Ai GROUP SUBMISSION

Senate Education and Employment Legislation Committee

Inquiry into the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* [Provisions]

February 2021

Contents

Introduction

The Australian Industry Group (**Ai Group**) welcomes the opportunity to make a submission to the Senate Education and Employment Legislation Committee during its inquiry into the provisions of the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* (**Bill**).

As its name implies, this is an important piece of legislation aimed at removing roadblocks to productivity, jobs growth and higher wages during the recovery from the COVID-19 pandemic.

The Bill would make substantial changes to the provisions in the *Fair Work Act 2009* (**FW Act**) which deal with casual employment, awards, enterprise agreements, greenfields agreements for major projects, and compliance and enforcement.

Ai Group has been heavily involved in the development of the Bill and we have worked hard to achieve a worthwhile and fair outcome for employers, employees and the broader community.

The introduction of the Bill into Parliament follows meetings of five working groups of employer representatives and unions, that met over a 10-week period up to September 2020 to discuss what reforms should be implemented to industrial relations laws to drive employment growth and investment, and to assist the recovery from the pandemic. Ai Group was heavily involved in all five working groups, which were chaired by the responsible Minister. Ai Group was a member of the four working groups on casual and fixed term employment, awards, enterprise agreements and compliance and enforcement. We also participated in all meetings of the greenfields agreements working group, as an adviser to our affiliated organisation – the Australian Constructors Association.

The working groups completed their discussions in September 2020 after several rounds of meetings. The process was a useful forum for discussing the issues and exploring potential changes to IR laws.

This submission sets out Ai Group's views on the provisions of the Bill. In summary:

- The casual employment provisions in the Bill are particularly important due to the widespread uncertainties and cost risks that have arisen from the Federal Court's controversial decisions in the *WorkPac v Skene* [1] and *WorkPac v Rossato* [2] cases. The uncertainties and risks are particularly relevant to small businesses. Importantly, the Bill includes:
    - An exclusive definition of a 'casual employee', rather than the vague indicia approach adopted by the Federal Court; and

[1] [2018] FCAFC 131.

[2] [2020] FCAFC 84. The High Court of Australia is currently hearing an appeal by WorkPac against this decision.

- Protection for employers against 'double-dipping' claims by employees who have been engaged and paid as casuals.

- The modern award provisions in the Bill would deliver some modest but important flexibility for employers and employees in industries heavily impacted by the pandemic.

- The enterprise agreement provisions are designed to address widely recognised problems that have led to the number of current enterprise agreements in Australia reducing from 25,000 a decade ago to less than 10,000 today. The reinvigoration of the enterprise bargaining system will lead to productivity improvements and wages growth at the enterprise level.

- The greenfields agreement provisions of the Bill would enable such agreements to continue for the life of a major project (up to a maximum of eight years). This would assist in driving investment and jobs in the construction and resources industries.

- Ai Group does not support employers who deliberately underpay their employees. However, the much higher civil penalties and the criminal penalties in the Bill for underpayments are not warranted. Civil penalties for underpayments were increased tenfold in 2017 and the evidence is that these increases have had a positive impact on compliance. There is no evidence that justifies the highly punitive approach in Schedule 5 of the Bill. The proposed provisions would operate as a barrier to jobs growth and investment during the recovery from the pandemic.

With the sensible and practical amendments that Ai Group has recommended in this submission, the Bill would deliver a series of worthwhile changes to the IR system that would provide opportunities for more productive and flexible workplaces, in order to assist the economic recovery.

We urge the Committee to recommend that the Bill is passed by Parliament without delay, with the amendments that we have proposed.

The economic and business environment necessitates reform to IR laws

The Australian economy faces important challenges over two interrelated time horizons: the medium-to-longer term and the short-to-medium term which can be taken to be the period to the end of 2022.

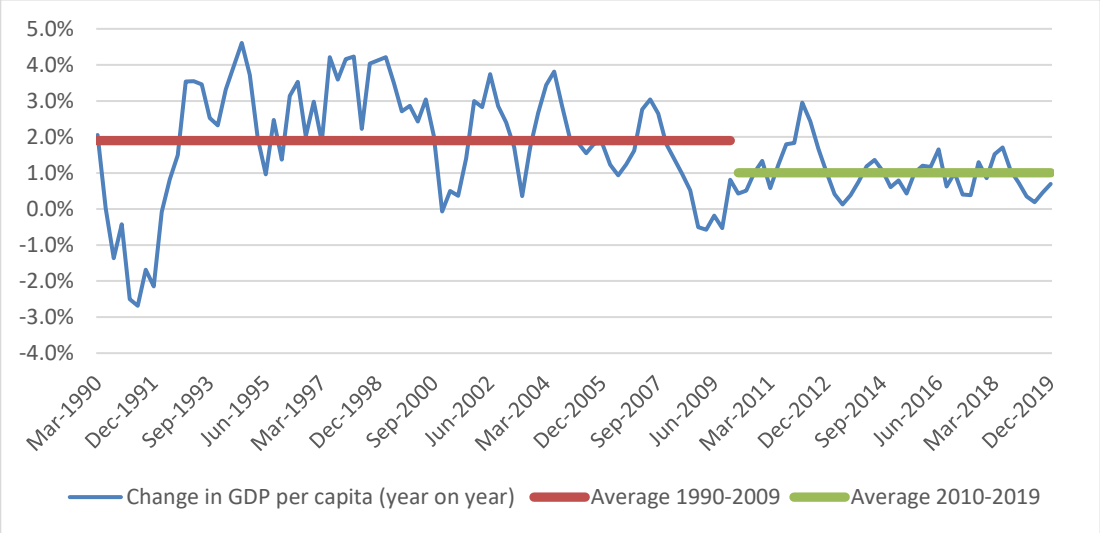
The challenges over the medium-to-longer term relate to the distinct slowing in the underlying economy since the mid-1990s. Addressing these challenges, which show up in low incomes growth, including low real wages growth; entrenched weak business investment and a decline in the pace of productivity growth, calls for measures across a range of policy areas including in the industrial relations sphere.

The challenges over the shorter-to-medium term would be assisted by progress in addressing the underlying challenges but relate more directly to the task of securing recovery in the broader economy and the labour market in the aftermath of the COVID-19 economic crisis.

The medium-to-longer term challenges

From well before the onset of the COVID-19 crisis, Australia's economic performance had slowed markedly. The extent of the fall is evident in the reduced pace of growth of GDP per person. This is shown in Chart 1 by comparing the average annual rate of growth for the three decades from the start of 1990 with the average annual rate of growth in the decade ending in December 2019.

Chart 1: Change in GDP per capita 1990-2019 (year on year change)

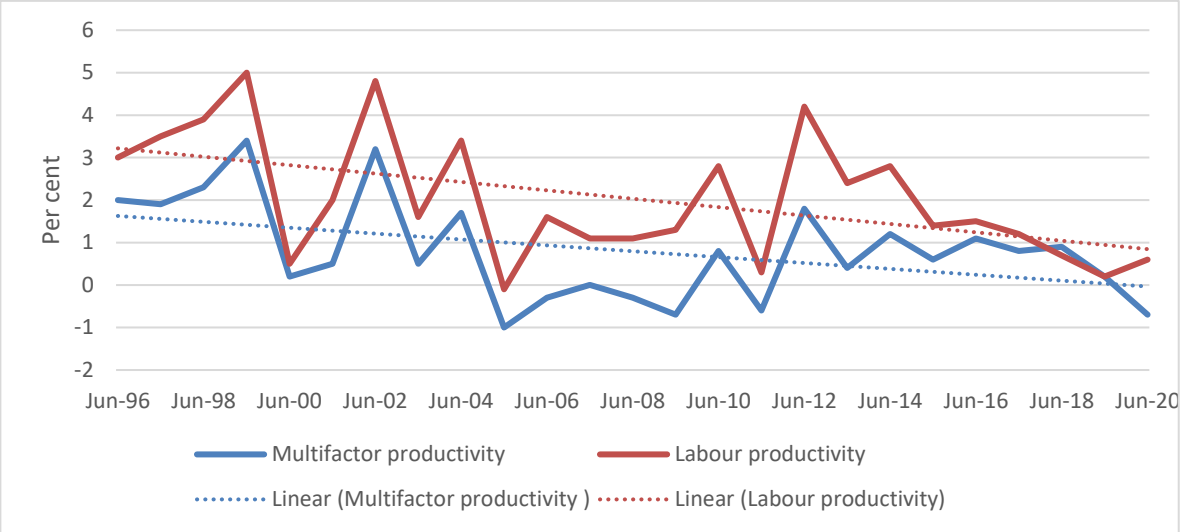


Source: ABS, National Accounts, December 2020.

The fall in the pace of growth of GDP per person limited increases in real incomes and meant that during the decade leading up to the COVID-19 recession, living standards advanced at a slower pace than Australians had become accustomed to over the long period of growth that followed the recession of the early 1990s.

The fall in the pace of productivity growth has been a fundamental driver of the decline in growth of per capita output. Chart 2 summarises the latest ABS measures of market sector productivity growth. As shown by the linear trend lines in this chart, productivity trended down over the period from 1996 in a pattern that was well-entrenched prior to the COVID-19 crisis.

Chart 2: Market Sector Productivity Growth (% pa) 1996-2020

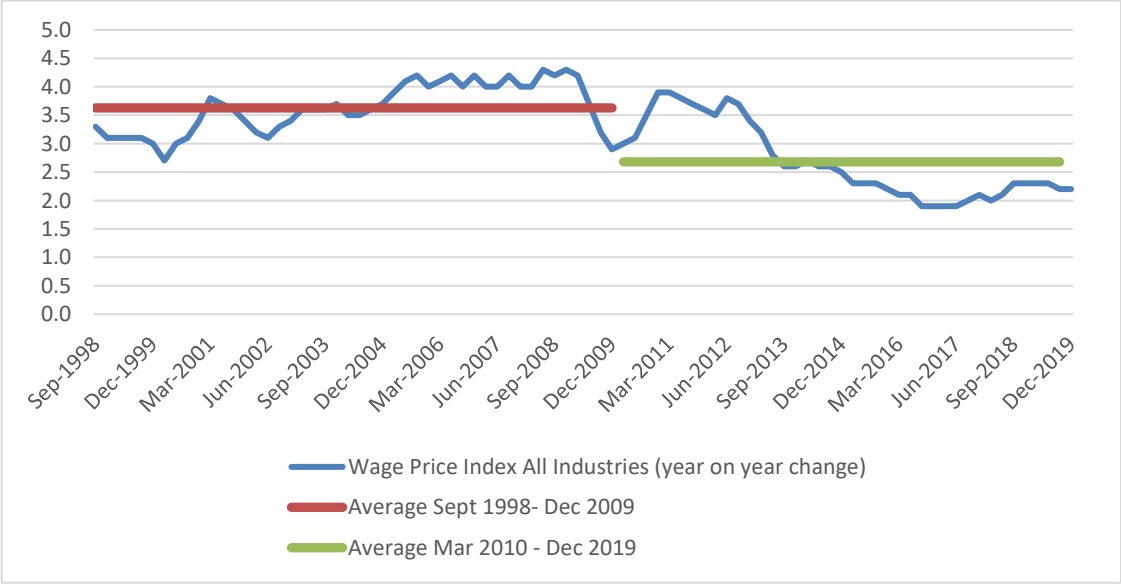


Source: ABS, Estimates of Industry Multifactor Productivity, 30 November 2020.

With productivity growth lower, wages have also risen at a slower pace in recent years as shown in Chart 3 below.

The slower pace of nominal wages growth recorded in the Wage Price Index presented in Chart 3 is reflected both in the lower average in the most recent decade and by the further fall below this lower average in more recent years.

Chart 3 Wage Price Index All Industries (year on year change) Sep 1998 to Dec 2020



Source: ABS, Wage Price Index Australia, 18 November 2020.

As the Productivity Commission has recently pointed out, improving Australia's productivity performance is fundamental to resurrecting the pace of wages growth and the rate of improvement in Australia's living standards (including in the form of greater leisure time).[3]

The changes proposed in the Bill offer the opportunity to substantially improve the pace of productivity growth in Australia. The measures in the Bill would:

- Remove new uncertainties and potential costs facing businesses in relation to casual employees that are currently acting as barrier to investment, business expansion and employment;
- Improve flexibility for many award covered employers and employees;
- Revive the enterprise bargaining process through which enterprise-based productivity improvements can be negotiated with employees; and
- Improve the operation of Greenfields Agreements so they can more closely match the life of major projects allowing a greater concentration on the efficient delivery of project outcomes and reducing the scope for opportunistic bargaining mid-project.

The short-to-medium term challenges

Australia is only part way through an uncertain recovery from the most severe peace-time shock since the Great Depression. While the pace of this recovery in economic activity has been faster than was expected only six months ago, the impacts of the COVID-19 downturn remain severe by any standards.

- GDP at the end of the September quarter was still 4.2 per cent below the level reached at the end of 2019.
- 278,000 more people were unemployed or underemployed in December 2020 than a year earlier.

Securing a full recovery will not be easy. This is particularly the case because, at least for the year ahead, notwithstanding the high hopes being placed on vaccines, there is likely to be a need to manage intermittent outbreaks and continue to adjust to disruptions to work, social activity, commuting and interstate movement.

[3] Productivity Commission, 2020, *PC Productivity Insights: Australia's Long Term Productivity Experience*, November 2020, pp 8-12.

Constrained international travel has pulled the rug from under immigration which has been a staple of Australian economic growth and has been critical to the supply of key skills. This presents particular challenges for the housing industry and could act as a brake on the recovery and expansion potential of many businesses.

Additional challenges relate to the ongoing severe impact of restrictions and disruptions related to COVID-19 with the consequent risk of a permanent loss, or a very heavy erosion of capability. Many businesses and their employees that are linked to inbound tourism, international students, entertainment venues and passenger transport, among others, fall into this category.

These challenges lie behind the cautious prognosis issues by the Governor of the Reserve Bank of Australia following the Bank's Board meeting on 2 February 2021. The Governor warned that:

> "the economy is expected to operate with considerable spare capacity for some time to come. The unemployment rate remains higher than it has been for the past 2 decades and while it is expected to decline, the central scenario is for unemployment to be around 6 per cent at the end of this year and 5½ per cent at the end of 2022."[4]

Securing the full recovery from the COVID-19 recession remains a substantial challenge. The most severe potential impacts arising from any delay in the pace of recovery would most likely take the form of higher rates of unemployment and underemployment with the consequent social and personal hardship that implies.

Many of the changes proposed in the Bill will help to accelerate the pace of recovery by allowing employers to adapt to the challenges of recovery in a more flexible way. These include the improved flexibilities that can be negotiated with part-time employees and the ability over the critical period of the next two years for employers to issue Flexible Work Directions in relation to the location of work and duties to be performed.

These changes offer important potential for Australia's industrial relations arrangements to make a material difference to the pace of the recovery of the labour market from the current crisis.

[4] Reserve Bank of Australia, Statement by Philip Lowe, Governor: Monetary Policy Decision, 2 February 2021.

Schedule 1: Casual employees

Summary of the key provisions in this Schedule

Definition of a 'casual employee'

The Bill contains important provisions that are designed to address the uncertainties and cost risks that have arisen from the Federal Court's controversial decisions in the *WorkPac v Skene*[5] and *WorkPac v Rossato*[6] cases.

Under the provisions in the Bill, a person will be a 'casual employee' for the purposes of the entitlements in the FW Act, if:

> "(a) an offer of employment made by the employer to the person is made on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person; and
>
> (b) the person accepts the offer on that basis; and
>
> (c) the person is an employee as a result of that acceptance."

The Bill clarifies that for the purposes of determining whether the above conditions have been met, regard must be had only to the following considerations:

> "(a) whether the employer can elect to offer work and whether the person can elect to accept or reject work;
>
> (b) whether the person will work only as required;
>
> (c) whether the employment is described as casual employment;
>
> (d) whether the person will be entitled to a casual loading or a specific rate of pay for casual employees under the terms of the offer or a fair work instrument."

It can be seen that the definition is an exclusive one, rather than one that reflects the vague indicia approach adopted by the Federal Court, which is unworkable in practice.

Importantly, the Bill also clarifies that:

- In determining whether a person is a casual employee this "is to be assessed on the basis of the offer of employment and the acceptance of that offer, not on the basis of any subsequent conduct of either party"; and
- A "regular pattern of hours does not of itself indicate a firm advance commitment to continuing and indefinite work according to an agreed pattern of work".

[5] [2018] FCAFC 131.

