all the circumstances*'. The Commission '*must*' have regard to the matters in s.57(3) in reaching a conclusion on this point. These broadly reflect the matters the CEO must consider when deciding whether to make the application to the Commission. We reiterate our concerns with this framework that we have earlier set out. In particular, the scope of the factors is not specific and it is unclear how the matters are to be weighed and assessed by the Commission in determining whether to name an employer in a determination. Greater direction should be provided to the Commission.

Clearly, the factors which the Commission must have regard to overlap with elements of the existing legal framework set out earlier in this submission. For example, this includes the reference to '*supports…to facilitate transition employees…to find other employment*' in s.57(3)(b) and the extent to which redeployment must be considered. However, the Bill is silent on how this overlap is to be treated and ultimately resolved. It is imperative that this is addressed in the framework.

Given the significance of the Commission making a COI Determination, it is appropriate that this overlap be considered and addressed at this stage in accordance with the proposal we set out above. For example, in this context, if an employer and relevant employees are covered by an award that already sets a job search entitlement they should not be afforded additional entitlements in relation to recruitment related activities unless this agreed by their employer.

We are supportive of s.57(4) to the extent that it permits the Commission to have regard to other matters in forming a view about whether it is reasonable in all the circumstances to name an employer in a determination.

Subsection 57(6) states that a COI Determination comes into force on the day it is made and '*must*' be expressed to remain in force until six months after the closure of the relevant part of the power station concerned.

What is not clear from s.57(6), is whether the practical effect of any such determination could entail a degree of retrospectivity. For example, if a closing employer is named in a COI Determination that is made in April, but the employer's employees attended career planning advice in the previous March (which would fall within the scope of the employer's obligation in s.59(3)) it would not be appropriate for the employer to be expected to make a financial contribution to the cost of that advice if it was provided before the COI Determination was made. However, we are concerned that it may be possible for a determination to this effect (or similar effect) to be made. In our submission, given the raft of significant obligations on employers that may flow from the making of a COI Determination, including in relation to making financial contributions to relevant training and career / financial advice, it should not be able to operate with any degree retrospectively (accepting that the Determination itself cannot commence retrospectively). Such an outcome would clearly be unfair for employers.

## Division 3 - Employer Obligations

**Section 58 – General obligations**

The general obligations set out in s.58 are expressed to apply to a closing or dependent employer specified in a COI Determination regardless of any enterprise agreement or industrial instrument that may be in force with respect to that employer.

Aspects of the obligations expressed is s.58 are unclear. For example, s.58(1)(a) requires the employer to seek expressions of interest from each transition employee in finding other employment. The level of detail required is not clear – for example, the limits on '*seek[ing] expressions of interest'* from transition employees and providing information about the employer's obligations are not readily ascertainable. We return to the requirement to provide information in more detail below. The EM states that the reason the Bill doesn't prescribe how the obligations should be delivered is because it '*[recognises] some employers are large and some are small, and that there are different operational requirements and employee needs depending on the circumstances'*.[32]

We agree that there is merit in recognising the array of different employer circumstances that will be relevant. However, the scheme of the Bill does not do this a workable way. It will leave employers, employees and other interested parties grappling with intolerable uncertainty as to what precisely is required. This is a deeply flawed approach and a recipe for industrial disputation.

The employer is also required to provide information to transition employees about its obligations under s.59 (s.58(1)(b)). We have two concerns with this. The first relates to the regulatory burden that will fall on employers when they are required to do this. Our second, and bigger concern, is that the employer is required to provide information about obligations under s.59 when there is no clarity as to what precisely these obligations will require and in circumstances where Commission has not yet made a further determination on this point.

To address both these concerns, any obligation on the employer to provide information about the additional obligations in s.59 should only apply once a determination or order is made by the Commission specifying which obligations apply, and the employer should only be required to provide information about those that do.

The regulatory burden that falls on employers because of s.58 is compounded because of pre-existing applicable components of the existing framework, including a duty to consult employees about major change under awards.[33] The amendments we have proposed be made to s.58 will help to reduce this regulatory burden, as well as the mechanism for addressing overlap between the components of the Plan and the existing legislative framework that we have earlier set out.

