Ai GROUP SUBMISSION

Department of Employment and Workplace Relations

Consultation on workplace relations measures being considered for introduction in the second half of 2023

13 April 2023

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Introduction

The Australian Industry Group (**Ai Group**) welcomes the opportunity to make a submission, on a confidential basis, to the Department of Employment and Workplace Relations (**DEWR**) on the next tranche of proposed workplace relations measures being considered for introduction in the second half of 2023.

We refer to DEWR's letter that was addressed to Ai Group on 23 March 2023 (**23 March Letter**) which seeks our views on the following proposed measures or topics:

1. Casual workers.

2. Same job, same pay.

3. Compliance and enforcement: criminalising wage theft.

4. Extend the powers of the Fair Work Commission (**FWC**) to include 'employee-like' forms of work.

5. Give workers the right to challenge unfair contractual terms.

6. Allow the FWC to set minimum standards to ensure the road transport industry is safe, sustainable and viable.

7. Provide stronger protections against discrimination, adverse action and harassment.

8. A single national framework for labour hire regulation, which could be implemented in place of existing state and territory schemes.

9. Address the impact of the small business redundancy exemption in winding up scenarios to support equitable outcomes for claimants under the Fair Entitlements Guarantee (**FEG**).

10. Reforms to strengthen enterprise bargaining and close loopholes:
    (a) The FWC issuing model terms for enterprise agreements.
    (b) Preserve arrangements for employers already using single interest agreements.

11. Repeal demerger from registered organisations amalgamation provisions.

An overview of our current provisional views on each of the proposed measures above, as developed within the short window provided, is outlined in this submission. We also refer to the consultation meetings on 30 March and 5 April 2023, where we identified (at a high-level) some of the key issues associated with the proposed measures above. We also note that we have raised various issues for consideration in relation to the abovementioned matters through consultation with DEWR during various meetings last year. We do not seek to here comprehensively traverse or repeat all of the issues that we have previously raised but instead identify a number of particularly saliant considerations.

We note that DEWR has indicated that more detailed consultation papers will be released in relation to proposed measures 2 to 7 shortly, and a further opportunity to prepare more detailed submissions on those measures will be provided. Accordingly, in our submissions below, we have set out our preliminary views in relation to some of these measures but we aknowedge that those views may change and/or be further developed once the detailed consultation papers are released.

We understand that consultation and the development of any legislative reform will be an iterative process. Ai Group foreshadows that we anticipate providing further and more detailed views to DEWR in relation to all of the matters raised in DEWR's correspondence, both through written submissions and direct meetings, once we have and an opportunity to consult our members in relation to such matters in a more fulsome way.

Item 1: Casual workers

As recognised in DEWR's 23 March Letter: '*Casual employment plays an important role in the labour market, meeting the needs of businesses that have short term and unpredictable needs, and enabling workers to have flexibility around when they work, helping to manage other commitments such as study*'.

Also, as stated in DEWR's 23 March Letter: '*Reforms should balance certainty and fairness for both employees and employers*'.

The importance of not re-creating the damaging uncertainty that resulted from the Federal Court's *WorkPac v Skene* and *WorkPac v Rossato* judgments

Between 2018 and March 2021, businesses that employed casual employees faced major uncertainty and cost-risks due to the Federal Court's controversial judgments in the *WorkPac v Skene*[1] and *WorkPac v Rossato*[2] cases. These judgments awarded annual leave and other entitlements to Mr Skene and Mr Rossato - two employees of WorkPac who 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 became a major barrier to casual jobs and business investment. The judgments had 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.

At the special leave stage of the High Court appeal, the Australian 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 had made provision for these costs as they had already paid a casual loading in lieu of annual leave and other entitlements.

In August 2021, the High Court handed down its appeal decision in the *WorkPac v Rossato*[3] case. The High Court unanimously overturned the decision of the Full Court of the Federal Court in the *Workpac v Rossato* case and in doing so identified that the reasoning in the Federal Court's earlier decision in the *WorkPac v Skene* case was erroneous. The High Court determined that at all times during his employment, Mr Rossato was a casual employee for the purposes of the *Fair Work Act 2009* (Cth) (**FW Act**) and the enterprise agreement under which he was employed by WorkPac.

The High Court's appeal decision followed the enactment of a statutory definition of a '*casual employee*' in s.15A of the FW Act and double-dipping protection for employers in s.545 of the FW

[1] [2018] FCAFC 131.

[2] [2020] FCAFC 84.

[3] [2021] HCA 23.

Act. The amendments were made through the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) and were operative from 27 March 2021 (**March 2021 Amendments**).

Without the High Court's appeal decision and the legislative reforms, the Federal Court's decisions in *WorkPac v Skene* and *WorkPac v Rossato* would have:

- Imposed crippling costs on Australian businesses;
- Potentially destroyed a large number of businesses – including those in sectors like retail, hospitality and restaurants which employ a high proportion of casual staff;
- Destroyed the livelihoods of a large number of small business owners;
- Discouraged employers from retaining casual employees;
- Been a barrier to employers taking on additional casual staff;
- Increased the level of unemployment, including amongst young people who are already disadvantaged in the labour market; and
- Encouraged class action claims against employers.

Immediately prior to the High Court's appeal decision and the March 2021 Amendments, at least eight class actions were being pursued against employers on the basis of arguments about the alleged misclassification of casuals. Seven of these were funded by overseas litigation funders and were targeted against WorkPac, Skilled Workforce Solutions, Hays Recruitment, Ready Workforce, Tesa Mining, One Key Resources and Stellar Personnel. Some of these companies are Ai Group members. These class actions were just the '*tip of the iceberg*' of '*double-dipping'* claims that would have been pursued if the legislative amendments had not been made.

It is vital that any changes to the casual employment provisions in the FW Act do not result in uncertainty. This would not be in the interests of employers, employees or the Australian community. Uncertainty would only benefit overseas litigation funders chasing super-profits at the expense of the Australian community, and the law firms they partner with.

Uncertainty about the meaning of a '*casual employee'* would also impose major costs upon the Commonwealth through the FEG. Uncertainty would encourage casuals engaged by insolvent businesses to pursue '*double-dipping*' claims under the FEG. A claim of this type was recently dealt with by the Federal Court, in which the Court rejected the claim and, in doing so, referred to the

High Court's decision in *WorkPac v Rossato* and to ss.15A and 545A (orders relating to casual loading amounts) of the FW Act.[4]

The common law definition of a '*casual employee*'

The High Court's judgment in *WorkPac v Rossato* clarifies that where an employer and an employee have '*committed the terms of the employment relationship to a written contract and thereafter adhered to those terms. In such a case, it is to those terms that one must look to determine the character of the employment relationship.*'[5]

The High Court's judgment clarifies the common law meaning of a '*casual employee*'. The common law definition emphasises:

- The importance of the relationship being defined through the terms of the written contract and understandings reached at the start of the employment relationship;
- That post-contractual conduct should not be taken into account; and
- That a regular pattern of hours does not of itself indicate that the employment relationship is not one of casual employment.

The statutory definition of a '*casual employee*' in s.15A of the FW Act

The common law definition of a '*casual employee*' aligns very closely with the statutory definition of a '*casual employee*' in s.15A of the FW Act.

Under the definition in s.15A of the FW Act, a person is a '*casual employee*' for the purposes of 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.*'

Section 15A 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;*

[4] *Secretary, Attorney-General's Department v Warren* [2022] FCAFC 118 (12 July 2022); at paragraph [51].

[5] [2021] HCA 23, para [67] (Kiefel CJ, Keane, Gordon, Edelman, Stewart and Gleeson CJ).

(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 that was adopted by the Federal Court in *WorkPac v Skene*[6] and *WorkPac v Rossato*[7], which is unworkable in practice.

Importantly, the current statutory definition 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'.*

The definition in s.15A of the FW Act is fair to both employees and employers and provides certainty to both parties.

The *'double-dipping'* protection in s.545A of the FW Act

Section 545A of the FW Act protects employers against '*double-dipping*' claims by employees and ex-employees who were engaged and paid as casuals but who later claim they are entitled to annual leave and other benefits of permanent employment. Section 545A allows the amount of the casual loading paid to an employee to be offset against any entitlements the employee claims to be owed. This approach has obvious merit and fairness.

The 25 per cent standard casual loading in modern awards arose from the *Metal Industry Casual Employment Decision*[8] of a Full Bench of the Australian Industrial Relations Commission (**AIRC**) 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 AIRC'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 per cent loading flowed through to other awards and is now a standard entitlement in modern awards and the National Minimum

[6] [2018] FCAFC 131.

[7] [2020] FCAFC 84.

[8] Print T4991.

Wage Order.

It is vital that s.545A is not disturbed.

Casual conversion rights

The FW Act provides the following casual conversion rights to employees:

- 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. Unlike the process which applies to a casual employee's initial conversion right, the onus is on the employee to make a request if they wish to exercise a '*residual right to request conversion*'. If a request is made, the employer is able to refuse the request if there are reasonable business grounds to do so.
- 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 FWC. The FWC has the power to conciliate and, if both parties agree, to arbitrate. In addition, the Federal Circuit and Family Court, in the small claims jurisdiction, is able to make orders relating to the eligibility of an employee to convert to permanent employment.
- The maximum penalty for a body corporate which breaches the National Employment Standards (**NES**), including the casual employment provisions, is $82,500 per contravention or

$825,000 for a '*serious contravention*'. The maximum penalty for an individual is $16,500 per contravention or $165,000 for a '*serious contravention*'. In addition, the casual employment rights in the NES are '*workplace rights*' under the general protections in the FW Act. Similar maximum penalties apply to breaches of the general protections. Accessorial liability provisions in the FW Act enable individuals to be penalised if they are knowingly involved in a breach by a body corporate or other party.