[6] [2020] FCAFC 84. The High Court of Australia is currently hearing an appeal by WorkPac against this decision.

Protection against 'double-dipping' claims by employees and ex-employees

Vitally, the Bill provides protection to employers against 'double-dipping' claims by employees and ex-employees who were engaged and paid as casuals but who later claim that they are entitled to annual leave and other benefits of permanent employment. It does this by including a provision which allows the amount of the casual loading paid to an employee to be offset against any entitlements that the employee claims to be owed. This approach has obvious merit and fairness.

The Bill also clarifies that service as a casual employee is not counted for the purposes of redundancy pay and various other entitlements of permanent employment, if the casual converts to permanent employment.

Casual conversion

The Bill would amend the National Employment Standards (**NES**) in the FW Act to provide casual conversion rights to employees as follows:

- Where an employee has been employed by the employer for a period of 12 months and, during at least the last 6 months of that period, the employee has worked a regular pattern of hours on an ongoing basis which without significant adjustment the employee could continue to work as a permanent employee, the employer must make an offer to the employee for conversion to permanent employment, except where:
    - there are reasonable grounds for the employer not to make the offer; and
    - the reasonable grounds are based on facts that are known, or reasonably foreseeable, at the time of deciding not to make the offer.
- The above offer must be made within 21 days after the employee has completed 12 months of employment.
- If an employer decides that the employee has not worked regular hours during at least the last 6 months, or decides that there are reasonable grounds not to make an offer to the employee for conversion, the employer must give written notice of this decision to the employee.
- If the employee chooses not to convert to permanent employment, the employee can remain a 'casual employee' indefinitely.
- A casual employee who works regular hours generally has a right to request conversion every six months, with an employer only having the right to refuse on reasonable grounds.
- If a dispute between an employer and an employee arises about the casual conversion rights of the employee, the dispute can be referred to the Fair Work Commission (**FWC**). The FWC has the power to conciliate and, if both parties agree, to arbitrate.

The above approach has a lot of similarity with the FWC's model casual conversion clause for awards which was determined in 2017 as part of the FWC's major *Casual Employment and Part-time Employment Case*[7] which ran for three years and involved an extensive amount of evidence, submissions and hearings. Ai Group played a leading role in representing employers in the case.

The Bill would require the FWC to review the casual employment provisions in all modern awards within six months of the new legislative provisions coming into effect to ensure that the provisions are not inconsistent with the Act, including reviewing award provisions which define a 'casual employee' and those which provide conversion rights.

Casual Employment Information Statement

The Bill would require the Fair Work Ombudsman (**FWO**) to publish a Casual Employment Information Statement which includes information about the definition of a 'casual employee' and conversion rights. Employers would be required to give the Casual Employment Statement to all casual employees.

The need for reform to casual employment laws

There are many myths about casual employment promoted by unions and other parties. It is important that the Inquiry focus on facts, not myths.

Six key facts are particularly relevant.

Fact 1 – The level of casual employment in Australia is not increasing

As of November 2020, **there were 2.485 million casuals (19.3% of the workforce)**.[8] This is down by 5% from pre-pandemic levels. In February 2020, there were 2.624 million casuals (20.1% of the workforce).

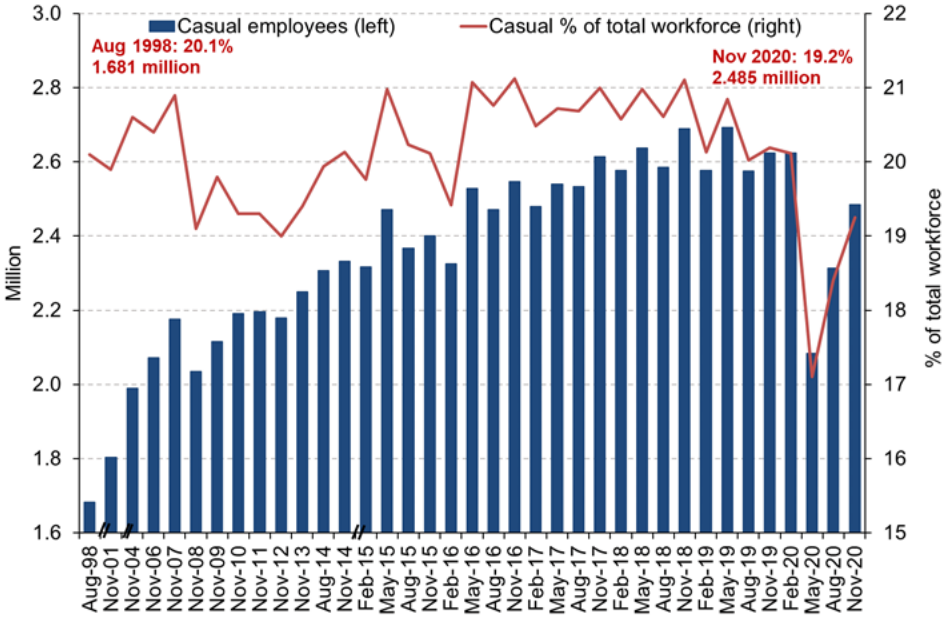
As can be seen in the chart below, apart from the major drop in the last 12 months, for the past 22 years the level of casual employment has been around 20% of the total workforce, or 25% of employees in the workforce (if business owners and contractors are excluded from the total).

Between February and May 2020, total employment fell by 861,600 in Australia, with casual employment falling by 540,500 and accounting for the majority of this fall (62.7%). By November 2020, there were still around 139,500 fewer casuals than there were in February (5% fewer than in Feb 2020).

[7] [2017] FWCFB 3541.

[8] ABS 6291.0, *Labour Force Australia, Detailed*, November 2020, Table 13. 'Casuals' are identified in the ABS labour force survey as 'employees without paid leave entitlements'.

Chart 4: Casual employment and incidence, 1998 to 2020



ABS 6291.0, *Labour Force Australia, Detailed*, November 2020, Table 13

* 'casuals' are identified in the ABS labour force survey as 'employees without paid leave entitlements'.

Chart 5: Changes in employment for casuals, permanent employees and owner-managers in 2020

ABS 6291.0, *Labour Force Australia, Detailed*, November 2020, Table 13

* 'casuals' are identified in the ABS labour force survey as 'employees without paid leave entitlements'.

Fact 2 – The very widespread industry practice is that a person engaged as a casual employee and paid a casual loaded rate is treated as a 'casual employee' for the purposes of modern awards and the FW Act

When employers in the real world decide that they need a casual employee, they engage a person as a casual employee and pay them a casual loaded rate. This very widespread approach is consistent with the way that casual employment is treated in modern awards. For example:

- The *Manufacturing and Associated Industries and Occupations Award 2020* defines a 'casual employee' in the following manner:

  11.1 A casual employee is one engaged and paid as such.

- The *Hospitality Industry (General) Award 2020* states:

  11.1 An employee is a casual employee if they are engaged as a casual employee.

  11.2 An employer must pay a casual employee for each hour worked a loading of 25% in addition to the ordinary hourly rate.

- The *General Retail Industry Award 2020* states:

  11.1 A casual employee is an employee engaged as such.

  11.2 An employee who is not covered by clause 9—Full-time employees or clause 10—Part-time employees must be engaged and paid as a casual employee.

  11.3 An employer must pay a casual employee for each hour worked a loading of 25% on top of the minimum hourly rate otherwise applicable under clause 17—Minimum rates.

  NOTE 1: The casual loading is payable instead of entitlements from which casuals are excluded by the terms of this award and the NES. See Part 2-2 of the Act.

  NOTE 2: Overtime rates applicable to casuals are set out in Table 10—Overtime rates.

  NOTE 3: Penalty rates applicable to casuals are set out in Table 11—Penalty rates.

In its major *Casual Employment and Part-Time Employment Decision*[9] of July 2017, which followed three years of Commission proceedings and an extensive amount of expert and industry evidence, a five-member Full Bench of the FWC outlined the approach that applies in the real world and identified the problems that would result if the Federal Circuit Court's *WorkPac v Skene*[10] decision was upheld by the Federal Court (as it subsequently was): (emphasis added)

> **[82]** The decision in *Skene* is currently the subject of an appeal to the Federal Court. No decision in the appeal had been issued at the time of writing of this decision. It may be observed, with respect, that the Federal Circuit Court decision if maintained is likely to be productive of significant difficulty, since it proceeds on the basis that there is a lack of integration between the concept of casual employment

[9] [2017] FWCFB 3541.

[10] [2016] FCCA 3035.

as it is dealt with in the FW Act and the casual employment provisions of modern awards and enterprise agreements made under the FW Act. Modern awards proceed upon the assumption that a casual employee under the award receives a 25% loading in lieu of the major NES leave entitlements, but *Skene* suggests that in respect of some employees the employer may be obliged to pay the employee the 25% casual loading under the award and in addition all the benefits of the NES under the FW Act. Conceivably, it could also conversely mean that a person who is not a casual for the purposes of the award and does not receive the casual loading (because the employer chose not to engage the person as a casual and pay him or her as such) *is* a casual for the purpose of the FW Act (applying the criteria referred to in *Skene*) and therefore is *not* entitled to NES benefits (except those applicable to casuals). The same problems could also arise in relation to enterprise agreements (as *Skene* itself demonstrates), which often reflect the casual provisions of modern awards because of the approval requirement in s.186(2)(d) that the agreement pass the better off overall test provided for in s.193 (under which the Commission must be satisfied that employees to whom the enterprise agreement would apply would be better off overall under the agreement than under any modern award which would otherwise apply).

[83] *Skene* is also at odds with the practical position which, from the evidence in this matter and our collective experience, actually applies, namely that employers universally treat persons as being casual employers (or otherwise) consistently for the purpose of NES and award or enterprise agreement entitlements.

Fact 3 – It was the intention of Parliament when the FW Act was developed that the very widespread industry approach to defining a casual employee would apply for the purposes of the FW Act

Ai Group was very heavily involved in the development of the FW Act between 2007 and 2009. At no stage was there any discussion about a vague indicia approach applying to the meaning of a 'casual employee' for the purposes of the FW Act.

At the time there was no controversy about the meaning of a 'casual employee'. Awards very widely defined a casual employee as an employee engaged and paid as such, consistent with the very widespread industry practice.

The following definition of a 'long term casual employee' in s.12 of the FW Act (which is relevant for the purposes of some NES entitlements and the unfair dismissal laws) highlights that Parliament intended that casual employees could be engaged to work a regular pattern of hours for an extended period:

> ***"long term casual employee"***: a national system employee of a national system employer is a ***long term casual employee*** at a particular time if, at that time:
>
> (a) the employee is a casual employee; and
>
> (b) the employee has been employed by the employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months.

The Explanatory Memorandum (**EM**) for the *Fair Work Bill 2008* refers to the ABS statistics when outlining the number of 'casual employees' in Australia and the consequent regulatory impact of the provisions in the legislation:

> r.60. The ABS offers three different measures of the incidence of casual employment – the Employee Earnings, Benefits and Trade Union Membership (EEBTUM), Forms of Employment (FoES) and Labour Market Statistics publications.
>
> r.61. ABS EEBTUM data show that casual employee incidence was 24.7 per cent (2,061,000 employees) in August 2007. The Department believes that this is the most accurate estimate of casual employment.

In the ABS statistics, casual employees are regarded as "employees without paid leave entitlements". This is very similar to the common award definition of a casual employee as "one engaged and paid as such".

If it was the intention of the Labor Federal Government and of Parliament that some narrower definition of a 'casual employee' apply for the purposes of the FW Act (like the Federal Court's vague indicia approach in the *WorkPac v Skene*[11] and *WorkPac v Rossato*[12] cases), surely this would have been referred to in the EM and taken account of in the regulatory impact statement. Instead, the EM refers to there being 2,061,000 casual employees in August 2007.

The EM also states that the annual leave entitlement in the NES has the same coverage as the annual leave entitlements in the previous Australian Fair Pay and Conditions Standard in the *Workplace Relations Act 1996* (Cth):

> *Annual leave:* both the Standard and the NES provide the same coverage and quantum of annual leave entitlement. A key change under the NES is a simpler manner of accrual and the concept of 'service' for calculating the entitlement. Paid annual leave will accrue and then be taken on the basis of an employee's ordinary hours of work….[13]

If there was an intention to extend annual leave entitlements to any employees who were engaged and paid as casuals, surely this would have been referred to in the EM and taken account of in the regulatory impact statement.

Fact 4 – The current uncertainties about casual employment are particularly relevant to small businesses

As set out in the *Characteristics and Use of Casual Employment in Australia* report, published in 2018 by the Commonwealth Parliamentary Library, over 80% of casuals worked for Small and Medium Enterprises (**SMEs**):

[11] [2018] FCAFC 131.

[12] [2020] FCAFC 84.

[13] Paragraph r.26.

- Over 51.4% of casuals work for small businesses with less than 20 employees;
- Over 30.7% of casuals work for businesses with 20-99 employees; and
- Less than 17.9% of casuals work for businesses with 100 or more employees.

There are a very large number of casual employees in every State as highlighted by the following table which reproduces the latest ABS statistics, released in December 2020:

State or Territory	Number of Casual Employees in the State / Territory as at August 2020[a]
NSW	716,200
VIC	505,600
QLD	486,000
SA	177,700
WA	277,400
Tas	56,200
NT	22,800
ACT	39,700
Australia	2,281,600

[a] ABS 6333.0 *Characteristics of Employment*, August 2020, Table 1c.3.

Given that most casuals work for SMEs and that the uncertainty caused by the Federal Court's *WorkPac v Skene* and *WorkPac v Rossato* decisions apply to all casuals who work regular hours, the current uncertainties about casual employment are particularly relevant to small businesses.

The current costs risks are threatening to drive many small businesses into insolvency and threatening to destroy the livelihoods of a large number of small business owners.

Fact 5: Industrial Commissions have consistently rejected union arguments to remove an employer's right of reasonable refusal of casual conversion requests

In four major cases, the unions have endeavoured to convince Federal and State Industrial Commissions to remove an employer's right to reasonably refuse casual conversion requests. On each occasion, after hearing an extensive amount of evidence and submissions, the relevant Commission has rejected the unions' claims and confirmed the importance of this right. The major cases are:

- The FWC's *Casual Employment and Part-time Employment Case*;[14]

[14] [2017] FWCFB 3541.

- The *Metal Industry Casual Employment Case*;[15]
- The NSW *Security Employment Test Case*;[16] and
- The *Clerks (SA) Award Casual Provisions Appeal Case*.[17]

In its main decision in the *Casual Employment and Part-time Employment Case*,[18] a five-member Full Bench of the FWC relevantly stated: (emphasis added)

> **[380]** In relation to the fourth question, we do not consider that the employer should be deprived of the capacity to refuse a casual conversion request on reasonable grounds. If it would require a significant adjustment to the casual employee's hours of work to accommodate them in full-time or part-time employment in accordance with the terms of the applicable modern award, or it is known or reasonably foreseeable that the casual employee's position will cease to exist or the employee's hours of work will significantly change or be reduced within the next 12 months, we consider that it would be unreasonable to require the employer nonetheless to convert the employee in those circumstances. The circumstances we have identified would generally constitute the grounds upon which a conversion request could reasonably be refused, although there may be other grounds which we currently cannot contemplate. We emphasise that for a ground for refusal to be reasonable, it must be based on facts which are known or reasonably foreseeable, and not be based on speculation or some general lack of certainty about the employee's future employment. A conversion request should only be able to be refused after consultation with the employee, the refusal and the reasons for it should be communicated in writing within a reasonable period, and if the reasons are not accepted resort should be had to the award's dispute resolution procedure.

Fact 6: Very few disputes have arisen over casual conversion requests and these have been resolved by the Commission through conciliation

Over the past 20 years, since the Australian Industrial Relations Commission handed down its decision in the *Metal Industry Casual Employment Case* and casual conversion provisions flowed into numerous federal awards, there have been virtually no disputes about the refusal of employee requests to convert.

The dispute settling provisions in modern awards give the FWC the power to conciliate if a dispute arises about the casual conversion provisions in the award, or to arbitrate if the employer and employee agrees. This is similar to the dispute settling provisions that apply to most areas of the FW Act (see s.595 and 739 of the FW Act) and would apply to the casual conversion provisions in the Bill. There is no evidence that this approach has not been effective in resolving disputes over casual conversion issues over the past 20 years.

[15] Print T4991.

[16] [2006] NSWIRComm 38.

[17] [2001] SAIRComm 7.

[18] [2017] FWCFB 3541.