[32] EM at [1.294].
[33] See, for example, clause 28 of the *Mining Industry Award 2020*.

**Section 59 – Additional actions for employers**

Closing and dependent employers named in a COI Determination '*must*' take the actions specified in s.59 (**Additional Actions**) unless it is unreasonable to do so. This is expressed to be subject to ss 60 and 61 (which deal with the Commission's power to make determinations about s.59). While employers are required to comply with the Additional Actions, there is no penalty for non-compliance, unless a determination or order is made by the Commission specifying the Additional Actions that apply. This leaves employers in the impossible position of deciding for themselves how to comply with these additional obligations, without any clear enforcement framework or limits.

Ai Group does not support the obligations to take the Additional Actions contemplated under s.59 being imposed upon employers. To the extent that such subject matter is already dealt with under the workplace relations system, the further regulation of such matters is particularly unwarranted. We envisage that the mechanism for addressing overlap we proposed above will have work to do in relation to the application of the Additional Actions.

The specific components of the framework also lack clarity and are bereft of sensible limitations: we have addressed these concerns separately in more detail below. Overall, the unclear framework created by s.59 is unworkable for employers. For example, it may result in time spent resolving disputes about the additional actions that apply in circumstances where there is no clear process for how such disputes are to be resolved or the limits upon those obligations. The benefit of ss.60 and 61 is that a dispute resolution process must be specified in any Commission determination about the Additional Actions that apply. This unclear component of the Bill should be removed and s.59 should be amended to ensure its purpose is simply to frame the obligations that the Commission may then require employers to comply with. The obligations themselves should also be further amended to ensure that sensible limits are provided so that it is clear when they have been complied with.

If the Parliament were to proceed with passing a Bill imposing the obligations contemplated under ss.58 and 59 upon employers, such obligations should only apply following the issue of a relevant determination of the Commission. Alternatively, at the very least, the intent that the nature of the relevant obligations will vary based on relevant circumstances could be communicated by way of legislative note to assist employers with what is required. This type of clarification will also help shape the expectations of other parties that may be closely monitoring compliance.

<u>Unreasonableness</u>

Section 59 is also the first time that the Net Zero Bill makes it clear that the terms of an applicable enterprise agreement or industrial instrument must be taken into account as a basis for whether employers should take an Additional Action. Section 59(1) clarifies that the additional obligations specified in s.59 must be taken except to the extent that it would unreasonable, having regard to a list of factors, including the employer's operational requirements, the need for transition employees to be supported to facilitate them finding other employment and relevant enterprise agreements or other industrial instruments. Our proposed mechanism for addressing overlap explained above

will ensure this issue is considered at an earlier stage under the Plan.

While we welcome recognition that the existing framework in enterprise agreements, modern awards and the NES should be taken into account with respect to the framework established in the Plan (and potentially warrant its non-application), this does not go far enough. The obligations specified in s.59 should not apply to an employer to the extent that that a modern award that covers the employer already deals with the matter. This should be made clear as a result of the overlap provision we have proposed.

At the very least, the way the factors in s.59(1) are to be assessed when determining unreasonableness should be clarified. For example, how should the operational requirements of the employer be taken into account to determine unreasonableness? When and in what way will the terms of an enterprise agreement be relevant? Further detail should be added to the Plan to make this clear. The limits of each factor should also be confirmed – including what is included in the scope of '*operational requirements*', for example whether it is solely financial impacts or whether other factors can and should be considered, and whether '*other employment*' refers to any other employment or to employment that is comparable in some way to what the employee is currently doing.

The EM provides no meaningful clarification on these factors. This is concerning because it is vital that employers have certainty. It attempts to do so through Example 1.19, which provides a factual scenario that is so far-fetched that it is almost comical. To the extent that factors identified in Example 1.19 such as cost of the training course, duration and location are matters that should be considered in assessing reasonableness, this should be made clear on the face of the legislation.

The EM also indicates that the factors listed in s.59(1) to determine unreasonableness are exhaustive.[34] In our submission such a rigid limit is highly inappropriate. It is vital that the relevant section be amended to provide that regard should be had to maters '*including'* those currently listed. There is a myriad of matters that should be open to be taken into account, not the least of which should be the cost imposed upon an employer and the nature of the advice, training or recruitment activities the employee is seeking to attend, as well as a consideration of whether such activities could be attended to outside of an employee's normal working hours.