The conversion rights in the FW Act are robust. All eligible casual employees have clear rights and opportunities to pursue conversion to permanent employment should they wish to do so.

The process that employers are required to comply with when each casual employee reaches 12 months of employment imposes a substantial regulatory burden, but the March 2021 Amendments were designed to strike a balance between the interests of all parties.

The conversion process implemented in the FW Act draws upon elements of the logic of the FWC's decision in the Casual Employment and Part-time Employment Case[9] that developed a casual conversion process, but ultimately provided even stronger rights to casual conversion than the Full Bench had deemed necessary as part of a fair and relevant safety net. The Casual Employment and Part-time Employment Case was a major undertaking involving a 5-member Full Bench undertaking a careful review of the operation of award terms and weighing detailed evidentiary material and submissions advanced by peak councils such as Ai Group and the ACTU as well as a range of industry associations and unions, along with other interested parties. The current legislative provisions which were subsequently developed, followed an extensive tripartite process involving meaningful negotiation between employer groups and unions facilitated by Government. Ai Group was heavily involved in both undertakings.

The current legislative provisions reflect a balance of interests of such parties that accommodate a raft of practical considerations associated with the need to retain workable casual employment arrangements while also delivering a pathway to permanent employment for those that prefer it.

Disputes over casual conversion

Over the past 23 years, since the AIRC handed down its decision in the *Metal Industry Casual Employment Case*[10] and casual conversion provisions flowed into numerous federal awards, there have been very few disputes about casual conversion. This is no doubt due to the very low incidence of employees requesting conversion to permanent employment. The relatively small number of requests is undoubtedly due to the employees preferring the flexibility of casual employment and/or preferring the 25% casual loading.

[9] [2017] FWCFB 3541.

[10] Print T4991.

Employer after employer has reported to Ai Group that only a small percentage of their casual employees who are eligible to convert to permanent employment, choose to convert.

The FW Act enables a dispute about casual conversion to be referred to the FWC. The FWC has the power to conciliate and, if both parties agree, to arbitrate. In addition, the Federal Circuit and Family Court, in the small claims jurisdiction, is able to make orders relating to the eligibility of an employee to convert to permanent employment.

So far, there have been very few disputes referred to either the FWC or the Federal Circuit and Family Court, but two recent examples are:

- In *CPSU v TAFE NSW* [2022] FWC 2908, Commissioner McKenna of the FWC determined that TAFE NSW must offer permanent employment to three casual employees as it had no reasonable grounds to decline to offer permanency; and

- In *Toby Priest v Flinders University of South Australia* [2022] FWC 478, Commissioner Platt of the FWC dealt with a dispute over Flinders University's refusal to offer permanent employment to a casual tutor. The FWC accepted the University's argument that, if converted to a part-time employee, the employee would not be able to work the regular pattern of hours that he had worked as a casual, without significant adjustment.

There is no evidence that the current dispute settlement mechanisms are not working effectively.

In its major *Casual Employment and Part-time Employment Case*,[11] 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.

[11] [2017] FWCFB 3541.

Casual Terms Award Review 2021

The March 2021 Amendments inserted clause 48 into Schedule 1 of the FW Act. Clause 48 required that the FWC 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 were not inconsistent with the FW Act, including reviewing award provisions which define a '*casual employee*' and those which provide conversion rights.

Between 27 March 2021 and 27 September 2021, the FWC reviewed the casual employment terms in all modern awards and varied a large number of terms to ensure there were no inconsistencies between the provisions of the legislation and awards. Ai Group played a leading role in representing employers in the Casual Terms Award Review (**Review**).

The Review imposed considerable resource demands on the FWC and on industrial parties like Ai Group given the tight six-month timeframe. However, despite the challenges, the FWC ensured that all interested parties had the opportunity to make written and oral submissions.

In considering any potential changes to the casual employment provisions in the FW Act, the Government should be mindful of the resource demands for the FWC and industrial parties that would be required if another review of all modern awards became necessary.

More importantly, the Government should be mindful of the negative consequences of an unwarranted departure from the existing regulatory regime. The desirability of a stable system should be appreciated. Frequent changes to workplace relations laws not only imposes a burden on employers, but adds to the complexity of the system and inevitably results in confusion amongst industry that undermines compliance.

The Government's policy on casual employment

The Australian Labor Party / Australian Government's policy on casual employment has been articulated in different ways over time.

- The *2021 ALP National Platform* states:

  'Labor will strengthen the laws that prohibit sham contracting. Labor will set an objective test in legislation for determining when a worker is a casual'.[12]

- Labor's *Secure Australian Jobs Plan*, as released on 15 November 2021, by the Hon Anthony Albanese MP stated:

  *'**Standing up for casual workers***

[12] *ALP National Platform*, 2021, paragraph [24], p.26.

Labor will legislate a fair, objective test to determine when a worker can be classified as casual, so people have clearer pathway to permanent work.

The meaning of casual employment has evolved and been upheld many times through common law. It has been characterised as the "absence of a firm advance commitment as to the duration of the employee's employment or the days or hours the employees will work".

The Morrison Government has ignored this and its recent changes to the Fair Work Act give employers the right to define someone as a casual, even if they work regular, predictable hours. This gives a green light to casualisation and further entrenches insecure work.

Labor will amend this definition to restore the common law definition.'

- The *Secure Australian Jobs Plan* which currently appears on the ALP's website does not mention casuals. On the issue of job security, it states:

*'**Putting security back into work***

More gig work and short-term contracts means less secure work. Having a secure job with sick leave and holiday pay means you can save up for a house, take care of your family and get ahead.

Labor will enshrine secure work as an objective of the Fair Work Act. This means the Fair Work Commission will have to put job security at the heart of its decision-making.'

As can be seen from the above, Labor's *Secure Australian Jobs Plan* states:

'*The meaning of casual employment has evolved and been upheld many times through common law. It has been characterised as the "absence of a firm advance commitment as to the duration of the employee's employment or the days or hours the employees will work".*'

We agree with the above statement. In *WorkPac v Rossato*, the High Court stated:

'*Both before the Full Court and in this Court, the parties accepted that the expression "casual employee" in the Act refers to an employee who has no "firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work".*'[13]

With regard to concept of a '*firm advance commitment*', the High Court said:

'*A court can determine the character of a legal relationship between the parties only by reference to the legal rights and obligations which constitute that relationship. The search for the existence or otherwise of a "firm advance commitment" must be for enforceable*

[13] [2021] HCA 23, para 32 (Kiefel CJ, Keane, Gordon, Edelman, Stewart and Gleeson CJ).

> *terms, and not unenforceable expectations or understandings that might be said to reflect the manner in which the parties performed their agreement. To the extent that Bromberg J expressed support for the notion that the characterisation exercise should have regard to the entirety of the employment relationship, his Honour erred.*'[14]

With reference to the definition in s.15A of the FW Act, Labor's *Secure Australian Jobs Plan* states:

> *Labor will amend this definition to restore the common law definition.*

As explained earlier in this submission, s.15A of the FW Act closely aligns with the common law definition as articulated by the High Court in *WorkPac v Rossato*. Therefore, there is no need to '*restore the common law definition*' because the statutory definition and the common law definition are aligned.

The development of a definition of casual employment that was inconsistent with the common law definition, which we expect will be pressed for by unions, would directly contradict the Government's election commitment.

(1) How should an assessment of post-contractual conduct (that is, the pattern of work and nature of the relationship over time) be incorporated into the definition of casual employee?

Ai Group opposes any change to the definition of '*casual employee'* in s.15A of the FW Act. The definition in s.15A reflects the common law definition, which is a key stated objective of the Government's *Secure Australian Jobs Plan*.

The definition in s.15A centres upon the recognised meaning of casual employment, i.e. where there is '*no firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work'.* The preservation of this meaning is a key stated objective of the Government's *Secure Australian Jobs Plan*.

If, despite Ai Group's opposition to s.15A being amended, the Government decides to introduce amendments to enable post-contractual conduct to be assessed, such assessment should only be permitted for the limited purpose of determining whether the purported relationship is a sham.

With regard to sham arrangements, in *WorkPac v Rossato* the High Court stated: (emphasis added)

> '*Additionally, and importantly, it is to be noted that counsel for Mr Rossato expressly disavowed any suggestion that the contractual agreements between the parties were sham transactions not to be given effect according to their tenor. No suggestion was made that the six NOCEs were intended, in truth, not to be a series of separate engagements but instead to be a disguise for one continuing engagement between the parties. In the absence*

[14] [2021] HCA 23, para 57 (Kiefel CJ, Keane, Gordon, Edelman, Stewart and Gleeson CJ).

> *of such a contention, there is no reason not to regard the NOCEs and associated contractual documents as true, reliable and realistic statements of the rights and obligations to which the parties agreed to bind themselves.*'

Consistent with the above extract, a sham arrangement can be described as one where the parties attempt to disguise their relationship as something it is not.

We note that the statutory review of the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) conducted by KPMG made the following finding:

> '*Consideration should be given to including a suitable anti- avoidance provision in section 15A of the Fair Work Act, to exclude sham casual employment arrangements from meeting the statutory definition. Further regard should also be had to whether the Fair Work Act provides a sufficient deterrence for parties to enter into such arrangements, or whether additional deterrence is necessary.*'

Any anti-avoidance provision should be limited to excluding arrangements where the parties have attempted to describe their relationship as something it is not. A concept of reckless would not be appropriate because of the risk of creating the type of uncertainty that arose from the Federal Court's *WorkPac v Skene*[15] and *WorkPac v Rossato*[16] judgments.