In the *Casual Employment and Part-time Employment Case*,[19] the FWC Full Bench rejected union arguments that the casual conversion provisions in awards, including the employer's right of reasonable refusal and the absence of compulsory arbitration, were ineffective: (emphasis added)

> [386] Second, the evidence did not demonstrate that, for those who exercised the election to convert, the existing provisions in the awards in question were ineffective in leading to conversion actually occurring. The survey evidence presented on both sides shows that a significant majority of those who sought conversion to permanency actually obtained it. The ACTU survey, showed (albeit on the basis of fairly small response numbers) that 77% of those casuals who asked for conversion to permanency succeeded (although the responses seem not to have been confined to persons who had made their request via an award casual conversion clause mechanism), and the figure for the manufacturing and utilities sector was 67%. The Joint Employer Survey indicated that about 63% of those who elected to convert were actually converted – a broadly consistent outcome. Given that the current provisions generally allow for conversions to be resisted on reasonable grounds, it does not seem to us that these figures are inconsistent with the proper operation of those provisions.

Certainty and fairness need to be restored without delay

For the past 2.5 years, businesses that employ casual employees have faced uncertainty and cost-risks due to the Federal Court's controversial decisions in the *WorkPac v Skene*[20] and *WorkPac v Rossato*[21] cases, which awarded annual leave and other entitlements to Mr Skene and Mr Rossato. These two employees of WorkPac were engaged as casuals and paid a casual loaded rate under the enterprise agreement that applied to their employment.

The judgments of the Federal Court in these cases have created a great deal of uncertainty and cost risk for businesses and have become major barriers to casual jobs. The Federal Court's judgments have sweeping implications for many thousands of businesses, as indicated by the High Court's decision to hear an appeal against the *WorkPac v Rossato* judgment.

Certainty needs to be restored without delay to encourage employers to employ the more than one hundred thousand casuals who have lost their job since the onset of COVID-19 and have not yet been re-employed (see Chart 4 on page 12 of this submission).

At the special leave stage of the High Court appeal in the *WorkPac v Rossato* case, the Federal Government submitted evidence that the cost to employers of 'double dipping' claims by employees who have been engaged and paid as casuals would be up to $39 billion. No businesses would have made provision for these costs as they have already paid a casual loading in lieu of annual leave and other entitlements.

[19] [2017] FWCFB 3541.

[20] [2018] FCAFC 131.

[21] [2020] FCAFC 84. The High Court of Australia is currently hearing an appeal by WorkPac against this decision.

The 25% standard casual loading arose from the *Metal Industry Casual Employment Decision*[22] of a Full Bench of the Australian Industrial Relations Commission (now the FWC) in 2000. Ai Group represented the employers in the case. As a result of the decision, the casual loading in the *Metal, Engineering and Associated Industries Award 1998* was increased from 20% to 25%. The Bench calculated how much each relevant entitlement was worth in terms of a loading. While not adopting a precise formula, 10.1% of the 25% was calculated as compensating for the absence of annual leave entitlements. The Commission's decision highlights that it would be blatant 'double-dipping' for an employee to receive the casual loading as well as the annual leave entitlements that the loading has been paid in lieu of. The 25% loading flowed through to other awards and is now a standard entitlement in modern awards and the National Minimum Wage Order.

Unless addressed, the Federal Court's *WorkPac v Skene* and *WorkPac v Rossato* decisions will:

- Impose crippling costs on Australian businesses;
- Potentially destroy a large number of businesses – including those in sectors like retail, hospitality and restaurants which employ a high proportion of casual staff and which have been impacted the most by the COVID-19 crisis;
- Destroy the livelihoods of a large number of small business owners;
- Discourage employers from retaining casual employees when the JobKeeper scheme ends;
- Be a barrier to employers taking on additional casual staff;
- Increase the level of unemployment, including amongst young people who are already disadvantaged in the labour market; and
- Encourage class action claims against employers, including those funded by overseas litigation funders chasing super-profits at the expense of the Australian community.

In addition to the above impacts, unless addressed the uncertainty surrounding the definition of a 'casual employee' could impose huge costs on the Commonwealth through the Fair Entitlement Guarantee (**FEG**). The present lack of certainty around the meaning of a 'casual employee' provides an incentive to casuals engaged by insolvent businesses to pursue 'double-dipping' claims under the FEG. A claim of this type is currently before the Federal Court of Australia (see *Kyle Warren v Secretary, Department of Jobs and Small Business*, NSD302/2019). We understand that the applicant's costs in the case are being funded by the CFMMEU (Mining and Energy Division) as a test case.

[22] Print T4991.

Ai Group's views on the provisions of Schedule 1

Ai Group strongly supports the provisions of Schedule 1 but proposes a few amendments to improve the operation of the provisions and reduce the regulatory burden on businesses, as set out in the following table.

Provisions in the Bill	***Ai Group's position***	***Comments***
Item 2 Section 15A – Meaning of *casual employee*	Supported, but an amendment is proposed to improve the operation of the provision	The definition in s.15A is based on the common law principle that the essence of casual employment is the absence of a "*firm advance commitment to continuing and indefinite work according to an agreed pattern of work"* as determined by the Federal Court in the *WorkPac v Skene* and *WorkPac v Rossato* cases. The proposed definition in s.15A provides more certainty than the problematic and vague indicia approach adopted by the Federal Court in the above cases. Critically important aspects of the proposed definition include: • The definition is based on the employer's and employee's understandings at the time of engagement (see s.15A(1), (2), (4) and (5)). Any other approach would be unworkable and would not address the current cost risks and uncertainties. • The four indicators in s.15A(2) of whether there is a *"firm advance commitment to continuing and indefinite work according to an agreed pattern of work"* are defined and exclusive. Any non-exclusive approach would be unworkable and would not address the current cost risks and uncertainties. • The definition clarifies that a regular pattern of hours does not of itself indicate that an employee is not a casual employee (see s.15A(3)). This is important because more than one million casual employees work regular shifts and have done so for at least 12 month.[23] With regard to the four indicators of casual employment in s.15A(2), paragraphs (c) and (d) are aligned with modern award definitions and the industry practice that a casual employee is an employee engaged and paid as such. The concepts in paragraph (a) are unlikely to cause many difficulties. However, paragraph (b) could lead to some ongoing uncertainties about the meaning of "as required". Accordingly, Ai Group proposes the deletion of paragraph (b).

[23] This calculation is based on an analysis of relevant ABS and HILDA statistics prepared by Julie Toth, Chief Economist of Ai Group. The analysis was included in an Affidavit filed in the High Court of Australia in support of WorkPac's application for special leave to appeal the Federal Court's *WorkPac v Rossato* decision.

Provisions in the Bill	*Ai Group's position*	*Comments*
Item 3 Division 4A – Offers and requests for casual conversion Subdivision A – Application of Division [s.66A]	Supported	The provisions in Division 4A apply to all casual employees as terms of the NES, including: • Employees covered by modern awards; • Employees covered by enterprise agreements; and • Award-free and agreement-free employees. As discussed in the section of this submission dealing with Schedule 7 of the Bill, this approach will require that the provisions of all modern awards are reviewed to ensure consistency with the legislative provisions. While the wide application resulting from Subdivision A in the Bill will lead to significant complications in the short-term, it will deliver a standard approach to casual conversion that will greatly assist in ensuring that employees and employers understand their rights and obligations.
Item 3 Subdivision B – Employer Offers for Casual Conversion [ss.66A, 66B, 66C, 66D and 66E]	Supported, but an amendment is proposed to improve the operation of the provision and reduce the regulatory burden	The provisions of Subdivision B are based on key aspects of the FWC's model casual conversion clause which was an outcome of the 2017 decision of a five-member Full Bench of the Commission in the *Casual and Part-time Employment Case*.[24] The model clause has been included in numerous modern awards. Important principles included in Subdivision B of the Bill and in the FWC's model clause are: • Conversion rights arise after 12 months of employment where the employee has worked a regular pattern of hours which, without significant adjustment, the employee could continue to work as a full-time or part-time employee. (NB. The Bill includes more favourable entitlements for employees than the FWC's model clause because under s.66B(2) the employee only needs to have worked the regular pattern of hours for the last 6 months of the 12 month period, whereas the FWC's model clause requires the pattern of hours to be worked for the full 12 month period). • The employee does not have an entitlement to convert if the employer has reasonable grounds not to allow conversion, based on facts that are known or reasonably foreseeable. Reasonable grounds include: o The employee's position will cease to exist within 12 months;

[24] [2017] FWCFB 3541.

Provisions in the Bill	*Ai Group's position*	*Comments*
		○ The hours of work of the employee will be significantly reduced in the next 12 months; ○ There will be a significant change in the days or times at which the employee's hours of work are required to be performed in the next 12 months which cannot be accommodated. To reduce the regulatory burden on businesses (particularly those with a large number of casuals), we propose that the provisions of Subdivision B be amended to enable an eligible employee to make a request for conversion, with an employer having the right to reasonably refuse the request (rather than an employer being required to offer conversion to an eligible employee). This would ensure greater consistency with the approach in the FWC's model clause. In the FWC's *Casual and Part-time Employment Decision*, the FWC Full Bench was mindful of the importance of not imposing an unnecessary regulatory burden on employers. For this reason, the FWC's model clause gives employers the ability to advise employees of their conversion rights at the time of employment, rather when they have attained 12 months of regular employment. The Full Bench relevantly stated: (emphasis added) ***[379]*** *…. The conclusion we draw from that evidence is that the burden lies not in the actual process of sending the information to casual employees, but rather the work involved in identifying when casuals have completed the qualifying period and whether they meet the eligibility criteria for conversion. In the model we propose to remove this aspect of the burden by establishing a simple notification requirement under which all casual employees (whether they become eligible for conversion or not) must be provided with a copy of the casual conversion clause <u>within</u> the first 12 months after their initial engagement.* The relevant wording in the FWC's model award casual conversion clause is: *"An employer must provide a casual employee, whether a regular casual employee or not, with a copy of the provisions of this subclause <u>within</u> the first 12 months of the employee's first engagement to perform work."* The Bill ensures that employees are advised of their conversion rights at the time of engagement through the Casual Employment Information Statement in the Bill. Therefore, it is unnecessary to

Provisions in the Bill	*Ai Group's position*	*Comments*
		impose a regulatory burden on employers to advise employees of their conversion rights again after 12 months of employment. Even if the Bill is not amended to implement the approach described above, s.66C(3) should be deleted as the provision serves no useful purpose and would impose an unreasonable regulatory burden on employers. There are a very large number of employers who have casuals 'on their books' who work irregularly. It is unnecessary to advise all of these employees in writing after 12 months of employment that they do not have a right to be offered conversion. These employees have already been advised of their casual conversion rights at the time of engagement through the Casual Employment Information Statement.
Item 3 Subdivision C – Residual right to request casual conversion [ss.66F, 66G, 66H and 66J]	Supported	The provisions of Subdivision C are based on key aspects of the FWC's model casual conversion clause for modern awards. The Bill includes more favourable entitlements for employees than the FWC's model clause because under s.66F(1) the employee only needs to have worked the regular pattern of hours for the last 6 months of the 12 month period, whereas the FWC's model clause requires the pattern of hours to be worked for the full 12 month period.
Item 3 Section 66K – Effect of conversion	Supported	This provision clarifies the employment status of a casual employee who has converted to full-time or part-time employment and the date of effect of the conversion.
Item 3 Section 66L – Other rights and obligations	Supported, with an amendment to improve fairness to employers	Subsection 66L(2) is a useful provision which clarifies the rights of employers and employees. However, s.66L(1) is unnecessary and should be deleted. An employer who reduced or varied an employee's hours of work or who terminated an employee's employment in order to avoid rights and obligations under Division 4A (Offers and requests for casual conversion) would be subject to a civil penalty under Part 3-1 (General protections) of the Act. Such action would constitute the taking of adverse action against an employee because of a workplace right of the employee. Employers should not be exposed to two penalties for the same course of action.

Provisions in the Bill	*Ai Group's position*	*Comments*
Item 3 Section 66M – Disputes about the operation of the Division	Supported	The dispute settling provisions in s.66M of the Bill align with the dispute settling provisions applicable to most other areas of the FW Act. Under s.595(2) of the FW Act, the FWC may deal with a dispute by mediation or conciliation or by making a recommendation or expressing an opinion. The FWC may deal with a dispute by arbitration if the FWC is expressly authorised to do so under the Act (see ss.595(3) and 739(4)). Subsection 66M(2) of the Bill provides that the dispute settling terms of relevant awards, enterprise agreements and contracts of employment apply to disputes that arise about the casual conversion provisions in the Act (which are terms of the NES). This is sensible because: • The dispute settling clauses in awards apply to disputes in relation to the NES; • Subsection 186(6) of the Act requires that dispute settling clauses in enterprise agreements include a procedure that requires or allows the FWC or another independent person to settle disputes in relation to the NES; and • The model dispute settling term for enterprise agreements in the *Fair Work Regulations 2009* (Schedule 6.1) applies to disputes relating to the NES.
Item 4 Division 12 – Fair Work Ombudsman to prepare and publish Casual Employment Information Statement [ss.125A and 125B]	Supported	The required content for the Casual Employment Information Statement in s.125A(2) of the Bill is appropriate. Given the importance of ensuring that all casual employees understand the meaning of a 'casual employee' under the FW Act and understand their conversion rights, it is reasonable to require that employers give each casual employee the Casual Employment Information Statement before, or as soon as practicable after, the employee commences employment as a casual employee with the employer.

Provisions in the Bill	***Ai Group's position***	***Comments***
Item 6 s.545A – Orders relating to casual loading amounts	Supported with an amendment to address any unforeseen interpretation problems	By far, the greatest issue of concern to employers at the present time in respect of casual employment matters is the risk of 'double-dipping' claims being pursued by the very large number of casuals who have worked regularly for an extended period. There are at least eight class actions underway about this matter, nearly all of which are being funded by overseas litigation funders. Accordingly, it is vital that the Bill give employers protection against 'double-dipping' claims. Employer confidence to employ is critical to the recovery from the pandemic. More than 100,000 casuals who lost the job in 2020 as a result of the pandemic have not yet been re-employed (see Chart 4 on page 12 of this submission). Section 545A of the Bill is a vital provision that addresses 'double-dipping' claims. The provision would require the Courts, when dealing with any claims for certain NES entitlements, to offset against any monetary amount owing to an employee, the amount of any casual loading or other similar identifiable amount that has been paid to the employee. The relevant NES entitlements are those that a 'casual employee' is not entitled to under the NES. It is not unusual for industrial relations legislation to include provisions protecting employers against 'double-dipping' claims, for example, s.22(6) of the FW Act protects an employer against 'double-dipping' claims in relation to annual leave and other entitlements that are calculated by reference to a period of service. We propose the following additional subclause that will provide some flexibility to address any unforeseen problems that may arise regarding the determination of the "loading amount" in particular circumstances: *(6) The regulations may prescribe matters relating to the loading amount.* Section 545A is a critical provision in the Bill and it is very important that the policy intent is achieved. The above form of words is similar to that used in ss.178(3) and 178A(4) of the FW Act and is designed to provide sufficient flexibility to address any unforeseen interpretation problems that may arise with s.545A.

Provisions in the Bill	***Ai Group's position***	***Comments***
Items 8, 9, 10, 11, 12, 13, 14 and 22 Part 2 – Other amendments [ss.12, 23, 61, 65, 67 and 384]	Supported	These are technical and consequential amendments.
Items 15, 16, 17, 18, 19, 20 and 21 Part 2 – Other amendments [ss.87, 96, 117, 119 and 121]	Supported	These provisions protect against 'double dipping' claims by casual employees who convert to permanent employment. The provisions ensure that only the period of service as a permanent employee is included when calculating an employee's annual leave, personal carer's leave, notice of termination and redundancy pay entitlements. This is fair and appropriate because the employee received the casual loading in lieu of these entitlements during the period of casual employment. The legislative amendments reflect the interpretation of the relevant provisions in the FW Act adopted by a Full Bench of the FWC in *Unilever v AMWU* [2018] FWCFB 4463. The interpretation of the relevant provisions was the subject of some debate given an earlier split decision of a different Full Bench of the Commission. In relation to the earlier decision, the Full Bench in *Unilever* said: *"[28] There was argument before us about the significance of a decision of the Full Bench in Australian Manufacturing Workers' Union v Donau Pty Ltd, in which a majority found that a period of 'contiguous' casual service counted in the calculation of severance pay under the enterprise agreement in question. That decision turned on its own facts. It should not be understood as establishing any principle about the application of s.22 of the Act to casual employment, or the approach to calculating service in enterprise agreements…."*

Schedule 2: Modern awards

Summary of the key provisions in this Schedule

The Bill includes some increased flexibility for employers and employees to whom the following "identified modern awards" apply:

- *Business Equipment Award 2020*;
- *Commercial Sales Award 2020*;
- *Fast Food Industry Award 2010*;
- *General Retail Industry Award 2020*;
- *Hospitality Industry (General) Award 2020*;
- *Meat Industry Award 2020*;
- *Nursery Award 2020*;
- *Pharmacy Industry Award 2020*;
- *Restaurant Industry Award 2020*;
- *Registered and Licensed Clubs Award 2010*;
- *Seafood Processing Award 2020*;
- *Vehicle Repair, Services and Retail Award 2020*.