Section 59 then goes on to set out a raft of non-specific but potentially significant Additional Actions for closing and dependent employers. The Bill should be amended to ensure sensible limits apply to these Additional Actions and that it is clear when the relevant obligations have been met. We have addressed each Additional Action in turn below.

<u>Career planning or financial advice</u>

Sections 59(3) and (4) require the employer to take steps to provide career planning advice or financial advice to transition employees on request. In particular, the employer is required to

[34] EM at [1.300].

'[*arrange] (at the employer's cost)*' for the employees to be provided with '*career planning advice and financial advice'* or allow them '*time off work'* or access to flexible work to receive this advice in connection with their future employment. If the employee organises this themselves, the employer is required to make '*a financial contribution*' towards the cost of the advice.

The obligations are unclear and non-specific. The requirement to arrange at the employer's cost does not make clear whether the employer is expected to organise for this advice to be provided during work time (and also pay the employees for their ordinary hours during this period). The EM's reference to the employer being required to '*pay all costs associated with the provision of the advice*' will undoubtedly be argued by some to suggest this is the case.[35] Requiring the employer to pay for the advice and for the employees' time if the advice is provided during work time will certainly not be appropriate if it can be provided outside of such time. The advice should only be offered after hours and without the need for an employer to pay for time spent receiving it.

Section 59(10) clarifies that '*time off*' must be '*with the pay that the employee would otherwise be entitled to receive for performing the employee's normal duties during that period*'. The scope of '*normal duties*', including the rate at which it should be paid, is not clarified in the Bill or in the EM. In particular, it is not clear whether this concept is referable to an employee's ordinary hours, or is intended to include overtime and, by extension certain additional payments an employee may receive such as penalty rates. In addition, this concept is difficult to apply to situations where there is an atypical remuneration structure such as a piece rate or annualised salary which is referable to being employed. This reflects a lack of understanding of the diversity of arrangements that exist in industry and should be clarified.

The scope of the financial or career advice is not specified in the Bill. The EM states that '*the advice would need to be in relation to the employee's current or possible future employment, rather than general financial advice or planning*'.[36]

We are concerned that the provision of this advice will be unreasonably costly for many employers, particularly those facing a dramatic loss of work. We are also concerned about the lack of clarity around what constitutes an acceptable '*financial contribution*' is also problematic. It will foreseeably lead to disputation around what the appropriate quantum is. Also, the additional financial obligation may not be appropriate in circumstances where the employer will be facing impeding closure of part or all of its business. Sensible limits upon the cost to employers should be set within the framework of the Bill to manage this or the obligation should only be based on what Commission has determined is warranted in specific circumstances.

<u>Union support</u>

Section 59(5) requires the employer to permit the transition employee to receive advice and support from any employee organisation entitled to represent them. In our submission, what is involved in

[35] EM at [1.303.1]
[36] EM at [1.302]

'*advice and support*' is a further example of the non-specific requirements of the Plan. The details of what the employer is required to do to permit employees to receive this support is not objectively ascertainable. What employers might be required to do in order to comply with this obligation should be clarified (and subject to sensible limits) before the Bill is passed, lest it result in unnecessary disputation. Further, we submit s.59(5) is not necessary in light of the many protections afforded to employees who choose to engage with employee organisations elsewhere in the safety net. It should be removed from the Bill.

Participation in training

Section 59(6) applies to participating employees, defined as transition employees who have expressed an interest to the employer in finding other employment. The employer is required to, on request, allow participating employees with *'time off work*' (or access to flexible work) to '*undertake training to assist*' them to find other employment.

Section 59(11) applies to '*time off work'* in this context, clarifying that it must be with the pay the employee would otherwise be entitled to receive for performing the employee's normal duties during that period. This is identical to s.59(10) which applies in the context of attending training under s.59(3). We rely on our earlier submission regarding concerns with the unclear scope of this part of the framework, and urge that it be clarified.