(2) What, and how should, other elements of the legislative framework, such as the conversion process and dispute resolution, change as a result?

The inclusion of an anti-avoidance provision in s.15A of the FW Act to exclude sham casual employment arrangements from meeting the statutory definition would not require any amendments to other elements of the legislative framework.

As explained above, the current casual conversion process and dispute resolution process are working effectively.

[15] [2018] FCAFC 131.

[16] [2020] FCAFC 84.

Item 2: Same Job, Same Pay

Ai Group opposes the Government's policy of requiring that labour hire companies provide the same rates and conditions to their employees, as their clients provide to their own employees. Labour hire businesses must comply with the FW Act and modern awards, like every other employer.

We are concerned that there is the potential for such a policy to lead to legislative changes that are unfair, damaging to the interests of employees and employers that legitimately rely upon labour hire arrangements and the broader economy. Based on an assessment of previously proposed legislative changes, there is a real risk that an amendment will be unworkable for numerous reasons.

As DEWR is aware, Ai Group has addressed the critical importance of the labour hire sector to a significant number of employees, employers and the economy in submissions advanced in different contexts and through our previous engagement with DEWR. We do however, emphasise that this is of paramount importance in the context of the current labour market. Difficulty locating staff is a critical impediment to industry and the labour hire sector provides an important measure to assist industry and the economy to function efficiently, notwithstanding such impediments.

It is trite to observe that the '*same job same pay*' policy has caused significant alarm amongst industry. There is concern amongst many that it represents an unfair attack on labour hire businesses that comply with relevant workplace laws and provide a valuable and legitimate service to other organisations, employees and the broader community.

In raising our overarching concerns, we also emphasise that there are fundamental questions about how it is envisaged that the policy objective will be implemented. Ai Group understands that DEWR intends to release a detailed discussion paper in relation to this item. Accordingly, Ai Group's submission is made on a preliminary basis and is responsive to the limited information currently available. Ai Group reserves its position to revise and/or raise additional points following consideration of the discussion paper.

We note that Ai Group has already raised concerns and matters for consideration during previous consultation sessions with DEWR. These submissions are intended to supplement such matters rather than demur from observations that have been previously raised. We have also prepared submissions in relation to the proposed *Fair Work Amendment (Equal Pay for Equal Work) Bill 2022* (Cth) introduced by Senator Malcolm Roberts in 2022 and the *Fair Work Amendment (Same Job Same Pay) Bill 2021* (Cth) introduced by the Government when it was in Opposition.

(1) The Same Job, Same Pay measure is intended to apply to labour hire arrangements.

(a) How should different labour hire arrangements be identified or defined?

It is critical that '*labour hire'* is defined in a manner that is no broader than in modern awards.

Most modern awards do not use the expression '*labour hire'* but rather they use the expression '*on-hire*', which is defined as follows:

> '***on-hire*** *means the on-hire of an employee by their employer to a client, where such employee works under the general guidance and instruction of the client or a representative of the client.*'

The modern award definition of on-hire was determined by a seven-member Full Bench of the then AIRC during the Award Modernisation 2009 proceedings, which followed extensive arguments and submissions put by both employer groups and unions. The definition is well-understood in industry and used as the basis for determining wages and entitlements for labour hire employees in modern awards.

Any broader definition of this is likely to disturb countless business-to-business contracting arrangements.

For example, in the Hunter Valley and the Bowen Basin there are hundreds of businesses which provide various services to coal mining clients. For example, many small electrical contracting firms based around Muswellbrook and Emerald send electricians out to coal mine sites from time to time to carry out electrical repairs. There is the risk that these electrical contracting firms could be held to be '*labour hire employers*'.

This risk is highlighted by the extremely broad and inappropriate concepts of '*labour hire'* reflected in the Queensland and Victorian labour hire licensing legislation. Many hundreds of contracting businesses (that on any reasonable definition are not labour hire businesses) have been forced to obtain labour hire licences under these laws in order to avoid the risks of non-compliance. This has imposed a substantial cost and ongoing regulatory burden on these businesses.

A broad definition of '*labour hire'* that goes beyond the modern award definition would be an impossible basis to frame any '*same job same pay*' provision to the vast array of business to business arrangements involving the use of a person's services outside the direct employment relationship. The diversity of commercial arrangements that are covered by labour hire licensing laws are too broad and unwarranted for the application of a '*same job same pay*' principle.

A broader definition would also impose a severe level of regulatory over-reach beyond the stated objective of '*same job same pay*'.

It is also vitally important that any definition only apply in the context of related corporate entities.

(b) Should any arrangements be excluded from the scope of the measure? If so, why?

Yes.

Such arrangements should only apply to genuine labour hire arrangements.

The arrangements should not have any application in the context of work performed by employees of related corporate entities where there is no labour hire arrangement, as traditionally understood, in place. To do otherwise would be to interfere with the integrity of the bargaining system.

The arrangements should only apply in the context of employees engaged to perform the same job as an employee of a host employer covered by an enterprise agreement.

The arrangements should not apply in the context of award free employees. There is no justification to do otherwise.

The arrangements should not apply in the context of short-term placements of an employee or in circumstances where the use of labour hire is engaged in by an employer for the primary reason of addressing a genuine operational purpose, rather than as a measure to undermine the operation of an otherwise applicable enterprise agreement. This exemption should include circumstances where it used to address an inability to directly recruit staff, to address temporary needs or to obtain specialist skills.

The arrangement should not apply in circumstances where an employee is engaged to undertake work with multiple host employers during a pay period. Any alternate approach risks being unworkable or unduly burdensome.

There needs to be sensible transitional arrangements that recognise the operation of commercial arrangements currently in place. This will necessitate the delayed commencement of any new provisions and framing of sensible exemptions.

Ai Group looks forward to elaborating on these, and other potentially appropriate exclusions, during further consultation with DEWR.

(1) How should a '*same job*' be identified? For example, is a labour hire worker doing the '*same job*' as a directly engaged employee if the labour hire worker is:
- **(a) performing duties that attach to a classification in a host employer's enterprise agreement; and/or**
- **(b) performing the same duties as a directly employed employee; and/or**
- **(c) performing the same duties as an employee covered by the modern award; and/or**
- **(d) meeting any other potential criteria?**

We tentatively suggest that any notion of '*same job*' should be limited to capturing a job that reflects:

- the same duties, tasks and responsibilities as performed by a current employee of a host employer; and
- falls within the same classification of an enterprise agreement that applies to an employee directly employed by the host employer who is performing work at the time the labour hire employee is engaged to perform that work; and

- is performed by the labour hire employee at the same work site location as the work performed by the host employee.

Framing '*same job*' simply around the application of the same classification in the context of either a modern award or enterprise agreement, would in many circumstances, not result in the same '*job'* being captured. Many modern award classifications contain broad descriptors that cover a raft of competencies and job titles that would not be amenable to any meaningful comparison around '*same job*.' For example, the classification structure in the *Clerks – Private Sector Award 2020* is broadly defined to include a wide range of very different jobs as they appear in different industry settings and based on the occupational character of that award. Similarly, and perhaps more importantly, many enterprise agreements contain classifications that could be said to cover, but not accurately describe, the tasks or '*job'* that labour hire workers may be engaged to perform. This is entirely understandable as such instruments have not been framed with the need to provide greater specificity as employers will be able to the control the application of such instruments through their recruitment decisions.

Any reform must also account for the fact that many classifications in enterprise agreements reflect skills or qualifications of an employee, rather than the '*job'* that they undertake. In some contexts, this recognises the benefit or value to an employer of the engagement if such employees are required, over the full course of their ongoing engagement, to utilise such skills or qualifications. Such structures also promote skill development and the establishment of a career path within an employer's enterprise. It would often be inappropriate and unjustifiable to determine the wages of labour hire employees through the application of such classifications when they may only be engaged for a short period of time and not called upon to use or draw upon the relevant skills or qualifications in the course of their work. Put another way, often labour hire workers will only be required to undertake a narrow or discrete work activity over a short period of time and as such the broader skills or qualifications that may be caught by a classification structure applicable to a permanent employee would not be of any value to a host employer so as to warrant the application of the '*same pay*' as may be applicable under the enterprise agreement.

It is also essential that the concept of '*same job'* encompasses a temporal connection to the time when the labour hire employee is engaged to the existence of a direct employee performing the same job. This is to ensure that comparisons cannot be made to jobs that were once available but no longer exist in a host employer. The temporal connection goes to the core assumption of the policy: that the employer is offering the same job as that currently performed by a direct employee, being the basis for the application of same pay.

It is further essential that the meaning of '*same job'* include the same work site location at which the direct employee is performing the same job. Significant variations in above award wages are commonly and understandably applied in different geographical locations as they respond to local labour market pressures, for instance between rural, regional and metropolitan areas.

Work performed at certain locations may also attract differing rates of pay and allowances, notwithstanding that an enterprise agreement may cover multiple locations at which the labour hire employee performs work. The problems around the '*same pay*' are also dealt with below.

It is essential that the meaning of '*same job*' be a specifically defined term in any amendment to the FW Act.

Ai Group otherwise reserves its views in relation to the balance of the questions referred to in items 2(a) to (d) (inclusive) pending release and consideration of DEWR's more detailed discussion paper.