Where one of the above awards applies, the Bill would allow:

- An employer and a part-time employee (who works at least 16 ordinary hours) to reach a 'simplified additional hours agreement' for the part-time employee to work additional hours, within specified limits, without the payment of overtime penalties.

- An employer to issue a flexible work direction to an employee directing the employee to work at a different location to the employee's normal place of work, subject to consultation and various safeguards.

- An employer to issue a flexible work direction to an employee directing the employee to perform different duties to the employee's usual duties, subject to consultation and various safeguards.

The legislative provisions would override any inconsistent provisions in the relevant award. Flexible work directions would only be available for a two year period.

The Bill gives the Federal Government the ability to add one or more awards to the list of 'identified modern awards' through regulations.

The need for reform to award arrangements

Allowing the three types of flexibility in Schedule 2 of the Bill is an important initiative that would meaningfully assist industry to recover from the significant impacts of the pandemic, to navigate the inevitable challenges ahead and, crucially, to maximise employment.

Importantly, implementing the flexibilities through legislative amendments is necessary given the commonly cited concern that awards are overly restrictive, the barriers that many employers face in seeking these kinds of flexibilities through the enterprise bargaining system, and the limited capacity for such initiatives to be implemented on a widespread basis through the FWC's processes.

The part-time flexibilities in the Bill are fair and appropriate

Current part-time provisions in the identified awards, and indeed in most modern awards, are unduly restrictive for employers and employees.

The existing provisions operate to create a perverse disincentive to employers offering existing part-time employees additional work which they often want to undertake. The deficiencies in such provisions have been put into sharp focus by the challenging and rapidly changing trading environment that has accompanied the COVID-19 pandemic and various necessary initiatives to limit the spread of the virus.

Most awards require agreement in writing at the time of commencement of employment on the precise hours that the part-time employee will work. Often this will require specific agreement on the days the employee will work, the number of hours that will be worked, and the precise starting or finishing times.

The current very prescriptive and cumbersome requirements regarding the setting of hours for part-time employees are generally accompanied by a requirement to pay employees for any hours that they work outside of the initially agreed hours at overtime rates. This operates as a significant disincentive to employers offering part-time employees additional hours of work, even in circumstances where the employee is very keen to undertake such additional work if it is available.

Although awards generally contain some capacity for employers and employees to agree to vary a part-time employee's ordinary hours of work, the provisions often do not appropriately permit temporary changes or only permit variations to such hours in a manner that imposes an unreasonable administrative burden on employers that is, in practice, a barrier to their utilisation.

The diversity of approaches within part-time provisions in awards, and the way they are often drafted, also means that they are often far from simple or easy to understand.

The Bill would deliver important and fair flexibilities for award-covered employers and employees in industries particularly hard-hit by the pandemic. The provisions would allow part-time employees to work additional hours that they want to work, and receive additional pay for doing so.

There is nothing particularly unusual about the idea of part-time employees agreeing to work additional ordinary hours (up to the hours worked by full-time employees) without the payment of overtime. For example, the current Restaurants Award, Hospitality Award, Clubs Award, Telecommunications Services Award, Contract Call Centres Award and Nurses Award already provide for this. The Fast Food Industry Award was also varied last year to provide this flexibility for a limited period.

The need for flexible work directions

The capacity to issue flexible work directions requiring employees to undertake different duties, or to work at different locations, is a necessary flexibility that would assist employers to navigate the circumstances of the pandemic and to maximise employment, for the next two years.

The pandemic has necessitated many changes to the way in which organisations operate. Often, changes have been required to the manner in which people work and indeed where they work. It is reasonable to expect that these circumstances will persist for some time to come and it is appropriate that employers are afforded mechanisms to responsibly respond to such issues, subject to appropriate safeguards and limitations.

The provisions in the Bill represent a sensible and important extension of existing temporary flexibilities introduced under the JobKeeper reforms and to provisions that were temporarily included in various awards with the support of major employer associations and unions.

Ai Group's views on the provisions of Schedule 2

Provisions in the Bill	***Ai Group's position***	***Comments***
Items 1, 2 and 3 Part 1—Additional hours for part-time employees [ss.12, 132 and 136]	Supported	These are machinery provisions.
Item 4 Section 161A - Variation of modern award to resolve uncertainty or difficulty relating to simplified additional hours agreements	Supported	Section 161A enables the Commission to make a determination resolving unforeseen problems or issues arising from the interaction between the provisions of the Bill and current award terms. Although we do not envisage that the proposed provisions will give rise to the kinds of problems contemplated by the section, the inclusion of s.161A is prudent.

Provisions in the Bill	*Ai Group's position*	*Comments*
Item 5 Division 9—Agreements for part-time employees to work additional agreed hours Subdivision A—Simplified additional hours agreements Section 168M - When a simplified additional hours agreement may be made	Supported, with amendments to improve the operation of the provisions	Section 168M deals with when a simplified additional hours agreement may be made. It enables an agreement to be made for the employee to work 'additional hours'. Paragraph 168M(1)(c) only permits employees who work an average of 16 hours a week to enter into a simplified additional hours agreement. This significantly limits the utility of the reform. It would unjustifiably limit large numbers of employees from accessing the benefits of a simplified additional hours agreement. Many employees to whom the identified awards apply work less than 16 ordinary hours a week. Often this a product of the employee needing to balance work and personal commitments, such as caring obligations or their involvement in ongoing education, rather than employer unwillingness to permanently engage them on additional hours. For example, it is particularly common for young employees covered by the *Fast Food Industry Award 2010*, the *General Retail Industry Award 2020* and the *Hospitality Industry (General) Award 2020* to be undertaking study that limits their ability to permanently work a large number of ordinary hours. Nonetheless, many of these employees are keen to temporarily work additional hours at certain times of the year (e.g. during school or university holidays). There is no apparent logic for the adoption of a 16-hour threshold given that a very large number of workplaces arrange ordinary hours on the basis of 7.6 ordinary hours per day (i.e. 1/5 of the standard 38 hour week). The selection of a 16-hour threshold would often mean that an employee needs to be employed to work for more than 2 days a week in order to access the new arrangements. Such an approach would lock many thousands of employees out of the benefits of the new provisions. For these reasons, the reference to 16 hours in s.168M(1)(c) should be changed to 7.6 hours. Employees will still be protected by the requirement in s.168P that any agreed hours to be worked under a simplified additional hours agreement must be 3 hours or a period of continuous work of at least 3 hours.

Provisions in the Bill	*Ai Group's position*	*Comments*
		Identified modern awards Subsection 168M in the Bill lists the modern awards that constitute the 'identified modern awards' for the purposes of the Bill and permits regulations to be made either prescribing other awards or removing modern awards from the list. The Bill should be amended to: • Extend the flexibilities relating to part-time employment to all modern awards that permit this type of employment. There is no merit in locking a large number of employers and employees out of the benefits that will be delivered through this sensible reform. • Include the following awards, amongst others, as 'identified modern awards': o The *Manufacturing and Associated Industries and Occupations Award 2020*; o The *Airline Operations – Ground Staff Award 2020*; and o The *Clerks – Private Sector Award 2020*. ABS statistics indicate that in the period between November 2019 and November 2020 the number of persons employed in the Manufacturing Industry fell from 917,800 to 840,700.[25] This is not dissimilar to the losses in the hospitality industry, which saw the number of persons employed in the sector during the same period fall from 925,200 to 831,700. Similarly, the devastating impact that the pandemic has had on the aviation industry and related sectors is obvious. The *Airline Operations – Ground Staff Award 2020* covers a large number of employers and employees in this industry. International air travel to and from Australia has virtually come to a standstill and is not expected to recover for several years to come. Similarly, domestic travel remains at very low levels. Flexible part-time employment is particularly important in the aviation industry because aviation businesses face considerable uncertainties associated with flight schedules. Last-minute changes to flight schedules, including cancellations, are commonplace.

[25] ABS 6291.0.55.001 *Labour Force, Australia, detailed,* Nov 2020. Table 06 - Employed persons by Industry sub-division of main job (ANZSIC) and Sex.

Provisions in the Bill	*Ai Group's position*	*Comments*
		There is also a compelling case for including the *Clerks – Private Sector Award 2020* in the list of 'identified modern awards'. The jobs of many clerical staff have been lost during the pandemic and flexibility is important to prevent further job losses and to encourage employment. In addition, many employers in the retail, hospitality and other distressed sectors employ clerical staff under the Clerks Award.
Item 5 Section 168N – Entering into simplified additional hours agreement	Supported but an important amendment is proposed to increase the utility of simplified additional hours agreements	A significant limitation on the utility of simplified additional hours agreements is that it appears the Bill, as drafted, would only permit agreement to be reached in relation to hours that ***will*** be worked. This approach falls short of delivering the kind of flexibility that employers and employees need in the current uncertain and challenging environment. What is needed is provision that enables an employer and an employee to agree that certain additional hours may be undertaken as ordinary hours if they become available and the employee is willing to work them. Paragraph 168N(1)(a) should be amended as follows: *A simplified additional hours agreement:* *(a) Must identify additional agreed hours <u>that may</u> ~~to be~~ worked on one or more days; and* This would enable an employer and employee to agree, in advance, on additional hours that *may* be work as ordinary hours if they are offered to the employee. This would: • Remove the administrative burden of requiring an employer to reach agreement with an employee each time that additional hours become available; • Encourage employers to offer extra hours to permanent employees instead of engaging casual employee; and • Provide employers and employees with greater certainty. For example, the proposed amendment would enable an employer and a part-time employee to agree that the employee may work additional hours during school holidays. This would encourage the employer to offer any such hours to the employee rather than engaging a casual. Importantly, the proposed amendment would not compel an employee to work any additional hours provided.

Provisions in the Bill	*Ai Group's position*	*Comments*
Item 5 Section 168P – Requirements for simplified additional hours agreements	Supported	This provision contains significant safeguards to ensure that employees cannot be required to work unreasonably short engagements as a result of the implementation of a simplified additional hours agreement. The safeguards in s.168P are much more justifiable than the arbitrary requirement in s.168M that employees must work at least 16 ordinary hours a week in order to access a simplified additional hours agreement. The safeguards in s.168P more closely accord with the approach in awards of generally setting minimum daily engagements, rather than minimum weekly engagements.
Item 5 Section 168Q – Effect of simplified additional hours agreement	Supported	This provision enables 'additional agreed hours' to be treated as ordinary hours for certain specified purposes. This includes providing that they will not attract overtime rates. By ensuring that employers do not have to pay overtime rates for additional hours that a part-time employee has agreed to work as ordinary hours, the clause will encourage employers to offer such hours to the employee. The availability of this flexibility will also give employers greater confidence to engage part-time employees in preference to casual employees. Subsection 168Q(3) places outer limits on the additional hours. It requires payment of overtime rates outside of the relevant span or spread of ordinary hours in the award, outside of daily limits on ordinary hours in the award and outside of an average 38 hours per week. Section 168Q(4) requires that additional agreed hours are treated as ordinary hours for the purposes of various entitlements under the NES and *Superannuation Guarantee (Administration) Act 1992*. This will ensure that employees receive additional superannuation and leave entitlements when they work additional agreed hours.
Item 5 Section 168R – Terminating a simplified additional hours agreement	Supported	This provision enables the employer or employee to terminate the agreement with 7 days' notice, or sooner with the agreement of the other party. This is a significant safeguard for employees. The provision also contains two legislative notes alerting a reader to the fact that terminating or not terminating a simplified additional hours agreement is a workplace right for the purposes of the general protections in the Act and that undue influence or pressure is prohibited.

Provisions in the Bill	*Ai Group's position*	*Comments*
Item 5 Section 168S – Certain provisions taken to be terms of an identified modern award etc.	Supported	This provision addresses the interaction between the legislative provisions and modern award and NES terms.
Items 5 and 6 Section 168T – Protection of workplace rights [ss.168T and 344(c)]	Supported	These provisions clarify that entering into or not entering into a simplified additional hours agreement, or terminating or not terminating such agreement, constitutes workplace rights. The provisions will further ensure that the flexibilities are not used in a manner that is unfair to employees.
Items 7 and 8 Part 2—Flexible work directions Division 1 – Introduction Division 2 – Flexible work directions [ss. 789GZC, 789GZD, 789GZE and 789GZF]	Supported	This Part of the Bill creates an ability for employers to require employees to undertake different duties to those that they would ordinarily undertake and to potentially work at different locations, as nominated by the employer, through the issuing of 'flexible work directions'. The directions are similar in nature to those currently provided for under ss.789GE and 789GF of the FW Act and would only be available for the next two years. Division 1 contains machinery and application provisions. Section 789GZF deals with the interaction with the terms of 'identified modern awards'. As discussed above in relation to s.168M, the Bill should be amended to include the following awards, amongst others, as 'identified modern awards': • The *Manufacturing and Associated Industries and Occupations Award 2020*; • The *Airline Operations – Ground Staff Award 2020*; and • The *Clerks – Private Sector Award 2020*. A central rational for the legislative provisions concerning flexible work directions appears to be the need for the current JobKeeper flexibilities pertaining to work duties and location to be extended to employers in distressed industries. We agree that employers which apply the awards currently specified in the Bill should be afforded such flexibilities but there are many others which also should.

Provisions in the Bill	*Ai Group's position*	*Comments*
Item 8 Section 789GZG – Flexible work duties directions	Supported	This section enables employers to issue a direction to an employee to perform any duties within their skill and competency subject to a number of limitations and safeguards. This would give employers an important ability over the next two years to alter the way their employees work in order to respond to the challenges and changed circumstances flowing from the pandemic and associated trading environment. This is crucial as a measure to both assist businesses to navigate the pandemic and to maximise employment. The right to issue flexible work duties directions is subject to four key safeguards: 1. The duties must be within the employee's skill or competence; 2. The duties must be safe; 3. The employee must have any licence or qualification necessary to perform the duties; and 4. The duties must be reasonably within the scope of the employer's business operations. The above safeguards are complemented by additional protections under other sections of the Bill.
Item 8 Section 789 – Flexible work location directions	Supported	This provision would enable an employer to require an employee to work at a location that is different to their normal work location. This would include requiring them to work at their home. It is trite to observe that the circumstances of the pandemic have at times necessitated that employees work at different locations. Millions of Australians have worked remotely over the past 12 months. In some instances, this has been due to public health orders, while in others it is been a measure adopted in order to enable employers to continue to operate, while minimising risks associated with COVID-19. The provisions in the Bill will assist employers to continue to implement such arrangements.

Provisions in the Bill	*Ai Group's position*	*Comments*
Item 8 Section 789GZI – Duration of flexible work directions	Supported	This provision deals with the duration over which a flexible work direction has effect. It provides that such a direction will cease to have effect after two years from the commencement of the Bill or earlier for reasons including its withdrawal by the employer or an order of the FWC. While there have been some pleasing signs of economic recovery, at least in some sectors, the economy will undoubtedly continue to face significant risks and challenges over the next two years. The proposed two year term is fair and sensible.
Item 8 Section 789GZJ – Reasonableness Section 789GZK – Flexible work direction to assist the revival of the enterprise Section 789GZL – Consultation Section 789GZM – Form of direction	Supported	These sections provide significant safeguards which ensure that the proposed flexibilities will not be able to be used inappropriately or unreasonably by employers. The proposed safeguards include requirements that: • A direction must not be unreasonable in all the circumstances; • A direction has no effect unless the employer reasonably believes the direction is a necessary part of a reasonable strategy for the revival of the business; • The employer must consult employees and, where relevant, unions prior to issuing a direction; and • A direction must be in writing.
Item 8 Section 789GZN – Minimum rate of pay guarantee	Supported	Section 789GZN requires that an employee must be paid the base rate of pay that would have been applicable to an employee if they had not been subject to a flexible work direction. This is an important safeguard for employees.
Item 8 Section 789GZO – Certain provisions taken to be term of an identified modern award	Supported	This provision deals with the interaction between the legislative provisions and the terms in modern awards and the NES.