The scope of the requisite training is also non-specific. For example, it could be argued to potentially include an employee attending medical school to retrain as a doctor – something that involves significant time and financial resources. The EM states that reference to '*other employment*' is contemplated to be employment with any employer – this confirms the potential breadth of what is considered to be training.[37] In our submission, the scope of training should be clarified to be subject to reasonable limits.

Employees are not required to provide any notice of when they want to take the time off or to provide evidence to the employer to establish that they have in fact attended such training during their time off. This should be addressed so that reasonable notice and evidence is required to be provided. This would go some way to ensuring consistency with the job search entitlement provided for in many modern awards in cases of redundancy, under which an employee is required to produce proof of attendance at an interview.[38] Importantly, payment should be conditional on this requirement being met.

As to s.59(7) which requires the employer to make '*a financial contribution*', we repeat our submissions in relation to s.59(4). Being required to provide a financial contribution as well as an unspecified amount and quantum of '*time off*' effectively doubles the employer's contribution and is not justified in the circumstances.

[37] EM at [1.305].
[38] See, for example, clause 32.3 of the *Mining Industry Award 2020*.

Engaging with receiving employers

Section 59(8) requires closing and dependent employers to engage with receiving employers in connection with assisting employees to obtain employment with receiving employers, including when an offer has been made. This is a further example of a non-specific obligation. The EM states that engagement contemplated by s.59(8) could include providing information to receiving employers as part of a recruitment process, enabling employees to participate in recruitment processes or negotiating mutually reasonable dates for participating employers to begin their employment at the new employer.[39] Section 59(8) does not refer to an employee being permitted any time off work, rather it only refers to the employer's engagement with a new employer. On that basis the reference to participation in recruitment processes should be removed from the EM. The scope of what is required by this section should be clarified and subject to sensible limits in order to provide employers and employees with certainty about what to expect.

Further, it is not clear how this interacts with the employer's role in the NES redundancy framework to obtain alternative employment, and is another example of where the mechanism to address overlap between the Plan and existing frameworks has work to do. In our submission, to the extent that a closing or dependent employer engages in this action for the purposes of trying to find alternative employment for a transition employee, they should be taken to have obtained other acceptable employment for the employee for the purposes of the redundancy framework in the NES (or any applicable award or enterprise agreement) such that the employer's redundancy liability can be reduced. The Bill should be amended to add a provision clarifying that this will be the case and at least provide a mechanism comparable to that found in the FW Act such that an employer is entitled to seek a reduction of applicable redundancy entitlements when an employee has found alternative employment.

In addition, there is a possibility that as part of the engagement with receiving employers contemplated by s.59(8) the transfer of business provisions in Part 2-8 of the FW Act may be engaged inadvertently. For example, depending on the extent to which the receiving employer wishes to make commercial arrangements with the dependent or closing employer around employing the transition employee/s (such as by taking ownership of other assets). There are a range of other situations that could arise where the same risk exists. This is a further reason why the Bill should contain a broad carve out protecting receiving employers from inadvertently triggering these provisions when they agree to offer employment to transition employees under the Plan.

Attend recruitment activities

Section 59(9) requires an employer to, on request, allow participating employees with time off work (or access to flexible work) to '*attend activities relating to the recruitment*' of those employees.

To the extent that s.59(9) refers to '*time off work*', we repeat our earlier submissions regarding the

[39] EM at [1.306].

concerning lack of clarity in this concept (which is supplemented by s.59(11)), and urge that it be addressed.

The scope of '*activities related to recruitment*' is not clear from the text of the Bill. It is potentially very broad and could include things like going shopping to purchase an outfit for an interview, or as stated in the EM: attending interviews and undertaking pre-employment medical assessments.[40] There is currently no requirement for employees to provide any evidence to the employer that they in fact undertook those tasks during the time off. There should be reasonable limitations on what is understood to fall within '*activities related to recruitment*'.

A requirement for the employee to provide evidence supporting the employee's attendance at the relevant activity should also be inserted into the Bill. This would be consistent with the job search entitlement provided for in many modern awards in cases of redundancy, under which an employee is required to produce proof of attendance at an interview.[41]

**Sections 60 – 62 – Specifying the additional obligations that apply to an employer**

Sections 60, 61 and 62 establish a framework for the Commission to make a determination or order specifying the additional obligations in s.59 that will apply to a closing or dependent employer.