(2) How should '*same pay*' be calculated? The Department is considering calculating '*same pay*' in accordance with the term '*full rate of pay*' in the *Fair Work Act 2009*.

(a) Is calculating '*same pay*' with reference to '*full rate of pay*' appropriate?

No.

The definition of '*full rate of pay*' is found in s.18 of the FW Act. The general meaning of this term for national system employees (excluding pieceworkers, for whom separate definitions apply in sub-section 18(2)) is:

> '*… the rate of pay payable to the employee, including all the following:*
>
> *(a) incentive-based payments and bonuses,*
> *(b) loadings,*
> *(c) monetary allowances,*
> *(d) overtime or penalty rates,*
> (e) *any other separately identifiable amounts.'*

In contrast, '*base rate of pay*' is defined in s.16 of the FW Act as:

> '*…the rate of pay payable to the employee for his or her ordinary hours of work, but not including any of the following:*
> *(a) incentive-based payments and bonuses;*
> *(b) loadings;*
> *(c) monetary allowances;*
> *(d) overtime or penalty rates;*
> *(e) any other separately identifiable amounts.*'

It would be unworkable for the proposed requirement to extend beyond the '*base rate of pay*' given that many businesses have implemented annualised salaries and loaded rates of pay which include compensation for the specific rosters that their employees are working. Labour hire employees often work different rosters to those worked by employees of their clients' businesses.

If a labour hire employer pays its employees a higher total remuneration package than that paid by the client, it would be unfair to require the employer to pay an even higher rate by forcing the labour hire employer to pay all of the discrete items comprising the definition of '*full rate of pay*'.

Incentive-based payments and bonuses

It would not be workable or fair to require a labour hire business or other contractor to pay the same incentive-based payments or bonuses to their employees as the client pays to its own employees, for reasons which include the following:

- Production bonuses are a common form of incentive, particularly in industries such as mining. Bonuses are typically based on the mining company's production performance over a specified period (e.g. quarterly or annually). How could a labour hire employer know what amount it is required to pay each of its employees at each point in time when some employees are only employed for a short period? If the short period of employment for an employee aligned with the time when the mining company paid its employees an annual production bonus, it would be extremely unfair to require the labour hire company to pay the employee the annual bonus.
- Individual incentive-payments are typically based on the performance of each individual employee. Different employees perform at different levels and therefore the same incentive-payment is not paid to each employee. In such circumstances, how could a '*labour hire employer*' conceivably determine the amount to be paid to its employees?
- Individual incentive-payments are typically confidential. Many employees may not wish to have such matters disclosed to third parties. In such circumstances, the labour hire employer would have no way of knowing the amount that it is required to pay to its employees.
- Some employers pay substantial flat dollar payments to their employees at the commencement of operation of their enterprise agreements. It would be unfair to require a labour hire company to pay its employees such an amount when often labour hire companies have their own enterprise agreements which include a schedule of wage increases, and may have included a flat dollar amount that was payable at a different point in time.

There are a wide variety of different types of bonuses and incentive schemes, including payment by results, merit pay, gainsharing, profit sharing and employee share plans. None of the payments under bonus or incentive schemes are appropriately or fairly included under any 'same job/same pay' requirement.

Monetary allowances

Monetary allowances usually relate to particular types of work that an employee undertakes, particular disabilities that an employee experiences, or particular expenses that an employee incurs.

It is extremely common for employees in the '*same classification or class of work*' to be paid different allowances. For example:

- One employee may work underground more often than another;
- One employee may use an explosive power tool or work in a confined space whereas another employee may not;
- One employee may spend more time travelling between mine sites whereas another employee may work only on one mine site and not be entitled to a travelling allowance;
- One employee may use his or her own vehicle to travel on the employer's business, whereas another employee may travel in the employer's vehicle; and
- One employee may be supplied with meals by the employer, but another employee may be required to provide meals and be entitled to an allowance.

Allowances are not appropriately included in any '*same job same pay*' requirement. It would be unworkable and unfair to do so.

Overtime and penalty rates

Inclusion of overtime and penalty rates has the potential to operate extremely unfairly where a labour hire employer and host employer are covered by industrial instruments that deal with matters such as the maximum number of ordinary hours per week, the manner in which ordinary hours may be arranged, or where different penalty rate payments apply for overtime.

It would not be appropriate, fair or workable to include overtime and penalty rates in any '*same job same pay*' requirement.

Any other separately identifiable amounts

The concept of '*any other separately identifiable amounts*' is extremely broad and uncertain. A vast array of different payments to employees could be captured.

It would be unworkable, unfair and inappropriate to include this concept in any '*same job same pay*' requirement.

(b) Should '*same pay*' extend to conditions that fall outside this definition? If so, what conditions should be captured and why?

No.

It would be unworkable for the proposed requirement to extend to conditions of employment because many companies offer their own employees access to staff discounts, employee share schemes and other conditions that labour hire companies have no ability to offer.

(3) How should the Fair Work Commission resolve Same Job, Same Pay disputes?

The precise role of the FWC in resolving any '*same job, same pay*' disputes will depend upon the mechanism for implementation of the '*same job, same pay*' obligation.

For example, if it is a required term of an enterprise agreement it may be appropriate for the FWC's existing jurisdiction to be used to resolve disputes involving the interpretation and application of enterprise agreements.

Ai Group reserves its position on this item until it has had the benefit of additional detail relevant to the consideration of this item.

(4) What could be done to prevent parties avoiding Same Job, Same Pay obligations?

The options available to deter parties avoiding '*same job, same pay*' obligations may similarly depend upon the mechanism by which the '*same job, same pay'* obligation is implemented and the precise nature of the obligation itself.

Ai Group's preliminary view is that there may be existing measures available under both labour-hire licensing schemes as well as the FW Act provisions concerning the breach of an industrial instrument that may adequately deter avoidance without the need to create additional layers of regulation that contribute to the compliance burden on employers.

Ai Group reserves its position on this item until it has had the benefit of any additional detail relevant to the consideration of this item.

(5) What could be done to avoid discouraging parties from enterprise bargaining in light of Same Job, Same Pay obligations and entitlements?

The '*same job, same pay*' arrangement has the potential to be a strong disincentive for employers in the labour-hire sector to bargain.

Moreover, there is considerable uncertainty as to how an employer who is subject to a different industrial instrument will be able comply with both the terms of that instrument and any same pay obligation.

The key to avoiding discouraging parties from entering into enterprise bargaining is to ensure that the same pay and same job entitlements are appropriately targeted and not broad in scope.

Many labour hire companies have reached enterprise agreements with their employees. The arrangement may, in effect, force labour hire companies who have an enterprise agreement to pay their employees more than the terms and conditions bargained for, during the life of the agreement. Such outcomes would be unfair, since agreements typically represent a '*bargain'* between the parties, with pay being just one of the items dealt with in the agreement.

It would be appropriate to exclude a party that is subject to an enterprise agreement from the application of the proposed new requirement. This would provide a powerful incentive for parties to engage in enterprise bargaining.

Ai Group reserves its position on this item until it has had the benefit of any additional detail relevant to the consideration of this item.

Item 3: Compliance and enforcement: criminalising wage theft

The proposed introduction of criminal penalties to the underpayment of wages is a significant change to Australia's workplace relations laws. While Ai Group does not in any way condone non-compliance, we nonetheless oppose the introduction of criminal penalties.

Criminal penalties do not address why most underpayments occur. They instead prioritise the punishment of employers while leaving underpaid workers out of pocket.

Exposing businesses, directors and managers of businesses to criminal penalties would operate as a major barrier to employers self-disclosing and rectifying underpayments. It will foreseeably discourage constructive engagement with the Fair Work Ombudsman (**FWO**). An unduly punitive framework will also deter investment and discourage employment growth.

Notwithstanding our overarching views, we seek below to constructively engage with the issues that have been raised by DEWR.

Criminal penalties do not address why underpayments occur

Australia's workplace relations system comprises of a variety of different sources of minimum employment conditions including some 123 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 often contain ambiguity.

Determining a rate of pay should be a straightforward exercise, but for many employers it is not. A rate of pay may be determined by reference to not only multiple sources of legal obligations, but also the application of multiple provisions in an industrial instrument that interact to set monetary entitlements, (e.g. loadings, allowances, and penalty rates). In other words, calculating a rate of pay can involve sourcing in excess of 10 different pay points depending on the hours worked and applicable conditions.

Ai Group devotes significant resources and services to assist employers in understanding Australia's workplace relations system such that relevant minimum rates of pay can be properly identified. It is one of our core services to members. In particular, Ai Group receives thousands of calls from employers seeking advice on the correct payment of wages as they relate to competing modern award coverage, classification structures, the application of loadings to irregular hours of work and the interpretation of enterprise agreements. This is not to mention the calculation of long service leave and other leave or monetary entitlements.

The imposition of criminal penalties does nothing to address the structural complexity of Australia's workplace laws but simply deals with the issue of underpayments by punishing employers who get it wrong.

The complexity of workplace laws also plays out in payroll errors 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.[17] In most cases, employees are not asked to give the money back.

In addition, criminal penalties are not designed to recover unpaid wages owing to employees. The FW Act's prioritisation of criminal proceedings ahead of civil enforcement and proceedings is likely to leave some of the most vulnerable workers without repayment while the courts deal with the criminal conduct of their employer.

Criminal penalties will promote high-cost interpretations of workplace laws at the expense of the proper interpretation of such provisions

In recent years, Australia has seen a number of High Court decisions that have dealt with public interest matters on competing interpretations under workplace laws – including in relation to fundamental issues such as the definition of a casual employee, the tests for which workers are independent contractors and the meaning of a '*day*' in the FW Act for the purpose of personal/carers leave.