Provisions in the Bill	*Ai Group's position*	*Comments*
Item 8 Section 789GZP – Variation of modern award to resolve uncertainty or difficulty relating to flexible work directions	Supported	Section 789GZP enables the FWC to make a determination resolving unforeseen problems or issues arising from the interaction between the provisions of the Bill and current award terms. Although we do not envisage that the proposed provisions will give rise to the kind of problems contemplated by this section, the inclusion of such a provision is prudent.

Schedule 3: Enterprise agreements etc.

Summary of the key provisions in this Schedule

The Bill includes some important changes to the enterprise agreement provisions in the FW Act, in order to simplify the agreement making and approval process. The following changes are included in the Bill:

- The Better Off Overall Test (**BOOT**) for enterprise agreements would be simplified to:
    - Prevent the FWC taking into account hypothetical kinds of work, patterns of work and types of employment that are unlikely to be engaged in by the employer or employees covered by the agreement;
    - Require the FWC to give significant weight to any views expressed by the employer, the employee and the bargaining representatives regarding whether the agreement passes the BOOT; and
    - Allow the FWC to take into account any non-monetary benefits in the agreement.
- In exceptional circumstances, an agreement that does not pass the BOOT would be able to be approved by the FWC if the Commission decides that it is in the public interest to do so (e.g. where a business is struggling to survive due to the effects of COVID-19). The relevant provisions in the Bill would only operate for a two-year period.
- The objects in the FW Act would be amended to emphasise that enterprise agreements are intended to reflect the needs and priorities of the parties to those agreements, and that applications for the approval of agreements are to be dealt with by the FWC in a timely, practical and transparent manner.
- The Notice of Employee Representational Rights, which is currently required to be given to employees within 14 days of the commencement of bargaining, would be simplified and the 14-day period would be extended to 28 days.
- The requirement for employers to explain the terms of a proposed enterprise agreement to employees prior to the vote, would be simplified.
- Employers would not be required to provide copies of materials referred to in a proposed enterprise agreement to the employees, where the materials are publicly available (e.g. awards and legislation).
- The cohort of casual employees who are entitled to vote on an enterprise agreement would be clarified. Only casual employees who perform work during the 7-day period immediately prior to the date that the voting process occurs or commences (i.e. during the 'access period') would be entitled to vote.

- All enterprise agreements would be required to include a Model NES Interaction Term that explains how the terms of the agreement interact with the NES in the FW Act. If the model term is not included in an agreement, it would be deemed to be a term of the agreement.

- External parties which are not a bargaining representative for the employer or any of the employees covered by an enterprise agreement would not be permitted to make submissions at the approval stage, unless the FWC decides there are exceptional circumstances.

- The FWC would be required, as far as is practicable, to determine an application for the approval of an enterprise agreement within 21 days after the application is filed. If the FWC could not determine the application within this period, the FWC would be required to provide a written notice setting out why it was unable to determine the application within the 21-day period.

- The FWC would have a new duty requiring the Commission to perform its functions and exercise its powers in a manner that recognises the outcome of bargaining at the enterprise level.

- Enterprise agreements which apply to a franchise group would be able to be varied to include additional franchisees, through a simpler process.

- Applications to unilaterally terminate an enterprise agreement would not be permitted until at least three months has elapsed since the nominal expiry date.

- The transfer of business provisions in the Act would be amended to prevent an enterprise agreement becoming binding on the new employer, where:

    - The new employer is an associated entity of the old employer; and

    - The employee sought to become employed by the new employer at the employee's initiative.

The Bill would lead to various agreement-based instruments that were made prior to 1 January 2010 ceasing to operate from 1 July 2022, including:

- Certified agreements, enterprise agreements and other agreement-based transitional instruments that were made under the *Workplace Relations Act 1996* and earlier legislation; and

- Enterprise agreements made under the FW Act during the 'bridging period' (i.e. between 1 July 2009 and 31 December 2009).

The need for reform to the enterprise agreement making system

Enterprise agreement-making under the current provisions of the FW Act is a 'minefield'. It is not surprising that the number of current enterprise agreements has more than halved since the FW Act was implemented. Far from facilitating enterprise agreement making, the current laws operate as a major barrier and disincentive to enterprise agreement-making.

The current unsatisfactory situation cannot be allowed to continue. Legislative provisions that facilitate enterprise agreement-making would drive productivity improvements, lead to higher wage increases for employees, and enable employment conditions to be tailored to the needs of enterprises and their employees. Such provisions would play an important role in driving employment and economic growth during the recovery from the pandemic.

Some current problems are outlined below.

1. The number of enterprise agreements has decreased dramatically since the FW Act was implemented

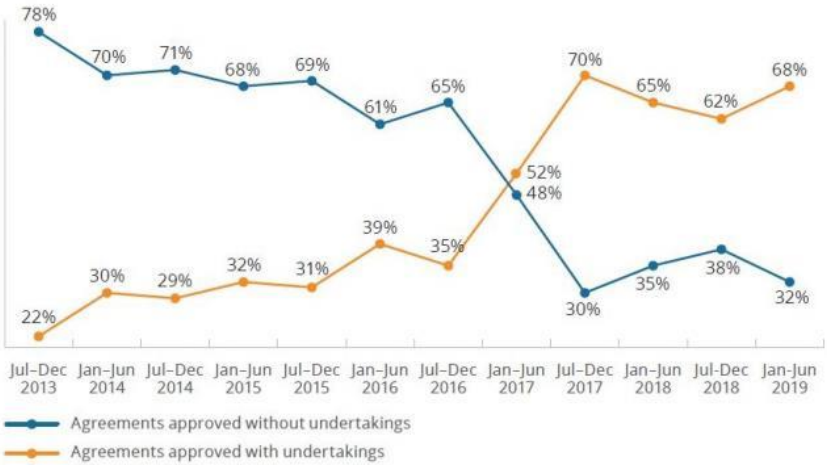
In the fourth quarter of 2010 there were nearly 25,000 current enterprise agreements.[26] As at 30 September 2020 (the latest available statistics), there were 9,804 current enterprise agreements. [27]

It can be seen that the number of current enterprise agreements is less than 40% of those in 2010.

2. Most applications for an enterprise agreement are not approved, without undertakings varying the terms of the agreement made between the employer and its employees

This is highlighted by the following statistics in the FWC's 2018-19 Annual Report:

Chart 2: Enterprise agreements approved with and without undertakings



[26] See Table 1 in the Department of Employment's *Report on Enterprise Bargaining*, February 2017.

[27] See Chart 7 in the Attorney-General Department's *Trends in Federal Enterprise Bargaining Report* for the September Quarter 2020.

The most recent FWC Annual Report (2019/20) does not include information on the number of agreements approved with and without undertakings.

Ai Group understands that as at mid-2020 it remained the case that less than 50% of agreements were being approved by the FWC without undertakings (i.e. in the terms agreed between the employer and its employees).

3. There are lengthy delays before the FWC approves many enterprise agreements

Ai Group Members very frequently express this concern to Ai Group. Our workplace relations advisers have similar experiences.

The most recent FWC Annual Report (2019/20) only includes information on the Commission's timeliness in approving enterprise agreements that do not require undertakings (i.e. a median of 17 days). This is not a complete picture because most enterprise agreements are approved with undertakings, as discussed above.

Far more detailed information on timeliness was included in the FWC's 2018/19 Annual Report. This annual report showed that in 2018/19 the median time for the FWC to approve an enterprise agreement was:

34 days for single enterprise agreements approved without undertakings

199 days for single enterprise agreements approved with undertakings

There is a vast gulf between the FWC's performance and the intention of the Labor Federal Government and Parliament when the FW Act was implemented, as highlighted by the following extract from the EM for the *Fair Work Bill 2008*: (emphasis added)

> 768. It is intended that FWA will usually act speedily and informally to approve agreements, with most agreements being approved on the papers within 7 days. This period has not been legislated, however, as there may be instances where approval takes longer because FWA has concerns about approving the agreement and it is necessary to seek further information from the bargaining representatives. FWA may hold a hearing, but it need not. An example of a case where FWA might hold a hearing is where there is insufficient information before it as to ordinary time working patterns to be satisfied on the papers that the agreement passes the better off overall test in relation to a group of employees covered by the agreement.

4. The current BOOT is unworkable

The current BOOT is widely recognised as being unworkable. It is often applied by the FWC on the basis of hypothetical, far-fetched scenarios, rather than on the basis of types of work and work patterns that are currently being worked or are reasonably likely to be worked.

The No Disadvantage Test that applied under the *Industrial Relations Act 1988* and the *Workplace Relations Act 1996* enabled the Commission to weigh up the provisions in an enterprise agreement in a sensible, practical manner and decide whether the agreement disadvantaged the employees.

For example, in *Tweed Valley Fruit Processors Pty Ltd v Australian Industrial Relations Commission* [1996] IRCA 149, the Full Court of the Federal Court expressed the following views about the No Disadvantage Test:

> Given the need to balance a range of factors the determination of whether or not the no disadvantage test has been met in a particular case will largely be a matter for the impression and judgment of the Commission member at first instance.

The current BOOT has led to many employers abandoning the enterprise agreement making process and reverting to the relevant modern awards, to the detriment of the employers and their employees.

The current unworkable BOOT gives external parties that have little or no involvement in the negotiation of an enterprise agreement, a great deal of ammunition to challenge the approval of an enterprise agreement, despite the fact that the agreement is supported by the overwhelming majority of employees covered by the agreement.

The existing BOOT has led to most agreements lodged for approval with the FWC not being approved in the terms agreed upon between employers and employees, despite containing generous over-award wages and conditions. As discussed above, the FWC requires that undertakings are given in most cases before approving an agreement. The effect of an undertaking is often an alteration in the terms of the enterprise agreement reached between the employer and its employees.

5. The agreement-making provisions of the FW Act are highly technical, leading to numerous errors by bargaining parties and widespread opportunities for third parties to frustrate enterprise agreements made between employers and employees

There are a large number of technical and procedural requirements for making an enterprise agreement under the FW Act that have led to the agreement-making system becoming a 'minefield' for employers. This has imposed a major barrier on agreement-making and is adversely impacting upon productivity and wages growth.

The overly technical requirements have enabled external parties that had little or no involvement in the negotiation of an enterprise agreement to frustrate the approval of many enterprise agreements, despite the agreements being supported by the vast majority of the relevant employees.

Common problems that are currently occurring relate to:

- The content of the Notice of Employee Representational Rights (**NERR**);
- The timeframe for issuing the NERR;
- The requirements relating to the explanation of the terms of the agreement to the employees;

- The requirement to give employees a copy of materials incorporated by reference into the agreement;
- The cohort of casual employees entitled to vote on the agreement; and
- The requirement that 'genuine agreement' be reached.

Ai Group's views on the provisions of Schedule 3

Ai Group strongly supports nearly all of the provisions in Schedule 3 of the Bill, as set out in the following table.

Provisions in the Bill	***Ai Group's position***	***Comments***
Item 1 Section 171 – Objects of this Part	Supported	The amended objects appropriately give more emphasis to: • Employment growth; • Agreements reflecting the needs and priorities of employers and employees; and • Agreements being approved by the FWC in a timely, practical and transparent manner.
Item 2 Part 2 – Notice of employee representational rights [ss.173, 174 and 625]	Supported	Many enterprise agreements have been rejected by the FWC because of inadvertent non-compliance with the current overly technical provisions relating to the NERR. For example: • With regard to the timing of issuing the NERR, see the split decision of a Full Bench of the FWC in *Uniline Australia Limited* [2016] FWCFB 4969. • Agreements have been rejected by the FWC because the employer provided the NERR to the employees on the company's letterhead; • Agreements have been rejected because the employer inserted the telephone number of the FWC on the NERR, rather than the telephone number of the FWO; and • Agreements have been rejected because the NERR was stapled to other documents relating to the bargaining process when it was given to the employees. The publication of a standard NERR on the FWC's website, with no insertions or amendments required, would address the numerous problems that have arisen regarding NERR content issues.

Provisions in the Bill	*Ai Group's position*	*Comments*
		Employers would be able to simply send an email to employees proving a link to the NERR on the FWC's website, thus greatly reducing the scope for errors.
Items 5, 6, 7, 8, 9, 10, 11, 12 and 13 Part 3 – Pre-approval requirements Section 180 – Employees must be given a copy of a proposed enterprise agreement etc [ss.180 and 211]	Supported	Many enterprise agreements have been rejected by the FWC because of inadvertent non-compliance with s.180 of the Act. For example: • There are inconsistent decisions of the FWC about whether or not an employer must provide a copy of awards and legislation referred to in an enterprise agreement to the employees at the start of the 7-day 'access period', where these documents are publicly available; • There are inconsistent decisions of the FWC about the extent to which an employee must explain the terms of awards referred to in an enterprise agreement, where the agreement does not alter the terms of the award; and • Some Members of the FWC have interpreted the existing requirement in s.180(2) to take "all reasonable steps" in an extremely onerous manner. The amendments to s.180 would improve clarity and provide a simpler and fairer set of requirements. Employers would be required to take reasonable steps to provide the employees with the following materials at the start of the 'access period': • The written text of the agreement; and • Any other material incorporated by reference in the agreement that is not publicly available.
Items 14, 15 and 16 Part 4 – Voting requirements [ss.181 and 207]	Supported	Determining which casuals are entitled to vote on an enterprise agreement has become a 'minefield' for employers, given that many employers have casuals on their books who work infrequently. Some enterprise agreements covering major employers and a large number of employees have been rejected by the FWC because a small number of casuals were inadvertently not given the opportunity to vote on an enterprise agreement, even though the majority of employees supported the

Provisions in the Bill	*Ai Group's position*	*Comments*
		agreement and the outcome of the vote would not have changed. In interpreting the existing provisions, the majority of the Full Court of the Federal Court in *NTEIU v Swinburne University of Technology* [2015] FCAFC 98 (***Swinburne***) decided that only casual employees who are employed at the time the employer requests that employees vote on a proposed enterprise agreement are eligible to vote. In *CFMMEU v Nooton Pty Ltd t/a Manly Fast Ferry* [2018] FWCFB 7224, a Full Bench of the FWC decided that: • The effect of the Full Court's interpretation in *Swinburne* is that an employer should only make a request under s.181(1) to employees who are employed at the time, as opposed to those who are not employed at the time but who might otherwise be regarded as usually employed; and • A person who is a casual employee but who is not working on a particular day or during a particular period, is unlikely to be employed on that day or during that period. The above principles are not readily applied in practice and even the FWC has struggled to apply them, leading to enterprise agreements being rejected. For example, see the decision of Mansini DP in *Application for approval of the Kmart Australia Ltd Agreement 2018* [2019] FWC 6105, which was subsequently overturned on appeal. The proposed amendments to ss.181 and 211 would provide a simple, practical and fair approach to determining which casuals are entitled to vote on an enterprise agreement, or a variation to an enterprise agreement. The relevant casuals would be those who performed work at any time during the 7-day 'access period' leading up to the start of the voting process. The 'access period' ends the day before the voting process commences.

Provisions in the Bill	*Ai Group's position*	*Comments*
Items 17, 18, 19, 20, 21 and 22 Part 5 – Better off overall test Subsection 189(1A) – Approval of agreement if not contrary to the public interest [ss.186, 189, 190, 193 and 211] Items 27, 28, 29, 30 and 31 Division 2 - Sunsetting of additional power to approve enterprise agreements that do not pass the better off overall test [ss.186 and 189]	Supported	The proposed s.189(1A) in the Bill would make some relatively modest changes for a two year period to a provision that has been in the FW Act and the *Workplace Relations Act 1996* for the past 25 years. The existing provisions in s.189 enable the FWC to approve an enterprise agreement that does not pass the BOOT if the FWC is satisfied that, because of exceptional circumstances, the approval would not be contrary to the public interest, e.g where the agreement is part of a reasonable strategy to deal with a short-term crisis in, and to assist the revival of, the business (s.189(2) and (3)). Agreements approved under s.189 must have a nominal life of two years or less (s.189(4)). The concept of an enterprise agreement that reduces existing wages and conditions in exceptional circumstances to ensure the survival of a business can be traced back to the nationally prominent SPC dispute in 1990. The employees reached agreement with the company to stop the closure of the Shepparton plant and to save their jobs, but the unions strongly opposed the agreement. The Bill amends s.189 by adding a new subsection (1A) which potentially widens the circumstances in which an agreement could be approved under s.189 to emphasise, amongst other aspects, the impact of COVID-19 on an enterprise. The provision would only apply for two years and would be subject to the following safeguards: • The FWC would need to be satisfied that approval of the agreement is appropriate, taking into account all of the circumstances (s.189(1A)(a)); • The FWC would be required to take into account the likely effect of the agreement on the employees and any relevant union/s (s.189(1A)(a)(ii)); • The FWC would be required to take into account the extent of employee support (s.189(1A)(a)(iv)); and • The agreement must comply with all other requirements of the Act, e.g. consistency with the NES. It is unlikely that the provision in the Bill would be used frequently, but it could be very important in saving some businesses and the jobs of their employees over the next two years, given the adverse impacts of COVID-19.