The requirement for the application to the Commission to specify a dispute resolution procedure for disputes arising under the determination does not prescribe the content of any such procedure (s.60(2)(b)). In our submission it would be reasonable that the procedures in any existing instrument (enterprise agreements or awards) should be able to be used for this purpose if applicable. This would assist employers to streamline dispute resolution processes across their business.

We support the requirement for the Commission to ensure the groups specified in subsection 60(4) have an opportunity to be heard in relation to any application for a determination.

In our submission s.60(6) should be clarified to confirm that a determination made by the Commission cannot be applied retrospectively (either expressly or through practical effect). That is, even though it may come into force on a particular day, it cannot be used to ground a dispute regarding past non-compliance with any additional obligations under s.59 that the employer may now be required to comply with because of the determination. For example, an employer should not be required to make a financial contribution to any financial or career advice that has already been provided as at the date the determination comes into force.

Section 60(7) establishes a penalty of 600 penalty units ($187,800) for contravention of a determination made by the Commission.

Section 61 establishes a process to apply to the Commission for a determination specifying the

[40] EM at [1.307]
[41] See, for example, clause 32.3 of the *Mining Industry Award 2020*.

additional obligations in s.59 that will apply to the employer where it has not been possible for the union and employer to agree, and negotiations have been ongoing for a period of at least three months. To the extent that s.61 overlaps with s.60 (for example in relation to including a proposed dispute resolution process in the application to the Commission and as to penalties for non-compliance), we rely on and repeat our submissions made in relation to s.60.

As an application can be made under s.61 in the absence of agreement between the parties, it is appropriate that the Commission is required to have regard to particular matters in the course of deciding whether to make a determination, and also that the list of such matters is not exhaustive. Section 61(6) requires the Commission to have regard to the object of the Act and also the employer's conduct, to the extent that it is relevant to the matters specified in s.59. It is entirely unclear what regard or weight is to be afforded to these considerations and how the balance might be struck in order for it to form the requisite level of satisfaction that it should make the determination in a given case. The EM does not provide any elaboration. If, for example, it is relevant for the Commission to consider the extent to which the employer has already completed any of the Additional Actions set out in s.59, this should be clarified in the Bill. Further, we submit that the Commission should be required to consider whether there is an applicable enterprise agreement or modern award that applies and would cover the situation, and that this should be a factor weighing against the Commission making a determination (if not a complete barrier to the issuing of a Determination dealing with overlapping subject matter). This is another circumstance in which our proposed mechanism for addressing overlap will be relevant.

Section 62 sets out a process for an individual employee, the CEO of the Authority or an employee organisation to apply to the Commission for an order specifying the actions to be taken by the employer under ss.58 or 59. The EM states this process is intended be a fall-back option for employees not covered by determinations under ss 60-61.[42]

It is appropriate that the entities listed in subsection 62(4) have an opportunity to be heard when an application is made, and that Division 3 of Part 5-1 of the FW Act applies in relation to an application under s.62 (by virtue of s.62(3)). Both of these factors will help provide a safeguard against applications that may be made without a reasonable basis (for example, applications that could be dismissed by the Commission under s.587 of the FW Act).

The Commission can only make an order under s.62 if satisfied that it is reasonable and fair in the circumstances to do so, and s.62(6) requires the Commission to consider the factors listed in that subsection when determining this. The factors are identical to those set out in s.61 and to that extent, we repeat and rely on our earlier submissions regarding our concerns about them.

To the extent that s.62 contains other components identical to ss. 60 or 61, we rely on our earlier submissions in respect of these.

Appropriately, both ss 60(11) and 61(13) make it clear that an individual employee cannot apply to

[42] EM at [1.330].

the Commission. under s 62 for an order specifying additional actions to be taken if the Commission has already made a determination under ss.60 or 61.

## Other Components of the Bill

**Information Sharing / Other Components of the Bill**

Division 5 of Part 5 of the Bill establishes an information management framework.