These cases demonstrate that workplace laws are not static but dynamic and attempts to criminalise underpayments risk significantly stymieing the reasonable ventilation of contested interpretations by employers for fear of such action exposing them to criminal sanctions.

A criminal penalty regime risks causing employers to adopt unwarranted, but understandably cautious, approaches to the interpretation of unclear workplace laws. There is an obvious risk that unions and other applicants will leverage the risk of employer exposure to such penalties in pursuit of claims against employers. This is particularly concerning given the frequency with which unions press for entitlements based upon interpretations in the interests of their members but may in fact be erroneous.

Federal compliance and enforcement measures must '*cover the field*'

It is essential that any new criminal penalty relating to compliance with, and enforcement of, workplace laws, including criminal sanctions for underpayment of wages, operate to the express exclusion of any concurrent application of any state and territory laws relating to the same subject matter. To do otherwise, would create a compliance and enforcement framework with competing, superfluous and inconsistent enforcement procedures and consequences across the country, notwithstanding that the FW Act already provides a comprehensive enforcement regime for non-compliance with modern awards, enterprise agreements and employment contracts.

Additional and inconsistent state and territory compliance and enforcement frameworks would undermine the extent to which the FW Act as a national workplace relations framework, and would unnecessarily add to the complexity of our workplace relations system and the costs of compliance for employers.

Competing frameworks raise the prospect of employers being faced with multiple enforcement actions under differing national and state/territory laws, including exposure to multiple penalties for the same offence. This risk must be removed to ensure the integrity of a national compliance framework and the objectives supporting it. Employers and the community should not wear an

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

added regulatory burden where state and federal governments choose to regulate in relation to the same issue in different ways.

The ongoing presence of competing state legislation, without a clear signal as to the validity of its enforceability, will significantly undermine the policy objectives of the Federal Government in relation to compliance and erode community confidence in the role of a national compliance framework.

Further, it is unfair and inappropriate for the community to carry the burden of any constitutional challenge to the enforceability of competing and inconsistent state/territory laws, when the Federal Government can make this clarification prophylactically under statute or regulation.

(1) Should a wage underpayment offence apply to conduct which is more serious than an honest mistake, but falls short of deliberate underpayment?

If the Government is to introduce criminal penalties for the underpayment of wages, it is essential that the new offences are limited to only deliberate underpayments with the fault element of intent.

The fault element of intent defined below (5.2 of the *Criminal Code 1995* (Cth) *(***Criminal Code***)*), is an appropriate standard for criminal offences of underpayment.

> '*(1) A person has intention with respect to conduct if he or she means to engage in that conduct.*
> *(2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.*
> *(3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.*'

The fault element is also used in other relevant labour exploitation criminal offences contained in the *Criminal Code.* For instance, section 270.7 refers to deceptive labour recruitment as incorporating intent:

> *'…the recruiter engages in the conduct* ***with the intention*** *of inducing another person (the* ***victim****) to enter into an engagement to provide labour or services…'*

Similarly, the criminal offence of debt bondage at section 270.7C frames the offence of debt bondage as:

> *'…A person commits an offence of debt bondage if:*
>
> > *(a) the person engages in conduct that causes another person to enter into debt bondage; and*
> >
> > *(b) the person* ***intends*** *to cause the other person to enter into debt bondage.'*

Ai Group contends there is no reason to depart from the established criminal standard adopted in other labour exploitation offences, particularly where there is already a robust enforcement and compliance framework for civil contraventions.

Ai Group is strongly opposed to the significantly lower threshold proposed in the 23 March Letter that would encompass both deliberate and non-deliberate conduct other than '*honest mistake.*'

The Minister's address at the National Press Club last year[18] revealed that new criminal offences would not necessarily be limited to the deliberate acts of '*wage theft*' but could extend to acts of recklessness – where '*recklessness*' seemed to broadly encompass non-deliberate underpayments that were not '*honest mistakes*.'

> ***'ROSIE LEWIS:*** *Rosie Lewis from The Australian, Minister. Your Government has proposed laws to criminalise wage theft which you referenced in your speech. When caught out, employers often argue their conduct was inadvertent or they seek leniency. Do you expect any bosses to actually be jailed under your proposed law and what would the bar for jail time be?*
>
> ***BURKE:*** *These are issues that will be part of the consultation that I just described and that consultation is real. There's three different categories that we need to be able to work through as we put these laws together. The first are the people who inadvertently make a completely honest mistake. The second group are the people where it might not have been deliberate, but they were reckless to the extent of really not making an effort to do the proper checks and they had the capacity to do so. The third group are people who it's absolutely eyes wide open that they are ripping staff off.*
>
> *So, what we will be working through is how do you deal with those three different categories and, you know, certainly for the final group, criminal penalties are clearly applicable there. How do you then work through the rest?*'

For the purpose of new criminal penalties, the only category of conduct that should be subject to any new criminal offence is that of the third category, being the deliberate underpayment of wages with the fault element of intent and knowledge.

The first and second categories that appear to cover all other forms of conduct relating to the underpayment wages must not be covered by criminal penalties. Rather, it is more appropriate for the FW Act's current civil compliance and enforcement framework to continue to cover this range of conduct with a view to prioritising the repayment of wages to employees.

To the extent that criminal penalties are being considered for categories one and two, Ai Group has concerns with how these categories have been formulated as distinct from the other. Specifically, the characterisation of non-deliberate conduct that is not an '*honest mistake*' as '*reckless'* is not a view we share in accounting for why underpayments occur.

An '*honest mistake*' may be appropriate to describe an inadvertent payroll error, but does not prima facie, account for the extent and frequency under which Australia's workplace laws can provide for competing interpretations and ambiguities around the simple question of what to pay somebody. From this arises disputed interpretations between employers, unions and, sometimes, the FWO itself. The context of the long running award review proceedings and the extent and frequency with which variations have been made to such awards since their creation to address deficiencies or a

[18] The Hon. Tony Burke, Address National Press Club, Transcript, 1 February 2023.

lack of clarity in such instruments demonstrates the potential for such issues to arise. It is trite to observe that enterprise agreements similarly often lack clarity.

In many instances, parties may adopt an interpretation of an industrial instrument that is favourable to them, after considering potential competing interpretations. In some instances, they may do so without checking this with a third party. This is understandable given the practical context in which such instruments need to be read and applied – Australia's workplace relations laws should be capable of application by employers without the need to engage lawyers or paid advisers. This is not reckless conduct. It is not however clear whether it is an honest mistake as contemplated by DEWR's question. This depends upon how narrowly that phrase is defined or interpreted. In any event, and in light of workplace laws that are often ambiguous, unclear or at the very least far from simple and easy to understand, it is conduct that should not be covered by criminal penalties.

We are also concerned that a concept of recklessness would not be capable of clear and consistent application. Australia's workplace laws and the various points at which different jurisdictions, statutes, case law and industrial instruments intersect, often necessitate that employers have regard to a raft of sources to understand their obligations. It is unclear when precisely it will be said that an employer that had failed to successfully navigate such rules to the extent that they can be considered '*reckless'*.

Conduct amounting to recklessness is significantly different to deliberate conduct evincing intent and knowledge regarding an underpayment. The FW Act's enforcement and compliance framework should accordingly treat them differently and proportionately. As a matter of principle and fairness, criminal offences should not apply to conduct that is reckless when compared to deliberate intentional conduct in underpaying workers. Criminal offences should be reserved for the most deliberate forms of underpayment.

This is not to say concepts of '*recklessness'* is irrelevant to underpayments generally. Indeed, the steps an employer took, or did not take in relation to an alleged underpayment would be a relevant consideration for the FWO (and the courts) in enforcing current wage-related civil contraventions. Indeed, we note the FW Act's current serious contravention provisions at s.557 (discussed below) and consider that these provisions are appropriate to remain if the intent is to create a new criminal offence for the deliberate underpayment of wages. Consistent with the '*escalation model*' of the FWO's enforcement and compliance powers, it is more appropriate for conduct amounting to recklessness to be pursued in civil contraventions, rather than to feature as a threshold for the application of criminal penalties.

(2) What is the appropriate penalty for a wage underpayment offence?

Ai Group opposes the alignment of wage underpayment offences with that of state '*wage theft*' law created by relevant states, namely Queensland and Victoria.

Aligning penalties with state laws that are arguably unenforceable and subject to constitutional challenge is not a reliable or appropriate basis for setting penalties. These laws were also developed in the context of the criminal law jurisdiction within those states, that differ to the Commonwealth Criminal Code.

Instead, the Australian Government should formulate an appropriate penalty framework having regard to its own existing Commonwealth laws that already include criminal penalties for labour exploitation and crimes of slavery.

Ai Group strongly opposes the criminal penalty of imprisonment for wage underpayment offences. Imprisonment is a disproportionate and excessive penalty to a wage underpayment offence, noting that imprisonment is already recognised by Commonwealth law as appropriate for other more serious crimes involving the non-payment of wages - like slavery and forced labour. A distinction between crimes of slavery and underpayment of wages should be maintained in the criminal framework and reflected in differential penalties.

It is appropriate and proportionate for criminal penalties for the underpayment of wages in the FW Act to be significantly less severe than penalties for crimes of slavery (including forced labour) under the Commonwealth Criminal Code.

(3) How does the serious civil contraventions regime fit sensibly with new criminal offences?

The FW Act's serious civil contravention regime at ss.557A, B and C already frame conduct around a person's knowledge and a systematic pattern of conduct.