Provisions in the Bill	*Ai Group's position*	*Comments*
Items 23, 24, 25 and 26 Section 193 – Passing the better off overall test [ss.193 and 211]	Supported, but an amendment is proposed to improve the operation of the provision	The current BOOT is widely recognised as being unworkable. It is often being applied by the FWC on the basis of hypothetical, far-fetched scenarios, rather than on the basis of types of work and work patterns that are currently being worked or are reasonably likely to be worked. The current BOOT has led to many employers abandoning the enterprise agreement making process and reverting to the relevant modern awards, to the detriment of the employers and their employees. The proposed new s.193(8) is an extremely important provision that is aimed at ensuring that the FWC adopts a more practical approach, whilst ensuring fairness to all parties. The new provision would clarify that: • The FWC can only take into account patterns of work, kinds of work and types of employment that are being engaged in by the employees covered by the agreement, or which are reasonably foreseeable; • The FWC may have regard to both monetary and non-monetary benefits an employee would receive under the agreement; and • The FWC must give significant weight to any views expressed by the parties who negotiated and made the agreement. In effect, s.193(8) is aimed at restoring the sensible, practical approach that the Commission took for over 20 years when applying the No Disadvantage Test and BOOT, up to a few years ago. We have a concern that the wording in s.193(8)(b) in the Bill could be misinterpreted as giving the FWC the discretion to not take into account all monetary benefits in an agreement. The current BOOT requires all monetary benefits to be taken into account and also allows non-monetary benefits to be taken into account. As stated by a Full Bench of the Commission in the *Armacell* case: *[41] The BOOT, as the name implies, requires an overall assessment to be made. This requires the identification of terms which are more beneficial for an employee, terms which are less beneficial and an overall assessment of*

Provisions in the Bill	*Ai Group's position*	*Comments*
		whether an employee would be better off under the agreement… To address this concern, we propose the following amendment to s.193(8)(b) which would appropriately require the FWC to have regard to all monetary and non-monetary benefits in an agreement and make "*an overall assessment of whether an employee would be better off under the agreement"*: *(b) ~~the other matters~~ the FWC ~~may~~ must have regard to ~~include~~ the overall benefits (including non-monetary benefits) an award covered employee or prospective award covered employee would receive under the agreement when compared to the relevant modern award; and*
Items 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44 and 45 Part 6 – NES Interaction terms [ss.12, 55, 169, 186, 201, 202, 205, 205A, 211, 272 and 273]	Supported	This amendment would not alter the existing relationship between enterprise agreements and the NES. Enterprise agreements cannot contain provisions that exclude the NES or are more detrimental to an employee in any respect. The inclusion of the proposed model NES interaction term in enterprise agreements would: • Assist in ensuring that employers and employees understand the relationship between enterprise agreements and the NES; • Reduce the instances of provisions which conflict with the NES being agreed upon in an enterprise agreement; and • Reduce the need for undertakings to be given by employers at the approval stage, where provisions which conflict with the NES have been included in an enterprise agreement.

Provisions in the Bill	*Ai Group's position*	*Comments*
Items 46, 47, 48, 49, 50, 51 and 52 Part 7 – Variation of single enterprise agreements to cover eligible franchisee employers and their employees [ss.12, 58, 216A, 216B, 216D, 216E and 278)	Supported	The proposed amendments would provide a more practical, less costly and less disruptive approach to including a new franchisee and its employees under an enterprise agreement applicable to a franchise group. Under the current provisions in the Act, a new franchisee employer and its employees could only be included under an existing enterprise agreement applicable to a franchise group if: • All of the existing employers covered by the enterprise agreement agree to the agreement being varied to include the new franchisee; and • The majority of all the employees of all the existing franchisee employers covered by the agreement vote to approve the agreement being varied to include the new franchisee. The existing requirements are costly and disruptive, particularly where an enterprise agreement applies to a large number of franchisees. The new provisions would enable a new franchisee employer to apply to the FWC to vary an existing agreement that covers other employers under the same franchise, so that it also covers the new franchisee. A majority of the employees of the new franchisee employer would be required to approve the variation of the agreement.
Item 53 Part 8 – Terminating agreements after nominal expiry date [s.225]	Opposed	Ai Group does not see any benefit in this legislative amendment, particularly when only a tiny proportion of applications to terminate enterprise agreements are contested. Most applications under s.225 relate to agreements that no longer apply to any employees because the relevant project or operation is no longer underway. According to the FWC's annual reports, there were 323 applications made under s.225 to terminate an enterprise agreement in the 2019/20 year. This was down from 400 in 2018/19 and 403 in 2017/18. These figures include applications made by employers, unions and employees. An FWC analysis of the decisions in 2017 showed that less than 3% of applications are opposed. This tiny figure includes applications made by employers, unions and employees.

Provisions in the Bill	*Ai Group's position*	*Comments*
Items 54, 55 and 56 Part 9 – How the FWC may inform itself Section 254AA – How FWC may inform itself [ss.254AA, 590 and 625]	Supported	This is an important provision which gives parties with a legitimate interest in an enterprise agreement the right to make submissions and provide evidence at the approval stage, and prevents parties without a legitimate interest frustrating and delaying the approval of agreements which are supported by the employer and employees who have made the agreement. There are many examples of unions and other parties (e.g. the Retail and Fast Food Workers Union, which is not a union under the relevant laws) delaying the approval of enterprise agreements for many months in circumstances where they have no members covered by the agreement. The CFMMEU often does this where an employer enters into an enterprise agreement with terms that differ from the pattern agreement that it is pursuing for the relevant sector. Typically, a delay in the approval of an enterprise agreement results in a delay in the employees receiving the wage increases and other benefits included in the agreement. There are numerous relevant FWC decisions that highlight the importance of this issue being addressed, including a 29 January 2021 decision[28] relating to the approval of the *McNab Constructions Enterprise Agreement 2020*, in which Deputy President Lake relevantly stated: (emphasis added) *[64] The circumstances of this agreement are that of a small construction organisation who have had the opportunity to have a high level of contact with each of the employees impacted by the new agreement. There are only 41 affected employees and each of them voted and each of them approved the agreement. I can only express sympathy for the employees who have not been able to access the conditions offered as a result of a third party, a stranger intervening and appealing the original decision which upon further examination of the material only confirms my view that the Agreement is capable of agreement.* Amongst other specified sources of information, s.254AA would sensibly and fairly enable the FWC to inform itself in relation to an enterprise agreement application on the basis of submissions, evidence and other information from:

[28] [2021] FWC 443.

Provisions in the Bill	*Ai Group's position*	*Comments*
		• The applicant employer or union; • The employer covered by the agreement; • The employees covered by the agreement; • A union or other bargaining representative for the agreement (NB. Under s.176(1) of the Act, a union is deemed to be a bargaining representative for each of its members, unless a particular member appoints a different bargaining representative in writing); • A union covered by the agreement; and • If the FWC is satisfied that exceptional circumstances exist – a union that does not have members covered by the agreement, or any other relevant party.
Items 57 and 58 Section 255AA – Certain applications to be determined within 21 days [ss.255AA and 625]	Supported	Section 255AA is a very important provision that would require the FWC to act promptly when it receives an application to approve an enterprise agreement. This is consistent with the policy intent when the FW Act was implemented as identified in the following extract from the Explanatory Memorandum for the *Fair Work Bill 2008*: *768. It is intended that FWA will usually act speedily and informally to approve agreements, with most agreements being approved on the papers within 7 days….* Ai Group Members very frequently express concern about lengthy delays in having their enterprise agreements approved by the FWC. Typically, a delay in the approval of an enterprise agreement results in a delay in the employees receiving the wage increases and other benefits included in the agreement and in implementing any associated productivity improvements. The proposed s.255A requires that 'as far as practicable', the FWC must determine an application for the approval or variation of an enterprise agreement within 21 working days. This is a reasonable period that is three times as long as the period referred to in the Explanatory Memorandum. The provision provides flexibility for the FWC to approve an agreement outside of this period in appropriate circumstances.

Provisions in the Bill	*Ai Group's position*	*Comments*
		Consistent with s.255AA in the Bill, some other existing provisions in the FW Act include timeframes for the FWC to deal with particular applications, including: • Section 420 – which requires that, 'as far as practicable', the FWC must determine an application for a stop order under s.418 or 419 within two days after the application is made; and • Section 441 – which requires that, 'as far as practicable', the FWC must determine an application for a protected action ballot within two days after the application is made.
Items 59 and 60 Part 11 – FWC functions Section 254B – FWC to recognise outcome of bargaining at enterprise level [ss.254A and 578]	Supported	The FW Act encourages employers and employees to engage in enterprise bargaining. Accordingly, the FWC should have a duty to perform its functions and exercise its powers in a manner that recognises the outcome of the bargaining at the enterprise level. The FWC should facilitate enterprise agreements and only refuse to approve an agreement, or require undertakings, where the proposed agreement is unlawful. Section 254B would assist with these matters.
Items 61 and 62 Part 12 – Transfer of business [ss.12 and 311]	Supported	The amendment in the Bill would implement a recommendation of the 2015 Productivity Commission (**PC**) inquiry into the Workplace Relations Framework and a recommendation of the earlier 2012 review of the FW Act carried out by a Panel appointed by the Labor Federal Government. The proposed change is modest and fair. It is intended to remove a barrier to employees transferring at their initiative to a position with a business that is a related entity of the employee's current employer, e.g. for the purposes of career progression. Currently, it is often too difficult for a business to allow such a transfer because of the problems that would result from the new employer becoming bound by the enterprise agreement applicable to the original employer (e.g. different employees in the same business would be covered by different enterprise agreements).

Provisions in the Bill	*Ai Group's position*	*Comments*
		The relevant recommendations of the two inquiries are: ***2015 PC INQUIRY - RECOMMENDATION 26.4*** *The Australian Government should amend the FW Act so that when employees, on their own initiative, seek to transfer to a related entity of their current employer, they will be subject to the terms and conditions of employment provided by the new employer.* ***2012 FW ACT REVIEW - RECOMMENDATION 38*** *The Panel recommends that s. 311 be amended to make it clear that when employees, on their own initiative, seek to transfer to a related entity of their current employer they will be subject to the terms and conditions of employment provided by the new employer.*
Items 63, 64, 65, 66 and 67 Part 13 – Cessation of instruments	Opposed	Ai Group does not support the automatic termination of all remaining agreement-based transitional instruments from 1 July 2022. The following existing legislative provisions ensure fairness to employees covered by agreement-based transitional instruments: • Schedule 9, Item 13 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, entitles an employee covered by an agreement-based transitional instruments to be paid no less than the base rate of pay in the relevant modern award; and • Schedule 3, Items 15, 16, 17, 18 and 19 in the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* entitles an employee covered by an agreement-based transitional instruments, or their representative, to apply to the FWC to terminate the instrument. The FWC's 2019/20 Annual Report identifies that 80 applications were made to terminate collective agreement-based transitional instruments in the year. Agreement-based transitional provisions typically include provisions of benefit to the employer and its employees. Rather that automatically terminating all agreement-based transitional instruments on 1 July 2022, a better approach would be give the parties to those instruments the opportunity to apply to the FWC before 1 July 2022 if they

Provisions in the Bill	*Ai Group's position*	*Comments*
		oppose termination on that date, setting out why it is in the public interest for the instrument to be maintained. The FWC would then be able to decide whether to: • Terminate the instrument; • Maintain the instrument for a specified period; or • Maintain the instrument indefinitely.

Schedule 4: Greenfields agreements

A joint Ai Group / ACA submission on Schedule 4 of the Bill, which has been filed separately, is reproduced below.

Senate Education and Employment Legislation Committee

Inquiry into the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* [Provisions]

Schedule 4 – Greenfields Agreements

This joint submission is made by the Australian Industry Group (**Ai Group**) and the Australian Constructors Association (**ACA**) in respect of Schedule 4 – Greenfields Agreements of the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* (**the Bill**).

The introduction of the Bill into Parliament follows meetings of five working groups that met over a 10-week period up to September 2020 to discuss what reforms should be implemented to industrial relations laws to drive employment growth and investment, and to assist the recovery from the pandemic.

The ACA was a member of the Greenfields Agreement Working Group and Ai Group also participated in the meetings of the Working Group as an adviser to the ACA.

Ai Group has a large membership in the construction industry including both major builders and large and small subcontractors. The ACA is a national industry association which represents Australia's major construction contractors.

Summary of the key provisions in Schedule 4

The Bill would amend the *Fair Work Act 2009* (**FW Act**) to enable greenfields agreements to continue for the life of the construction work on a 'major project' (with a maximum of eight years from the date the agreement comes into operation).

For the purposes of the new provisions, a project would be a 'major project' if:

- The total expenditure of a capital nature that has been incurred, or is reasonably likely to be incurred, in carrying out the project is at least $500 million; or

- A declaration is made by the responsible Minister that a project with capital expenditure of at least $250 million is a 'major project' given the national or regional significance of the project and the contribution that the project is expected to make to job creation.

If a major project greenfields agreements has a nominal expiry date that is more than four years after the date of approval, the agreement must include a term that provides for at least an annual increase of the base rate of pay for the employees covered by the agreement.

The need for reform to the laws regulating greenfields agreements on major projects

Currently, under s.186(5) of the FW Act an enterprise agreement cannot have a nominal term of more than four years.

It is illogical to prevent contractors and unions from negotiating a greenfields agreement with a nominal life of more than four years, if the agreement will apply to a major construction project that will continue for more than four years.

To make matters worse, the current maximum four-year term commences from the date that the agreement is approved by the Fair Work Commission (**FWC**), which often prevents agreements being negotiated and approved by the FWC during the planning stages of a project.

The expiry of a greenfields agreement at a critical stage during the construction of a major project is disruptive, risky and costly due to:

- The extensive amount of time and other resources that are typically required to negotiate greenfields agreements for major projects; and
- The risk of industrial action leading to project delays.

Industrial action on major projects impose many direct and indirect costs, including:

- Liquidated damages where the project is not completed on time;
- Program acceleration expenses, e.g. extra overtime;
- Increased costs for the hire of rented equipment, such as cranes, mobile plant, sheds, offices and other equipment, due to project delays;
- Damage to the contractor's reputation resulting in the loss of future business; and
- Lost wages for employees who take industrial action and those stood down as a result of the industrial action of other employees.

One area of great concern to contractors is the additional stresses that arise when accelerated 'catch-up' programs need to be implemented due to delays caused by industrial disputes on major projects. These programs can have a negative impact on safety and quality, and result in significant additional costs.

All of the above risks and potential costs are taken into account by:

- Contractors when submitting tender bids, resulting in increased project costs for Governments and other clients; and

- Private sector clients when deciding whether to invest in major projects in Australia.

During the life of a major project, the resources of all parties are best devoted to ensuring the delivery of the project on time and within budget, and that high standards of safety and quality are maintained. It is not in anyone's interests for resources to be devoted to negotiating a new agreement at a critical stage during the construction of the project.

The existing illogical and unnecessary restrictions on the nominal term of greenfields agreements applicable to major projects are a barrier to investment, jobs and the recovery from the pandemic. Removing the restrictions will boost investment and jobs, and aid the recovery.

We note that in the lead-up to the last Federal Election, the then Opposition Leader, the Hon Bill Shorten MP, publicly expressed support for project life greenfields agreements. At a business address in Perth on 15 May 2019, Mr Shorten said:[29]

> "We want to look at the ability for companies to negotiate with unions for extended greenfields agreements, project life, you can go to the global investors who will back it."
>
> "They'll be good paying jobs. You get the certainty of the arrangement, the union gets the certainty of the arrangement, the workforce get the certainty of the arrangement."

[29] *Australian Financial Review*, Phillip Coorey and Andrew Tillett, 'Shorten reaches out to miners', 15 May 2019.

Our views on the provisions of Schedule 4

We strongly support the provisions of Schedule 4, as set out in the following table.