Section 64 provides a mechanism for the CEO to issue a notice requesting particular information be provided to it from closing or dependent employers within a certain time period. Failure to comply with a notice can give rise to civil penalties of 60 penalty units ($18,780). It is clear on the face of s.64 that this information may include personal information for the purposes of the *Privacy Act 1988* (Cth) (**Privacy Act**).

The type of information that the CEO may request is broad. It is listed non-exhaustively in s.64(2) and includes names of participating employees, the occupations, qualifications and skills of those employees, their contact details and information regarding the employer's compliance with other components of the Plan. The EM acknowledges that these categories are broad, and provides a range of examples, including information the CEO would gather during a COI process under s.55 and information relevant to the discretion to apply to the Commission under s.56.[43]

Although s.64 clearly authorises the CEO to receive the relevant information for Privacy Act purposes, we have some concerns about the extent to which closing or dependent employers disclosing this information to the CEO are '*authorised by or under an Australian law*' to do so (if they are APP entities under the Privacy Act and have not obtained consent from the relevant employees to disclose the information).[44] Although civil penalties exist for non-compliance by employers, s.64 is not framed with reference to the employer's obligation to disclose the relevant information; it is framed with respect to the CEO's power to request it. For this reason, it does not clearly fall within the scope of '*required*' in the sense used in the Privacy Act context.[45] There is a risk that the disclosure of this information may not be permitted under the Privacy Act if this is not clarified. We submit that a provision equivalent to s.66(2) be inserted into s.64 in order to put beyond doubt that closing or dependent employers are authorised by the Bill to disclose this information to the CEO.

We are also concerned by the lack of reasonable limits on the CEO's power to request information from closing and dependent employers. The only limitation specified is in subsection 64(3) which requires the period of notice to be at least 14 days. This is not constrained by any requirement that the notice period be reasonable, having regard to the information requested and the size and capacity of the employer. This has the potential to operate unfairly towards employers who would be required to provide a whole raft of information about their entire workforce within a short time, at the same time as maintaining their regular operations. We submit that these matters should be

[43] EM at [1.354].
[44] APP 6.2(b), Schedule 1 to the *Privacy Act 1988* (Cth).
[45] Chapter B: Key concepts | OAIC at [B.132].

taken into account by the CEO when requesting information from employers. The Bill should be amended to provide a mechanism for employers to request an extension to the time period in certain circumstances, without the risk of falling foul of the civil penalty in s.64(5).

Section 66 establishes a framework for the CEO to disclose information to closing, dependent or receiving employers. The EM states that the collection and disclosure of personal information by the CEO would be subject to the consent of the employee to whom it belongs and subject to the Privacy Act.[46] This is not made clear on the face of the Bill. Section 66 should be amended to confirm that this is the case, either by way of legislative note or through inserting a new subsection referring to the Privacy Act.

Section 68 sets out some additional functions of the CEO. To the extent that the CEO is responsible for providing guidance and training to employers under s.68(1), this should be undertaken as soon as possible following passage of the Bill. This will help ensure that employers who will be affected by the scheme have as much time as possible to prepare. We support the review of the operation of the Bill that is contemplated by s.68(3). This is appropriate in light of the raft of additional obligations that are purported to be imposed under the Plan. It will be important for the review to consider the impact of the framework established under the Bill on the existing framework.

[46] EM at [1.360].

## ABOUT THE AUSTRALIAN INDUSTRY GROUP

The Australian Industry Group (Ai Group®) is a peak national employer organisation representing traditional, innovative and emerging industry sectors. We have been acting on behalf of businesses across Australia for 150 years. Ai Group and partner organisations represent the interests of more than 60,000 businesses employing more than 1 million staff. Our membership includes businesses of all sizes, from large international companies operating in Australia and iconic Australian brands to family-run SMEs. Our members operate across a wide cross-section of the Australian economy and are linked to the broader economy through national and international supply chains.

Our vision is for thriving industries and a prosperous community. We offer our membership strong advocacy and an effective voice at all levels of government underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international) we have the resources and the expertise to meet the changing needs of our membership. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We listen and support our members in facing their challenges by remaining at the cutting edge of policy debate and legislative change. We provide solution-driven advice to address business opportunities and risks.

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