These provisions should remain in the civil enforcement framework that prioritises the recovering of unpaid wages for workers.

Any new criminal offence should be triggered by a higher threshold in proportion to the more serious consequences of criminal penalties. That threshold is described above in question 1 in respect of this item and must include the fault element of intent.

Ai Group considers that the new criminal offences should be applied as an absolute last resort. Criminal offences are not directed to the repayment of wages but to punish the employer for committing the offence. The FWO should continue its prioritisation of seeking the recovery of wages for underpaid workers rather than initiating criminal proceedings.

(4) Which method should be used for increasing maximum civil penalties?

Civil contravention penalties have already been significantly increased for employers. No further increases are necessary. From 1 January 2023 and following the 2022 October Budget the Australian Government significantly increased the value of a penalty unit from $225 to $275, thereby significantly increasing the dollar amount of the FW Act's civil contravention penalties from $66,000 to $82,500 for a body corporate and from $666,000 to $825,000 for a serious contravention. The recent increase in the value of the penalty unit should be a reason not to increase the number of penalty units in the FW Act for civil contraventions.

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

A further increase in penalties is not justified in order to create a meaningful deterrent.

We also observe that many corporations 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*'.[19] 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.'*[20]

(5) Noting that increasing the likelihood of detection for wage underpayment is also important, are there opportunities for increased detection that should be considered alongside changes to the civil framework?

Employer associations, like Ai Group, play an integral role in assisting employers comply with workplace laws. This includes both through educational and advisory services and through assisting employers to identify potential non-compliance (including through auditing services) and to rectify it. The constructive work of employer associations should be encouraged and facilitated.

There should also be enhanced efforts by the FWO to undertake educational activities that assist employers to detect potential inadvertent underpayments.

If there is a view that the FWO should increase its role in the detection of underpayments, then this is best addressed through additional funding and resources to support the application of its existing powers.

Through previous discussions around enforcement and compliance, Ai Group is aware that there may be proposals to expand the circumstances for the FWO to use infringement notices. It is appropriate that the role of infringement notices should be limited to where they currently apply in relation to pay records and pay slips (ss.535 and 536 of the FW Act and reg 4.03 of the *Fair Work Regulations 2009* (Cth)).

The need for measures to facilitate self-disclosure and rectification

There needs be measures that facilitate self-disclosure, rather than an increasingly punitive approach. The system should positively promote the rectification of errors and engagement with the FWO.

Employers should be afforded greater certainty that they will not be subject to prosecution or the application of civil or criminal penalties if they proactively engage with the FWO over a potential underpayment and constructively take action to rectify it. They should also be afforded certainty

[19] Page 2.

[20] Page 2.

that they will not be subject to media announcements in relation to their disclosure.

Similarly, if parties seek to proactively engage with the FWC in the context of proceedings directed at addressing an ambiguity or uncertainty in an industrial instrument there should be certainty that they will not be subject to subsequent prosecution and the application of penalties as a product of disclosing potential non-compliance through such proceedings, provided they are prepared to rectify any underpayment. This will encourage ventilation and rectification of identified problems in such instruments.

It is essential that parties be afforded formal immunity from criminal prosecution in a wide array of circumstances including where:

- Advice is sought from an organisation or person with workplace law or industrial relations expertise and with that advice relied upon by the employer.
- Advice is sought from the FWO and relied upon by the employer.
- A self-disclosure is made to the FWO by the employer regarding an actual or suspected underpayment.
- An employer was engaged in contested proceedings before the FWC or the Courts regarding an interpretation that may give rise to a finding of an underpayment.

Ai Group has strong concerns that arrangements affording more limited criminal immunity will discourage employers from constructive dialogue about workplace law interpretations for fear of criminal prosecution.

Items 4, 5 and 6: Extend the powers of the FWC to include 'employee-like' forms of work; Give Woerkers the right to Challenge Unfair Contractual Terms; Allow the Fair Work Commission to Set Minimum Standards to Ensure the Road Transport Industry is Safe, Sustainable and Viable;

Ai Group has expressed detailed views to DEWR in relation to these issues. We will provide a further written submissions in relation to such matters and look forward to further consultation.

Item 7: Provide stronger protections against discrimination, adverse action and harassment

Employers are already subject to multiple and duplicate pieces of legislation directed at discrimination, adverse action and harassment.

Ai Group opposes additional regulation in respect of discrimination, adverse action and harassment that would see the regulatory burden on employers further increase.

Rather, the reform that is needed is a consolidation and removal of regulatory duplication that exists across state and territory and federal anti-discrimination laws and the FW Act. '*Levelling up*' regulation to increase obligations on employers in the name of '*consistency'* while still maintaining multiple legal frameworks and complaints avenues perpetuates unnecessary complexity for both employers and employees.

Significant and recent developments have also occurred with model WHS psychosocial hazard regulations that have been adopted by various state and territory governments. These regulations require strong interventions from persons conducting a business or undertaking (**PCBUs**) to eliminate psychosocial hazards including exposure to discrimination, harassment and bullying. Further reform to the FW Act is not necessary and is likely to place the FW Act on a regulatory collision with WHS laws, particularly as these regulatory frameworks address discrimination and harassment in different ways.

The FW Act

The role of the FW Act in regulating discrimination, adverse action and harassment in the workplace has expanded significantly in recent years.

In 2009, the inclusion of Part 3-1 – General Protections in the FW Act had the effect of expanding the anti-discrimination protections beyond those that have been in federal workplace relations legislation for many years (for example, the requirement that industrial instruments not include discriminatory provisions and the requirement that employees not be terminated for a discriminatory reason).

In September 2021, as a consequence of changes made by the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth)*,* Part 6-4B of the FW Act was expanded to include the ability for an employee to apply to the FWC for an order to stop sexual harassment.

In December 2022, changes were introduced by *the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (**Secure Jobs Better Pay Act**) to (amongst other things) insert three new additional protected attributes to the provisions that provide protections against discrimination, namely breastfeeding, gender identity and intersex status.

In March 2023, a further change introduced by the Secure Jobs Better Pay Act to insert new Part 3-5A – Prohibiting sexual harassment in connection with work (including repeal of the stop sexual harassment order provisions in Part 6-4B) came into effect. New Part 3-5A:

- prohibits sexual harassment in connection with work, which applies broadly to workers, prospective workers and PCBUs and provides that principals (employers and PCBUs) may be vicariously liable for acts of their employees or agents,
- introduces a new conciliation/mediation process in the FWC, which:
  - gives the FWC power to make stop sexual harassment orders or otherwise deal with a sexual harassment dispute, and

  - enables parties to proceed to consent arbitration (for applications that do not solely consist of an application for a stop sexual harassment order) or enables a person to make an application to the Federal Court within 60 days if conciliation/mediation is unsuccessful, and
- introduces new civil penalty provisions for employers and persons who contravene the sexual harassment prohibition or who contravene FWC orders.

The now-expansive provisions contained in the FW Act operate to cover national system employers in addition to obligations under federal anti-discrimination law and state anti-discrimination legislation.

Ai Group does not support further regulation on employers under the FW Act's anti-discrimination and adverse action framework. If any reform is contemplated it must be directed at:

- removing the current unfairness for employers,
- alleviating the number and/or duplication of obligations on employers, and
- easing the regulatory burden on duty-holders and employers.

Removing the current unfairness for duty holders

Unfairness to duty holders arising from a reverse onus

The test for discrimination under s.351 of the FW Act is inherently different to the tests for discrimination under Commonwealth, state and territory anti-discrimination laws. To prove a claim of discrimination under s.351 of the FW Act, a complainant merely needs to assert that they were treated adversely by the employer for the reason that they possess a protected attribute, leaving the employer with the difficult task of disproving the claim. This has made it far too easy for employees to pursue speculative claims aimed at achieving a monetary settlement during conciliation.

Burdensome evidentiary cases for duty holders who engage in collective decision making

Further, the general protections case law has evolved so as to require a court or tribunal to consider, when a decision involving adverse action is alleged to have been made by or on behalf of a body corporate, which of the officers or employees of the corporation are the '*decision-maker(s)*' for the purpose of ascertaining their state of mind (relevant to discharging the reverse onus of proof in s.361 of the FW Act). This can be onerous and complex where, for example, decisions are made at company board level, a committee, or one (or more) employees or officers with input from others.

Unfairness to duty holders arising from '*forum shopping*'

While a complainant is not entitled to make a complaint or initiate proceedings under other discrimination laws if they have already made a complaint or initiated proceedings under the provisions of the FW Act dealing with the same type of claim, it still permits complainants to

potentially '*forum shop*' for a jurisdiction which would result in a more favourable outcome for their claim.

'*Forum shopping*' by applicant employees for a jurisdiction which results in the more favourable outcome for their claim is inappropriate and unfair for duty holders, such as employers, who must ensure compliance with multiple laws covering the same subject matter, requiring different actions to comply and exposing them to different remedies.

Uncertainty for duty holders arising from divergent approaches to how aspects of the general protections have been applied

Section 340 of the FW Act prohibits a person from taking adverse action against another person because the other person has a workplace right, has (or has not) exercised a workplace right, or proposes (or proposes not to) or has at any time proposed or proposed not to, exercise a workplace right; or to prevent the exercise of a workplace right by the other person.

Relevantly, the circumstances in which a person has a workplace right include (amongst other circumstances) where an employee is able to make a complaint or inquiry in relation to his or her employment.