Provisions in the Bill	***Ai Group / ACA's position***	***Comments***
Item 2 Section 23B – Meaning of *major project*	Supported	The proposed $500 million and $250 million thresholds in the Bill are appropriate. There are many major projects and planned major projects with capital expenditure of between $250 million and $500 million that have continued for more than four years or can be expected to continue for more than four years, particularly in the mining industry. Any higher threshold would deter investment because a project that falls below the threshold would be exposed to increased risks and costs as discussed above, if the project continues for more than four years. The ability for the responsible Minister to declare that a project with capital expenditure of between $250 million and $500 million is a major project is important because, for example, a regional project with this value could be extremely important for jobs and economic growth in the relevant region.
Item 3 Paragraph 186(5)(b) – Maximum term for a greenfields agreement	Supported, but an amendment proposed to improve the operation of the provisions	The maximum 8-year term in the Bill is appropriate. The construction phase of most major projects are completed within 8 years. Importantly, the 8-year timeframe commences from 'the day the agreement will come into operation'. This approach gives contractors and unions the ability to negotiate a greenfields agreement at the planning stage of a project, with the agreement only commencing to operate when work commences on the project (see s.186(5)(b)(i)). For similar reasons, the following amendment should be made to s.186(5)(b)(ii) to allow agreements that apply to other construction projects to operate from a prospective date, without reducing the maximum 4-year term: *(ii) otherwise—4 years after the day on which ~~the FWC approves the agreement~~ <u>the agreement will come into operation.</u>*

Provisions in the Bill	***Ai Group / ACA's position***	***Comments***
Item 4 Subsection 187(7) – requirement for annual wage increases	Supported	It is reasonable for a greenfields agreements that has a nominal term greater than four years to include a term that provides for at least an annual increase in the base rate of pay. Approaches that could be taken to this issue within a greenfields agreement would include: • Including a schedule of annual wage increases in the agreement; • Including a term that provides for an annual wage increase in line with movements in the CPI or the Wage Cost Index; • Including a term that provides for annual wage increases equivalent to the CPI + x%.
Item 5 Paragraph 211(1)(b) – Maximum term for a varied greenfields agreement	Supported, but an amendment is proposed to improve the operation of the provisions	The maximum 8-year term in the Bill is appropriate for the reasons outlined above regarding Item 3 in Schedule 4 of the Bill. For similar reasons to those outlined above, the following amendment should be made to s.211(1)(b)(ii): *(ii) otherwise—4 years after the day on which ~~the FWC approves the agreement~~ the agreement will come into operation.*

We urge the Committee to recommend that the legislative amendments in the Bill are passed without delay.

Schedule 5: Compliance and enforcement

Summary of the key provisions in this Schedule

The Bill would make significant changes to the compliance and enforcement provisions in the FW Act.

New criminal offence relating to underpayments

The Bill would implement a new criminal offence for an employer who "dishonestly engages in a systematic pattern of underpaying one or more employees". The maximum penalties are:

- For an individual – imprisonment for 4 years or $1.11 million;
- For a body corporate - $5.55 million.

The Bill includes provisions which are intended to 'cover the field' and prevent the unfair application of State wage theft laws (e.g. the *Wage Theft Act 2020* (Vic)) to an employer covered by the FW Act.

Civil penalties and the FWO

The Bill would:

- Increase the civil penalties for remuneration-related contraventions and sham arrangements by 50 per cent;
- Introduce a new penalty for remuneration-related contraventions by bodies corporate (other than small business employers) based on a multiple of the 'value of the benefit' of the contravention to the employer;
- Prohibit employers publishing (or causing to be published) job advertisements with pay rates specified at less than the relevant national minimum wage;
- Increase the maximum penalties for non-compliance with compliance notices and infringement notices issued by the FWO by 50 per cent;
- Require the FWO to publish information relating to the circumstances in which enforcement proceedings will be commenced or deferred; and
- Codify factors the FWO may take into account in deciding whether to accept an enforceable undertaking from a party that has contravened the FW Act.

Small claims jurisdiction

The Bill would:

- Increase the cap for amounts that can be awarded in small claims proceedings under Division 3 of Part 4-1 of the FW Act from $20,000 to $50,000; and

- Make provision for courts to refer small claims matters to the FWC for conciliation and, if conciliation is unsuccessful, arbitration with the consent of the parties.

Ai Group's views on the provisions of Schedule 5

Ai Group does not support employers who deliberately underpay their employees. Non-compliance with workplace obligations has a detrimental impact on the lives of employees and negatively impacts the businesses which devote the significant effort required to pay employees correctly.

Australia's workplace relations system comprises a variety of different sources of minimum employment conditions including 121 modern industry and occupational awards, the NES and other provisions in the FW Act, enterprise agreements, State long service leave laws, and many other laws, regulations and industrial instruments. Workplace laws, regulations and industrial instruments are complex and often the subject of contested interpretations and ambiguity.

Ai Group supports a response to non-compliance that is remedial rather than punitive. As currently drafted, many of the provisions in Schedule 5 of the Bill are highly punitive and would operate as a barrier to jobs growth and investment during the recovery from the pandemic.

Most underpayments are the result of payroll errors

Audits are frequently undertaken by the FWO across industry sectors or specific geographical areas. Where such audits take place, the root cause of most instances of non-compliance tends to be ignorance or confusion about the requirements, rather than an intent to breach the FW Act. For example, on 11 March 2020, the FWO reported on an audit undertaken nationwide of 1,217 businesses in industries including hospitality, domestic construction, retail, manufacturing and administration services. The audit recovered $1,326,125 for employees. Importantly, nearly three quarters of employers that breached the law said that they were not aware of the rules.[30] Similarly, FWO audits of popular 'cheap eat' food districts in New South Wales, Victoria, South Australia and Western Australia which resulted in $316,674 in back payments for unpaid wages, commonly resulted from businesses not understanding their legal obligations to their workers.[31]

[30] Fair Work Ombudsman, 'Audits recover $1.3 million for underpaid workers' (11 March 2020), https://www.fairwork.gov.au/about-us/news-and-media-releases/2020-media-releases/march-2020/20200310-workplace-basics-campaign-report.

[31] Fair Work Ombudsman, 'Over $300,000 returned to fast food, restaurant and café workers', (6 December 2019) < https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/december-2019/20191206-over-300-000-returned-to-fast-food-restaurant-and-cafe-workers>.

Further, between March 2019 and March 2020, the FWO investigated 171 businesses across Australia in the fast food, restaurant and cafes and retail sectors that had previously been non-compliant. Of the 71% which were ultimately found to have committed other breaches of workplace obligations, reasons given for non-compliance included:[32]

- lack of awareness of obligations (51%);
- misinterpreting award requirements (17%); and
- payment of a flat hourly rate insufficient to compensate for award-based penalties (6%).

Most self-disclosures to the FWO have related to underpayments that were the result of honest mistakes. In many cases, self-disclosures of underpayments have been followed up with payroll audits to determine whether any further errors have been made. For example, on 7 January 2021, it was reported that the ABC had engaged PwC to conduct an audit to check whether a further 1,700 staff who had been paid a 'set rate' pursuant to a 'buyout arrangement' had been paid correctly.[33] This followed earlier self-disclosures that the national broadcaster had underpaid hundreds of employees more than $12 million over six years, resulting in a $600,000 contrition payment.[34]

It can be seen that the main reason for underpayments is ignorance of, and misunderstandings about, employer obligations. Accordingly, increased penalties are unlikely to address the problem of underpayments because most are not due to a deliberate decision to pay staff incorrectly.

Payroll errors are often made in both directions. In February 2020, the Australian Payroll Association reported that almost 70 per cent of businesses it assessed in an 18-month period had uncovered overpayments estimated to cost employers millions of dollars.[35] In most cases, employees are not asked to give the money back.

Employers often have significant difficulty in recovering money in the case of mistaken overpayments. The following extract from a decision of Deputy President Clancy of the FWC illustrates the problem:[36]

> [34] The net result in this matter is that Mr Moore appears to have been overpaid. As such, Mr Moore could elect to repay the equivalent of the six days of paid personal leave taken. If this does not occur, and the correspondence that has passed between the parties suggests that it will not, there would not appear to be an entitlement under the Agreement expressly authorising BHS to make a deduction from future wage payments or other entitlements. Even if there was, the legality of such a deduction would be questionable when regard is had to ss.324 and 326 of the Act. Therefore, if BHS was intent in

[32] Fair Work Ombudsman, 'National Food and Retail Revisit Report' (September 2020), < https://www.fairwork.gov.au/how-we-will-help/helping-the-community/campaigns/campaign-reports#20-21>.

[33] Natasha Gillezeau, 'ABC announces new underpayments review of thousands of its workers', *Australian Financial Review*, 7 January 2021.

[34] David Marin-Guzman, 'ABC underpaid staff $12 million', *Australian Financial Review*, 19 June 2020.

[35] David Marin-Guzman and Natasha Boddy, 'Overpayment as common as 'wage theft'', *Australian Financial Review*, 22 February 2020.

[36] *Daniel Moore v Ballarat Health Services* [2020] FWC 6758

> recovering the overpayment in the face of his unwillingness to repay it, BHS would be required to institute legal proceedings against Mr Moore for recovery.

Rather than a punitive approach, more Government resources should be devoted to:

- Educating businesses on the requirements of workplace laws and instruments; and
- Simplifying Australia's workplace laws and awards so that employers are able to readily understand their obligations and employees are able to readily understand their entitlements.

The increased civil penalties are not justified and the 'benefit obtained' approach is not sound

The Bill would increase the maximum civil penalties for ordinary remuneration-related contraventions by 50% and introduce a new alternative penalty calculation method for remuneration-related contraventions by bodies corporate (other than small business employers) based on a multiple of the 'value of the benefit' obtained from the contravention.

Recent amendments to the FW Act, through the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017,* increased maximum penalties for underpayments by 10 times, and for breaches of the pay record requirements, by 20 times.

The evidence is that these increased penalties have had a major positive impact on compliance.

This can be seen in the many corporations that have self-disclosed underpayments to the FWO over the past three years after identifying payroll errors, and back-paying the relevant amounts to employees. As acknowledged in the FWO's 2018-19 annual report (published in September 2019), this development suggests that 'compliance and enforcement activities are creating the desired effect'.[37] Since these comments in September 2019, this trend has continued and accelerated, as can be seen from the FWO's 2019/20 annual report:

> Since July 2019, we have seen a significant increase in the number of large corporate entities self-reporting non-compliance with their workplace obligations.[38]

A further increase in penalties at this time is not justified.

Also, the framing of civil penalties based on a 'benefit obtained' approach is inappropriate for underpayment contraventions, many of which are the result of genuine payroll errors.

Under competition law, where a company has obtained a commercial benefit from unfair and unlawful competition, it is logical to impose a penalty that is based on the extent of the benefit obtained because the company will not be typically required to compensate those impacted. However, this is not a logical approach with wage underpayments because the employer will have

[37] Page 2.

[38] Page 2.

to back-pay the employees and therefore will not typically receive any benefit from the underpayments.

Criminal penalties are not appropriate for underpayments

The proposed introduction of criminal penalties for the underpayment of wages would be a major and ill-conceived change to Australia's workplace relations laws.

Ai Group strongly opposes the introduction of criminal penalties for underpayments.

Criminal penalties would deter investment, entrepreneurship and employment growth at a time in which Australia requires policies to support jobs and economic growth during the recovery from the pandemic.

Criminal penalties for underpayments are at odds with remedial approaches to enforcement. Criminal proceedings would disadvantage workers, including the most vulnerable, by significantly delaying civil recovery of underpayments while criminal proceedings are taking place. Where a criminal case is underway, any civil case to recoup unpaid amounts would no doubt be put on hold by the Court until the criminal case is concluded. This means that underpaid workers could be waiting years for redress.

In addition, exposing directors and managers of businesses to criminal penalties would operate as a major barrier to employers self-disclosing underpayments to the FWO, and reverse the positive trends outlined above.

Ai Group's views on the specific provisions in the Bill are set out in the following table:

Provisions in the Bill	***Ai Group's position***	***Comments***
Items 1, 2, 3, 4 and 5 Part 1—Orders relating to civil remedy provisions [ss.12, 539, 545 and 546]	Opposed	These provisions increase the maximum civil penalties for ordinary remuneration-related contraventions by 50% and introduce a new alternative penalty calculation method for remuneration-related contraventions by bodies corporate (other than small business employers) based on a multiple of the 'value of the benefit' obtained from the contravention. **Higher civil penalties** Recent amendments to the FW Act, through the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017,* increased maximum penalties for underpayments by 10 times, and for breaches of the pay record requirements, by 20 times. The evidence is that these increased penalties have had a major positive impact on compliance. This can be seen in the many corporations that have self-disclosed underpayments to the FWO over the past three years after

Provisions in the Bill	*Ai Group's position*	*Comments*
		identifying payroll errors, and back-paying the relevant amounts to employees. A further increase in penalties at this time is not justified. The Explanatory Memorandum for the Bill notes that current maximum monetary penalties for remuneration-related contraventions that can be sought by the FWO are low compared to those that can be sought by other business regulators such as the Australian Competition and Consumer Commission and the Australian Securities and Investments Commission. However, varying the FW Act to increase the maximum penalties for remuneration-related contraventions must be viewed collectively with the often significant costs associated with rectifying an underpayment. Many underpayment cases will turn on disputed interpretations of workplace laws, plagued by ambiguities, historical interpretations, custom and practice and the complex over-layering between 121 separate modern industry and occupational awards, the NES and a myriad of other workplace laws, regulations and instruments. **The 'benefit obtained' approach** The framing of civil penalties based on a 'benefit obtained' approach is inappropriate for underpayment contraventions, many of which are inadvertent, unintentional, or not committed knowingly. Underpayment contraventions are different in character to contraventions in competition, consumer and corporations laws. For instance, a large number of separate contraventions may arise where employers mistakenly apply the incorrect modern award, or genuinely consider certain employed occupations to be award-free. Under competition law, where a company has obtained a commercial benefit from unfair and unlawful competition, it is logical to impose a penalty that is based on the extent of the benefit obtained because the company will not be typically required to compensate those impacted. However, this is not a logical approach with wage underpayments because the employer will have to back-pay the employees and therefore will not typically receive any benefit from the underpayments. If the Bill is to maintain the 'benefit obtained' approach to penalties, despite Ai Group's strong opposition, this

Provisions in the Bill	*Ai Group's position*	*Comments*
		framework should be confined to cases where employers have knowingly contravened workplace laws, as found in the current serious contravention provisions of the FW Act. Also, it is important that the provision reflects the actual benefit obtained by an employer. No benefit is obtained by an employer if the employer repays any unpaid wages to affected employees. Section 546D should be amended to clarify that the benefit obtained by an employer is to be calculated at the time an application is made to a relevant court for a civil penalty order. Such an approach would be much fairer and would encourage employers to backpay any amounts owing at an early stage, which is of course in employees' interests. This could be achieved through the following amendment to s.546A(1): *(1) The value of the benefit that a body corporate obtains from a remuneration-related contravention is the amount of remuneration that employees of the body corporate would have received, retained or been entitled to if the contravention had not occurred and that remains unpaid on the day an application for a pecuniary penalty order is made.* In the absence of a 'benefit obtained', under the provisions in the Bill the Court could still order a maximum capped penalty of 7.5 times the number of maximum penalty units, being a 50% increase on current penalty levels. Also, the Court is empowered to order an employer to pay interest to employees who have been underpaid.

Provisions in the Bill	*Ai Group's position*	*Comments*
Items 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22 Part 2—Small claims procedure [ss.12, 548, 548A, 548B, 548C, 548D, 548E, 570, 576, 592, 601 and 675]	Supported, with an amendment to improve the fairness of the provisions	Ai Group is not opposed to the proposed amendments to the small claims process for underpayment matters. The amendments strike an appropriate balance between a remedial and less formal approach to the resolution of underpayments filed in the small claims jurisdiction, with a revised jurisdictional cap of $50,000. While the Bill enables the relevant Court to refer a matter to the FWC for conciliation and consent arbitration, it appropriately recognises that proceedings for the enforcement of the payment of wages must originate in, and be enforced by the judiciary, consistent with Australia's Constitution and established doctrine of the separation of powers. However, we are concerned that, as the Bill is drafted, employers and employees who agree to consent arbitration will not have access to judicial review if the FWC makes an error of law in dealing with an underpayment claim Several Federal Court decisions have held that judicial review is not available where an employer and its employees (and/or a union) have agreed to consent arbitration by the FWC (e.g. see *Endeavour Energy v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2016] FCAFC 82; *Construction, Forestry, Mining & Energy Union v Wagstaff Piling Pty Ltd* [2012] FCAFC 87; and *Linfox Australia v Transport Workers Union of Australia* [2013] FCA 659. In these matters the Federal Court held that the FWC was exercising a power of 'private arbitration' similar to that articulated by the High Court in *Construction, Forestry, Mining and Energy Union v The Australian Industrial Relations Commission* (2001) 203 CLR 645 ("the *Gordonstone Coal Case*"). The Bill should give the Federal Circuit Court the power to review arbitration decisions of the FWC under s.548D, on questions of law. Alternatively, the Bill should enable parties to agree to arbitration, conditional upon the Federal Circuit Court having the power to review arbitration decisions of the FWC under s.548D, on questions of law. These proposed amendments are in the interests of employers and employees. The amendments would reduce the potential for unjust outcomes.