Divergent approaches in case law regarding interpretation of the phrase '*is able to make*' a complaint, as well as to the phrase '*in relation to his or her employment*' create difficulties for employers in understanding when a workplace right (for the purpose of the general protections) has been enlivened, as well as complexity associated with the legal arguments required to defend any general protections claim involving this ground. These provisions in the FW Act should be significantly tightened to provide for more targeted and consequently clearer application of these protections.

Alleviating the number and/or duplication of obligations on duty holders

Anti-discrimination legislation is excessively over-regulated through a complex web of federal, state and territory laws.

Anti-discrimination law is found at the federal, state and territory levels. In total, 14 pieces of principal legislation prohibit discrimination on multiple grounds in various areas of employment. These include:

1. *Fair Work Act 2009* (Cth)
2. *Age Discrimination Act 2004* (Cth)
3. *Disability Discrimination Act 1992* (Cth)
4. *Racial Discrimination Act 1975* (Cth)
5. *Sex Discrimination Act 1984* (Cth)
6. *Australian Human Rights Commission Act 1986* (Cth)
7. *Anti-Discrimination Act 1977* (NSW)
8. *Equal Opportunity Act 2010* (VIC)

9. *Anti-Discrimination Act 1991* (QLD)
10. *Equal Opportunity Act 1984* (WA)
11. *Equal Opportunity Act 1984* (SA)
12. *Anti-Discrimination Act 1998* (TAS)
13. *Discrimination Act 1991* (ACT)
14. *Anti-Discrimination Act* (NT)

Whilst Ai Group is not opposed to the recent introduction of the new sexual harassment dispute jurisdiction, we do not support the further increase that this represents in the number of different complaints jurisdictions that apply differing legal frameworks in how employers should address and respond to sexual harassment.

Ai Group opposes any further increased regulation on duty-holders given the current over-regulated and complex web of federal and state discrimination laws and broad general protections in the FW Act.

Regulatory burden on duty holders

There has been a steady increase in applications under the FW Act's general protections provisions since its commencement.

In FY09/10 the FWC received 1,188 general protections applications involving dismissal and 254 general protections applications not involving dismissal.[21] In FY21/22 the FWC received 5010 general protections applications involving dismissal, 1,305 general protections (other) applications, and 29 applications seeking orders to stop sexual harassment at work.[22]

This amounts to an increase of 421% in general protections applications involving dismissal and 513% increase in general protections applications 'other'/not involving dismissal during the preceding 12 years and demonstrates that the general protections are becoming an ever-increasing burden for employers.

The low threshold of discrimination and adverse action in the general protections is already burdensome on employers in applying to every day operational decisions in managing their business. This, combined with the general protections' reverse burden of proof on employers to disprove that adverse action or discrimination did not occur, intensifies this burden in organisational decision-making.

(1) What reforms do you want to see to the Fair Work Act's anti-discrimination and adverse action framework and why?

[21] Fair Work Australia, Annual Report of Fair Work Australia 1 July 2010 - 30 June 2011.
[22] FWC, Annual Report - Access to Justice, 2021-22.

Ai Group does not support reforms that would increase obligations on employers. Instead, any reform must be directed at:

- reducing the regulatory burden on employers,
- removing the current unfairness on employers;
- alleviating the regulatory burden on employers and duty-holders.

The consultation paper articulates four principles that '*will guide development of reforms to the FW Act's anti-discrimination framework*'.

The **first principle** is '*Alignment and consistency with key features of anti-discrimination law, including terminology and definitions*'.

The reverse onus in the general protections is inherently different to the tests for discrimination under Commonwealth, state and territory anti-discrimination laws and is unfair to duty holders. It is appropriate for this aspect of the general provisions to be aligned to those laws as they currently stand.

Given the expansive nature of the general protections (including discrimination) and sexual harassment provisions in the FW Act, an appropriate mechanism to address this is through the insertion of a new provision in the FW Act that has the effect of ousting the operation of state and territory laws dealing with the same grounds as those contained in the FW Act, rather than operating concurrently. This will avoid facilitating *'forum shopping*' by applicants and reduce the burden on employers.

Ai Group opposes any approach to proposed '*alignment and consistency*' that adopts an unjustified '*levelling up*' approach which is likely to further increase the existing burden on duty holders.

The **second principle** is '*Protected attributes in the FW Act are consistent with community expectations and best practice language'*.

As outlined above, the list of protected attributes in the FW Act is expansive and indeed, was amended in only December last year to include three additional grounds. It is clear from the wording in s.351(2) of the FW Act, that the list of attributes from which an employee or prospective employee is protected from discrimination is not intended to expand anti-discrimination protections beyond what is in place under anti-discrimination laws in the state or territory where the action is taken.

Ai Group opposes any further increased regulation on duty-holders given the current over-regulated and complex web of federal and state discrimination laws and broad general protections in the FW Act.

The **third principle** is '*Exemptions from anti-discrimination provisions are clear and relevant*'.

Ai Group does not support the removal of any exemptions that may lead to further increased regulation of duty holders in what is already an over-regulated area of law in Australia.

The **fourth principle** is '*Protections for national and non-national system employees are consistent and fair*'.

Ai Group agrees that the existing framework of federal, state and territory anti-discrimination legislation is a complex web. Differences between jurisdictions contributes to the compliance burden for duty holders.

Given the over-regulation that already exists it is important that any move toward consistency has the effect of reducing, not increasing, regulation.

Ai Group opposes any approach to proposed '*consistency'* that adopts an unjustified '*levelling up*' approach that further increases the existing burden on duty holders.

Item 8: A single national framework for labour hire regulation, which could be implemented in place of existing state and territory schemes

Ai Group will address this matter through a separate submission given there is a discrete consultation process that is being undertaken in relation to the matter.

Item 9: Address the impact of the small business redundancy exemption in winding up scenarios to support equitable outcomes for claimants under the Fair Entitlements Guarantee (FEG)

(1) Is this an issue that should only be addressed for the purpose of administering the FEG program, or more widely for all insolvency scenarios?

There is no obvious justification for amending the small business redundancy exemption in the context of all insolvency scenarios given the problem, as identified, arises from the manner in which FEG operates.

We note that that there is not any proposal to amend the operation of the small business redundancy exemption itself. Very different considerations would need to be taken into account if what is being contemplated is a change to the liability of an employer rather than the circumstances where FEG protections apply. We would seek an opportunity to address such matters if amendments that would apply outside of the application of the FEG program were being considered.

In most cases, the liquidation of a company terminates the employment of employees. Section 558 of the *Corporations Act 2001* (Cth) (**Corporations Act**) provides that all entitlements (including all leave and redundancy entitlements) are deemed to be payable when a liquidator is appointed.

Section 558 of the Corporations Act relevantly provides:

> *'(1) Where a contract of employment with a company being wound up was subsisting immediately before the relevant date, the employee under the contract is, whether or not he or she is a person referred to in subsection (2), entitled to payment under section 556 as if his or her services with the company had been terminated by the company on the relevant date.*
>
> *(2) Where, for the purposes of the winding up of a company, a liquidator employs a person whose services with the company had been terminated by reason of the winding up, that person is, for the purpose of calculating any entitlement to payment for leave of absence, or any entitlement to a retrenchment amount in respect of employment, taken, while the liquidator employs him or her for those purposes, to be employed by the company.'*

Section 558 deems an employee's date of termination (for the purposes of the s.556 priority) to be the date of the winding up (usually), including in circumstances where an employee whose employment is terminated but then employed for a time by the liquidator.

However, the timing and impact of termination of employment under the *Fair Entitlements Guarantee Act 2012* (Cth) is determined by the FW Act, not the Corporations Act, such that s.558

does not apply when determining the time when an employer was a small business employer for the purposes of determining eligibility of redundancy entitlements under the FEG.[23]

Ai Group acknowledges the likely unintended and inequitable outcomes that occur for employees affected by the small business redundancy exemption in an insolvency context as it relates to the purposes of administering the FEG. Our initial view is that there would be benefit in introducing changes that enable an employee who has been retained in employment beyond the appointment of a liquidator to retain an entitlement to FEG protection, calculated as at the date of the appointment of the liquidator.

(2) What safeguards could apply to ensure the solution does not impair the operation of the small business redundancy exemption for employers that are genuinely small businesses?

It is not clear precisely what changes the Government intends to implement to address the issue.

In the absence of such detail, we are necessarily limited in our ability to comment on necessary safeguards to the operation of the small business redundancy exemption. Nevertheless, Ai Group understands that the Government is not proposing any changes to the operation of the small business redundancy exemption outside of insolvency contexts. We consider any solution should be targeted to only address the issues and circumstances identified by the Government. More specifically, it should only alter entitlements to FEG protection, not the substantive liability of employers.

Ai Group would appreciate the opportunity review any proposed legislative changes with a view to considering and making submissions in relation to any unintended or adverse consequences that we might foresee arising from the operation of the small business redundancy exemption.

(3) What other matters should be considered in settling the approach addressing the small business redundancy exemption in insolvency contexts?

As above, it is not clear to the extent this issue needs to be addressed in circumstances beyond the application FEG protections.

However, to the extent that this question relates to the potential amendments to the FEG to address the issue as it relates specifically to redundancy entitlements, the Government should give particular consideration to any potential moral hazard and exploitation risks which will arise. In that regard, Ai Group notes the important role that insolvency practitioners play in this context, and how their practices can or may contribute to the issues identified.