Provisions in the Bill	*Ai Group's position*	*Comments*
Items 23, 24, 25, 26 and 27 Part 3—Prohibiting employment advertisements with pay rate less than the national minimum wage [ss.536AA, 539, 557 and 716]	Opposed	Ai Group does not see a need for this provision. There are very substantial penalties in the Act for underpaying employees and this is an effective deterrent against advertising employment with rates of pay that would be unlawful.
Items 28, 29, 30, 31 and 32 Part 4—Compliance notices, infringement notices and enforceable undertakings [BCIIP Act ss.5 and 98]	Supported	These provisions are appropriate.
Items 33 and 34 ss.539 and 715 – increased penalties	Opposed	For the reasons discussed above, Ai Group does not support the increased penalties in the Bill.
Item 35 Subsection 715(2) re. enforceable undertakings	Supported	The proposed criteria that the FWO may take into account in deciding whether to accept an enforceable undertaking are appropriate.

Provisions in the Bill	*Ai Group's position*	*Comments*
Items 36, 37, 38 and 39 Part 5—Sham arrangements [s.539]	Opposed	For the reasons discussed above, Ai Group does not support the increased penalties in the Bill.
Items 40 and 41 Part 6—Functions of the ABC Commissioner and the Fair Work Ombudsman [BCIIP Act s.16; FW Act s.682]	Supported	It is appropriate that the ABCC and FWO publish information relating to the circumstances in which they will commence proceedings or defer proceedings.
Items 42, 43, 44, 45, 46, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57 and 58 Part 7—Criminalising underpayments [ss.12, 26,323, 324B, 324C, 536CA, 536D, 682, 706, 711, 712AA, 793]	Opposed	Ai Group strongly opposes the introduction of criminal penalties for underpayments. Criminal penalties would deter investment, entrepreneurship and employment growth at a time in which Australia requires policies to support jobs and economic growth during the recovery from the pandemic. Criminal proceedings would disadvantage workers, including the most vulnerable, by significantly delaying civil recovery of underpayments while criminal proceedings are taking place. Where a criminal case is underway, any civil case to recoup unpaid amounts would no doubt be put on hold by the Court until the criminal case is concluded. This means that underpaid workers could be waiting years for redress. In addition, exposing directors and managers of businesses to criminal penalties would operate as a major barrier to employers self-disclosing underpayments to the FWO. If, despite Ai Group's opposition, criminal penalties are to remain in the Bill, they should be genuinely targeted to the most serious forms of underpayment. In its response to the Report of the Migrant Workers' Taskforce, the Australian Government announced that it would "consider the circumstances and vehicle in which criminal penalties will be applied for **the most serious forms**

Provisions in the Bill	*Ai Group's position*	*Comments*
		of deliberate exploitation of workers". It stated: (emphasis added) *By adding criminal sanctions to the suite of penalties available to regulators for the most egregious forms of workplace conduct, the Government is sending a strong and unambiguous message to those employers who think they can get away with the exploitation of vulnerable employees.* This intent is reflected in the Explanatory Memorandum for the Bill which states: (emphasis added) *The Bill would implement the Government's commitment to further deter the most egregious and persistent kinds of underpayments by criminalising conduct where an employer dishonestly engages in a systematic pattern of underpaying one or more employees.* Ai Group does not consider the wording of Part 7 of Schedule 5 to genuinely target, for the purpose of criminal offences, underpayments that are intentional, persistent and egregious. The requirement for the underpayment to be dishonest and persistent is reflected in proposed s.324B(1) which provides for an offence to be committed if an employer *dishonestly* engages in a *systematic pattern* of underpaying one or more employees. The non-exhaustive matters which may be taken into account in determining whether an underpayment is systematic in s. 324B(5) and (6) covers the need for *persistence* in the threshold for finding whether the offence has been breached. However, no part of the threshold for criminal responsibility adequately reflects the intent that the criminal penalties target only underpayment that is *serious*. Underpayments of more insignificant sums should not be the target of a criminal offence which potentially exposes an individual to imprisonment for 4 years or a body corporate to a fine of $5,550,000 (based on a penalty unit valued at $222). This is especially the case considering availability of accessorial liability and the extension of criminal responsibility available under Part 2.4 of the *Criminal Code* and section 6 of the *Crimes Act 1914*.

Provisions in the Bill	*Ai Group's position*	*Comments*
		If retained, s.324B(1) should be amended as follows: *(1) An employer commits an offence if the employer dishonestly engages in a <u>serious and</u> systematic pattern of underpaying one or more employees.* Similarly, s.324B(5) should be amended as follows: *(5) In determining for the purposes of subsection (1) whether the employer engaged in a <u>serious and</u> systematic pattern of underpaying one or more employees, a court may have regard to:*
Item 43 'Covering the field' provision [s.26(2)(d)	Supported, with an amendment, if criminal penalties are to remain in the Bill despite Ai Group's strong opposition	If criminal penalties are to remain in the Bill, despite Ai Group's strong opposition, Item 43 is an extremely important provision. It is essential that the FW Act's compliance and enforcement mechanisms, including any criminal sanctions for underpayment of wages, operate to the exclusion of any State and Territory laws relating to the same subject matter. To have otherwise, would be extremely unfair upon employers. It would create a compliance and enforcement framework with competing and inconsistent enforcement mechanisms and consequences across the country for non-compliance with the FW Act, modern awards, enterprise agreements and employment contracts. While Ai Group welcomes the inclusion of s.26(2)(da) and 26(2)(db) in the Bill, aimed at clarifying that the compliance and enforcement framework 'covers the field', we are concerned that the current wording of s.26(2)(da) may not fulfil this objective. We are concerned with the use of the expression "*an amount payable to the employee in relation to the performance of work*." There are many circumstances where an employer has an entitlement which arguably is not due to the performance of work, such as public holidays, meal breaks, annual leave and personal/carer's leave etc. Based on recent Court decisions, it is arguable that leave entitlements are excluded from being amounts payable to employees in relation to the performance of work.

Provisions in the Bill	*Ai Group's position*	*Comments*
		In *Qantas v FAAA* [2020] FCA 1365 (at paragraph 67) Flick J interpreted the phrase "*amounts payable ... in relation to the performance of work"* in a much narrower manner than would appear to be intended in s.26(2)(da). The relevant observations of Flick J were left undisturbed by the Full Federal Court in the appeal decision. Section 3 of the *Wage Theft Act 2020* (Vic) provides a more expansive definition of *employee entitlements* as: "*an amount payable by an employer to, or in respect of an employee, or any other benefit payable or attributable by an employer to, or in respect of an employee… including the attribution of long service leave, annual leave and meal breaks and superannuation.*" To address these issues, we propose the following amendment to s.26(2)(da): *(da) a law of a State or Territory providing for an employer, or officer, agent or an employee of an employer, to be liable to be prosecuted for an offence relating to underpaying an employee an amount payable to the employee in relation to the performance of work or the employee's employment.*

Schedule 6: The Fair Work Commission

Summary of the key provisions in this Schedule

The provisions in Schedule 6 would:

- Broaden the grounds on which the FWC may dismiss unmeritorious applications;
- Give the FWC an enhanced ability to deal with the small number of applicants who demonstrate a pattern of initiating unmeritorious proceedings and consequently wasting the scarce resources of the Commission and respondent parties;
- Enable the FWC to more easily vary or revoke decisions relating to enterprise agreements and workplace determinations in appropriate circumstances; and
- Give the FWC more discretion to decide when a matter on appeal or review may be determined without a hearing.

The need for reform to the existing laws

The FWC has limited resources and it is appropriate that the Commission has the powers necessary to avoid significant resources being wasted.

Ai Group's views on the provisions of Schedule 6

Ai Group does not have any concerns about the provisions of Schedule 6.

Importantly, the FWC would still be required to exercise its powers under the new provisions in accordance with the following ss.577 and 578 of the FW Act. Amongst other aspects, these provisions require that the FWC afford natural justice and procedural fairness to parties:

577 Performance of functions etc. by the FWC

The FWC must perform its functions and exercise its powers in a manner that:

(a) is fair and just; and

(b) is quick, informal and avoids unnecessary technicalities; and

(c) is open and transparent; and

(d) promotes harmonious and cooperative workplace relations.

Note: The President also is responsible for ensuring that the FWC performs its functions and exercises its powers efficiently etc. (see section 581).

578 Matters the FWC must take into account in performing functions etc.

In performing functions or exercising powers, in relation to a matter, under a part of this Act (including this Part), the FWC must take into account:

(a) the objects of this Act, and any objects of the part of this Act; and

(b) equity, good conscience and the merits of the matter; and

(c) the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

As stated by a Full Bench of Fair Work Australia (now the FWC) in *Galintel Rolling Mills Pty Ltd T/A The Graham Group* [2011] FWAFB 6772:

> **[27]** It has been long established that members of Fair Work Australia and predecessor bodies are bound to act in a judicial manner and apply the rules of natural justice.[39] The fundamental nature of that obligation was emphasised by Gibbs J in *R v Moore, Ex parte the State of Victoria* when he said:[40]
>
> > "The members of the Commission are bound to act in accordance with the rules of natural justice: *Reg. v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at p. 552. They must therefore afford any party to a dispute a proper opportunity to be heard before making any order that affects him. Indeed it is inherent in the very notion of arbitration that there shall be a hearing of the disputants, and a procedure which produced an award without a proper hearing would be outside the constitutional power: *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at pp. 384-385."
>
> **[28]** The requirements of natural justice depend on the nature of the inquiry, the circumstances of the case, the subject matter being ruled on and other relevant matters.[41] The High Court has said that one aspect of the duty to act judicially is the duty to hear a party and to allow a reasonable opportunity to present the case, coupled with a duty to consider the case put.[42]

[39] *R v Commonwealth Conciliation and Arbitration Commission; Ex Parte Angliss Group* 122 CLR 546.

[40] 140 CLR 92 at p. 101-2. Applied by a Full Bench of the ACAC in *Re Pastoral Award* Print H1196.

[41] *Russell v Duke of Norfolk* (1949) 1 All E.R. 109 at p. 118; *Re Food Preservers Award* (1980) 247 CAR 682.

[42] *Re Australian Bank Employees Union; Ex parte Citicorp Australia Ltd* (1989) 167 CLR 513 at p519; *Re Australian Railways Union; Ex parte Public Transport Corporation* 51 IR 22.

Schedule 7: Application, saving and transitional provisions

Ai Group's views on the provisions of Schedule 7 are set out in the following table.

Provisions in the Bill	***Ai Group's position***	***Comments***
Item 1 Division 2—Amendments made by Schedule 1 to the amending Act Clause 45 - Resolving uncertainties and difficulties about interaction between enterprise agreements and the definition of casual employee and casual conversion rights	Supported	Clause 45 provides an appropriate mechanism to enable uncertainties and difficulties about the interaction between enterprise agreements and the new casual employment provisions in the NES to be resolved by the FWC.
Item 1 Clause 46 - Application of certain amendments	Supported	These are important provisions that operate in conjunction with those in Schedule 1, to deliver the necessary certainty regarding casual employment arrangements.
Item 1 Clause 47 - Transitioning casual employees	Supported, but an amendment is proposed to reduce the regulatory burden on employers	Subclauses 47(1) to (4) are appropriate. Subclause 47(5) provides that an employer of a casual employee who was engaged prior to the commencement date for the legislation, must give the employee a Casual Employment Information Statement as soon as practicable after the end of the six-month period following commencement. This will impose a considerable regulatory burden on employers and, in Ai Group's view, is unnecessary. When the NES requirement in s.125 of the FW Act to issue the Fair Work Information Statement to employees was implemented on 1 January 2010, the relevant transitional provision in Item 13, Schedule 4 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* was: ***13 Fair Work Information Statement*** *The obligation in section 125 of the National Employment Standards for an employer to give an*

Provisions in the Bill	*Ai Group's position*	*Comments*
		employee the Fair Work Information Statement only applies to an employee who starts employment with the employer on or after the FW (safety net provisions) commencement day. A similar approach should be taken with the Casual Employment Information Statement by amending subclause 47(5) in the Bill as follows: *(5) ~~An employer referred to in subclause (1) must give an employee referred to in that subclause a Casual Employment Information Statement as soon as practicable after the end of the transition period~~. The obligation in the National Employment Standards for an employer to give an employee the Casual Employment Information Statement only applies to an employee who starts employment with the employer on or after commencement.*
Item 1 Clause 48 – Variations to modern awards	Supported	The provisions in Division 4A of the Bill apply to all casual employees as terms of the NES, including: • Employees covered by modern awards; • Employees covered by enterprise agreements; and • Award-free and agreement-free employees. This approach will require that the provisions of all modern awards are reviewed to ensure consistency with the legislative provisions. This issue is addressed in Schedule 7, clause 47 of the Bill which requires that the FWC review the casual employment provisions in all modern awards within six months of the new legislative provisions coming into effect. This timeframe is appropriate.
Item 1 Division 3—Amendments made by Schedule 2 to the amending Act Clause 49 - Transitional—flexible work directions	Supported	This provision is appropriate.

Provisions in the Bill	*Ai Group's position*	*Comments*
Item 1 Division 4—Amendments made by Schedule 3 to the amending Act Clause 50 – Application of amendments relating to enterprise agreements	Supported	This provision is appropriate.
Item 1 Clause 51 – Transfer of business	Supported	This provision is appropriate.
Item 1 Division 5—Amendments made by Schedule 4 to the amending Act Clause 52 – Application of amendments relating to greenfields agreements	Supported	This provision is appropriate.
Item 1 Division 6—Amendments made by Schedule 5 to the amending Act Clause 54 – Compliance notices Clause 55 - Remuneration-related contraventions Clause 56 – Infringement notices Clause 57 – Underpayments	Supported	These provisions are appropriate.

Provisions in the Bill	*Ai Group's position*	*Comments*
Item 1 Division 7—Amendments made by Schedule 6 to the amending Act Clause 60 – Varying and revoking certain FWC decisions Clause 61 - Appeals and reviews without hearings	Supported	These provisions are appropriate.
Item 2 Clause 53 – Employers must not advertise employment with rate of pay less than the national minimum wage	Supported	This provision is appropriate.
Item 3 Clause 58 – Small claims procedure—increase in amount of award Clause 59 – Small claims procedure—conciliation and arbitration of small claims proceedings	Supported	These provisions are appropriate.

ABOUT THE AUSTRALIAN INDUSTRY GROUP

The Australian Industry Group (Ai Group®) is a peak employer organisation representing traditional, innovative and emerging industry sectors. We are a truly national organisation which has been supporting businesses across Australia for nearly 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, ICT, transport & logistics, engineering, food, labour hire, mining services, the defence industry and civil airlines.

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.

OFFICE ADDRESSES

NEW SOUTH WALES

Sydney
51 Walker Street
North Sydney NSW 2060

Western Sydney
Level 2, 100 George Street
Parramatta NSW 2150

Albury Wodonga
560 David Street
Albury NSW 2640

Hunter
Suite 1, "Nautilos"
265 Wharf Road
Newcastle NSW 2300

VICTORIA

Melbourne
Level 2 / 441 St Kilda Road
Melbourne VIC 3004

Bendigo
87 Wil Street
Bendigo VIC 3550

QUEENSLAND

Brisbane
202 Boundary Street Spring Hill
QLD 4000

ACT

Canberra
Ground Floor,
42 Macquarie Street
Barton ACT 2600

SOUTH AUSTRALIA

Adelaide
Level 1 / 45 Greenhill Road
Wayville SA 5034

WESTERN AUSTRALIA

South Perth
Suite 6, Level 3 South Shore Centre 85
South Perth Esplanade
South Perth WA 6151

www.aigroup.com.au