In the context of redundancy claims under the FEG, insolvency practitioners who overlook the vital factor of the size of a business, and the impact that this size may have on an employee's rights to

[23] *Fink and Secretary, Attorney-General's Department* [2021] AATA 734.

redundancy, particularly in the case when they ask or direct employees to stay on to assist them in their task of winding down the business, has been the subject of recent criticism.[24]

To the extent that insolvency practitioners consider that the current operation of the FEG undermines their ability to request employees to remain to help the wind-up businesses, we refer to the recent decision of *Fink and Secretary, Attorney-General's Department*, in which a Member of the Administrative Appeals Tribunal of Australia aptly remarked:

> '*… it is surprising that a large administrator, which has been successfully operating for many years is just coming to this realisation – as this has been the case since the FEG Act was first introduced in 2012. The Tribunal was surprised to see that so much time and effort had gone into pursuing this action but it seemed no time had been taken, or action or explanation on behalf of the Administrators had occurred at the time staff were asked to transition from Unlockd to the liquidator. If the Administrators had clarified the terms of the individuals' employment contracts at that stage, as the Senior Member observed in Bullivant:*
>
> > *There is nothing in the applicant's evidence to suggest that the potential impact of section 121(1)(b) was explicitly raised or discussed. But the insolvency practitioners would have known, as an elementary matter, that if an employer is a SBE immediately before an employee receives a notice of termination, then section 121(1)(b) of the FWA will generally defeat a FEG redundancy claim. It does not matter if the employer was once a large employer and became an SBE during the course of administration*
>
> *this whole sorry situation…could have been avoided.'*[25]

It is clear, that in respect of any proposed changes to the operation of the FEG, the Government should consider the risk of insolvency practitioners, by design, taking advantage of an ability to induce employees to remain and benefit from their assistance in the winding up process, leaving the taxpayer to pick up associated costs, whilst they continue to receive the fees for their services.

Ai Group also notes the potential cost impacts of any changes to the FEG which would expand the availability redundancy entitlements, also needs to be considered. This is particularly important given the generous amount of redundancy pay protection which has been a feature of the FEG since it was legislated in 2012.

In Ai Group's view and consistent with our previous calls to Government, one way of offsetting any additional costs pressures on the FEG scheme could be achieved by redressing the current overly generous level of redundancy protection in the *Fair Entitlements Guarantee Act 2012* (Cth) and reinstate the former 16 weeks cap on redundancy payments, or at the very least have it limited to

[24] *Elsadat and Secretary, Attorney-General's Department* [2021] AATA 2101. See also *Fink and Secretary, Attorney-General's Department* [2021] AATA 734; and *Bullivant and Secretary, Attorney-General's Department* [2020] AATA 2047.

[25] [2021] AATA 734 at [137].

two weeks' or three weeks' pay per year of service, with a total limit of 12 months' redundancy pay, to align the cap with more common '*over-award*' redundancy entitlements. Ai Group maintains that four weeks' pay per year of service is an extremely generous and excessive level of redundancy protection, particularly for a scheme funded by taxpayers.

Item 10a: The Fair Work Commission issuing model terms for enterprise agreements

The genesis of this proposal, or the core concern to which it is directed, is not clear. We would welcome an opportunity to discuss this and other potential issues arising from this proposal. In the interim, our preliminary views are set out below.

(1) Would there be any adverse or unintended consequences if the power to make model consultation, flexibility and dispute resolution terms in enterprise agreements was given to the Fair Work Commission rather than the Minister?

The following issues would need to be considered if this proposal is to be adopted:

(a) How would the model terms be determined by the FWC?

(i) What would guide the FWC's discretion when determining the model terms? Would the Government identify factors that the FWC must take into account? Would it prescribe specific matters that must be dealt with in the model term?

(ii) Would it consider the content of the model terms afresh, or would it rely on the existing model terms provided by the *Fair Work Regulations 2009* (Cth) as a starting point?

(iii) What kind of process would the FWC undertake to determine the terms of the model clauses? Would it conduct proceedings that allow all interested stakeholders to be heard?

(iv) What status or form would the model terms take? Would they constitute a legislative instrument? In what way could they be amended, once made?

(b) Would any legislative amendments in this regard provide an opportunity to clarify the manner in which model terms that form part of enterprise agreements interact with provisions of that agreement that deal with the same subject matter? For example, if an enterprise agreement contains a consultation term that does not conform with s.205(1) of the FW Act and the agreement is therefore taken to include the model consultation term; does it, in effect, wholly replace the agreement's consultation term, or does it operate in conjunction with it? If the latter applies, how do they two provisions interact, particularly where they overlap? Does one supersede the other to the extent that they are inconsistent?

In our view, if the FWC is to be given the jurisdiction to determine the model terms, the Government should clearly identify the matters which those terms are to deal with. The Government should also take steps to ensure that the FWC undertakes a process that affords interested parties an opportunity to be heard regarding the development of the model terms.

(2) What role should key stakeholders play in assisting the Fair Work Commission to exercise this function?

Stakeholders should be afforded an opportunity to heard by the Commission as part of the exercise of this function.

We expect that the FWC would afford relevant stakeholders an opportunity to express their views to it in relation to the exercise of this function. Any regulatory change could expressly require this.

Ai Group would seek to play a significant role in any process implemented by the FWC regarding the development of the model terms. We would wish to be heard regarding the form and content of those terms.

Item 10b: Preserve arrangements for employers already using single interest agreements

(1) What aspects of the former single-interest bargaining stream should any further transitional or grandfathering measures cover, and why?

Whilst Schedule 1, Part 26 of the Secure Jobs Better Pay Act provides that the new provisions which apply to applications to vary a single interest employer authorisation will not apply to such applications which are made before 6 June 2023,[26] there does not appear to be a transitional measure which deals with situations where an application to vary a single interest employer authorisation is made on or after 6 June 2023 and where the relevant authorisation was obtained before 6 June 2023.

In the absence of such transitional measure, single interest employer authorisations which are obtained prior to 6 June 2023 and that has not ceased to operate, could be varied to add or remove an employer to the authorisation under the new provisions in s.251.

Adding new employers to pre-existing single interest employer authorisations made before 6 June 2023

The new subsections 251(3)-(8) wholly repeals the existing tests for adding an employer to a single interest employer authorisation and introduces the following:

- An expanded s.251(3) which allows a bargaining representative for the proposed enterprise agreement to which the authorisation relates and for an employee of the new employer, to apply to add the new employer to the authorisation. The existing s.251(3) only permits a new employer to apply to add itself to the authorisation.
- A new test in s.251(4) that the FWC must apply in determining whether to vary the authorisation. Most notably, the current requirement in existing s.251(4)(a) for each employer specified in the authorisation to agree to the new employer being added will be repealed.

In effect, a bargaining representative for an employee of an employer that is not already specified in the single interest employer authorisation, can seek to add a new employer to the authorisation that was made and granted under the existing single interest provisions and where the possibility of new employers being added to that authorisation without their consent, was not (and could not) have been contemplated at that time. A bargaining representative needs only to satisfy the FWC of the new requirements in s.251(5) in order to potentially rope in a new employer to an existing single interest authorisation that has been made prior to 6 June 2023.

[26] Clause 77, Schedule 1, Part 26.

Removing employers from pre-existing single interest employer authorisations made before 6 June 2023

The new subsections 251(1)-(2D) wholly repeals the existing tests for removing an employer specified in a single interest employer authorisation and introduces the following:

- An expanded s.251(1) which allows a bargaining representative for the proposed enterprise agreement to which the authorisation relates and for an employee of the new employer, to apply to remove an employer from the authorisation, provided that certain factors in s.251(2B) are satisfied. The existing s.251(1) only permits an existing employer specified in a single interest employer authorisation to apply to remove itself from the authorisation.

- A new requirement in s.251(2A)(a) that the FWC must be satisfied that bargaining representatives have had an opportunity to express to the FWC their views. There is currently no such requirement. The existing s.251(2) only requires that the FWC be satisfied that it is no longer appropriate for the employer to be specified in the authorisation because of a change in the employer's circumstances.

In effect, in the absence of a transitional measure, it would be more difficult for employers that are already specified in a single interest employer authorisation to remove themselves from an authorisation, as there would be a new additional requirement for bargaining representatives to have had the opportunity to express their views to the FWC.

Furthermore, bargaining representatives can seek to remove an employer from a pre-existing single interest employer authorisation, in circumstances where they were not previously privy to the making of such authorisation.

Proposed transitional measure

In order to give effect to the proposed transitional measure above, the following amendment could be made to clause 78 of Schedule 1 – Part 26 of the Secure Jobs Better Pay Act:

> 78 Application to existing applications to vary authorisations
>
> The amendments to section 251 made by Part 21 of Schedule 1 to the amending Act do not apply in relation to applications for variations made before the commencement of that Part or to applications for variations made on or after the commencement of that Part where such an application relates to a single interest employer authorisation that is made by the FWC before the commencement of that Part (or where clause 78B of Part 26 of Schedule 1 applies).

(2) Under what circumstances could transitional measures be used, and what would the effect be on existing single-interest parties?

See response to question (1) above.

(3) What impacts may arise for employers, unions and employees by introducing further transitional arrangements to the enterprise bargaining framework, following the passage of the Secure Jobs, Better Pay Act?

Ai Group submits that there would be no additional impacts for employers, unions and employees if the proposed transitional arrangement set out in our response to question (1) above is introduced, as it would simply preserve the status quo for applications to vary single interest authorisations which relate to authorisations which were made by the FWC before 6 June 2023 (or where the authorisation is made after that date by reason of clauses 78B of Part 26 of Schedule 1 to the Secure Jobs Better Pay Act).

Item 11: Repeal demerger from registered organisations amalgamation provisions

Ai Group does not intend to advance a submission in relation to this item at this stage.

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, retail, social and community services 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