WORKPLACE RELATIONS AMENDMENT (A STRONGER SAFETY NET) BILL 2007

AND

WORKPLACE RELATIONS (RESTORING FAMILY WORK BALANCE) AMENDMENT BILL 2007

Submission to the Senate Employment, Workplace Relations and Education Committee

4 JUNE 2007

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1.0 Introduction

The Australian Industry Group (Ai Group) is one of the largest national industry bodies in Australia representing employers in manufacturing, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, airlines and other industries.

Ai Group has had a strong and continuous involvement in the workplace relations system at the national, state, industry and enterprise level for nearly 140 years. Ai Group is well qualified to comment on the:

- *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007*; and
- *Workplace Relations (Restoring Family Work Balance) Amendment Bill 2007.*

This submission is made by Ai Group and on behalf of its affiliated organisation, the Engineering Employers' Association, South Australia (EEASA). It is not our intention to comment on all aspects of the Bills but rather to outline Ai Group's position on the significant legislative amendments proposed.

Heather Ridout - **CHIEF EXECUTIVE**

2.0 Workplace Relations Amendment (A Stronger Safety Net) Bill 2007

The changes to Australia's agreement-making system encompassed within the *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007* are fair and sensible measures which should allay the view within the community that more protection is needed to prevent unfairness in agreement-making. Ai Group supports the Bill but has proposed a few amendments to improve clarity and workability.

Most Ai Group member companies will be unaffected by the Bill because their agreements already easily meet the proposed fairness test. No doubt there will be a cost to some businesses in some industries but importantly the fundamental architecture of the national workplace relations system is not affected by the Bill. Agreement-making will continue to be a relatively simple and flexible process that will not impose an excessive compliance burden on companies.

The Bill's provisions are broadly consistent with the position advocated by Ai Group during the development of the WorkChoices package whereby we proposed that workplace agreements (other than for higher paid employees) should be compared against award penalty rates and other key conditions to assess fairness.

Ai Group is a strong supporter of the existing agreement-making system and the flexibility which it offers to both employers and employees in contemporary Australian workplaces. The Bill does not compromise this flexibility. Ai Group's position on the specific provisions of the Bill is set out in the table below.

Provisions of the *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007*	Ai Group's Position	Basis of Ai Group's Position
Schedule 1 – The Fairness Test **When protected award conditions apply to an employee** For the purposes of the fairness test, protected award conditions apply to an employee whose employment is subject to a workplace agreement: 1. If but for the workplace agreement (or a previous agreement or industrial instrument), the protected award conditions would have effect under a "relevant award"; or 2. If there is no "relevant award" - assuming that the designated award applied, the protected award conditions would have effect but for the workplace agreement (or a previous agreement or industrial instrument). Protected award conditions that apply to an employee because of the operation of point 2. above are not taken to be protected award conditions that have effect in relation to the employment of the employee. ***[ss.346C and H]***	**Supported but amendment proposed to improve clarity**	Ai Group understands that the intent of the Bill is: 1. In respect of **employees covered by a "relevant award"**, protected award conditions have: • effect for the purposes of determining whether the agreement meets the fairness test; and • have ongoing effect as terms of the agreement, subject to any terms that expressly exclude or modify them. 2. In respect of employees who are **award-free and employed in an industry or occupation in which the terms and conditions of the kind of work performed are usually regulated by a federal award**, protected award conditions have: • effect for the purposes of determining whether the agreement meets the fairness test; but • **do not have** ongoing effect as terms of the agreement. and 3. In respect of employees who are **award-free and not employed in an industry or occupation in which the terms and conditions of the kind of work performed are usually regulated by a federal award**, protected award conditions do not have any effect.

Provisions of the *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007*	Ai Group's Position	Basis of Ai Group's Position
		Ai Group supports the intent as set out above. For award-free employees it is essential that protected award conditions not have any ongoing application as terms of a workplace agreement. The fairness test should not become a device to extend award conditions into areas which are currently award-free. To do so would reduce necessary flexibility. The approach adopted in the Bill has some similarity with the approach set out in the Act prior to the WorkChoices amendments. If an employer proposed to make an AWA covering an award-free employee and there was no relevant award, the employer was required to apply to the Employment Advocate for an award to be designated. The designated award applied for the purposes of the no-disadvantage test but the award had no ongoing application. If an employee was paid a sufficiently high salary under the AWA, the no disadvantage test was satisfied, notwithstanding the fact that the designated award contained a raft of penalties, loadings and allowances that had never applied (nor would appropriately apply) to the employee. Ai Group submits that the wording of paragraph 346C(b) should be amended slightly to improve clarity, as follows: *(2) Protected award conditions that apply to an employee because of the operation of paragraph (1)(b) are not taken, for the purposes of section 354, to be protected award conditions that would have effect in relation to the employment of the employee.*

Provisions of the *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007*	Ai Group's Position	Basis of Ai Group's Position
Workplace agreements to which the fairness test applies The fairness test applies to an **AWA** if: • It was lodged on or after 7 May 2007; and • the employee is in an industry or occupation in which the terms and conditions of the kind of work performed are usually regulated by an award; and • the annual rate of salary payable to the employee is less than $75,000; and • the AWA excludes or modifies one or more protected award conditions that apply to an employee under a relevant award or a designated award. The fairness test applies to a **collective agreement** if: • It was lodged on or after 7 May 2007; and • One or more of the employees is in an industry or occupation in which the terms and conditions of the kind of work performed are usually regulated by an award; and • the agreement excludes or modifies one or more protected award conditions that apply to an employee under a relevant award or a designated award. ***[s.346E]***	**Supported**	The concept of not applying the fairness test to high paid staff on AWAs is reasonable. A substantial proportion of the employees on AWAs who are paid more than $75,000 are managers or professionals.

Provisions of the *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007*	**Ai Group's Position**	**Basis of Ai Group's Position**
The fairness test applies to variations lodged after 7 May 2007. ***[ss.346F and 346U]***	**Supported**	It is logical for the fairness test to apply both to new workplace agreements and to variations to agreements.
The $75,000 cut-off point for the application of the fairness test to AWAs is defined as "gross base salary". ***[ss.346B and 346G]***	**Supported with modification**	Defining salary as "gross base salary" as set out in s.346B is inconsistent with the flexible approaches which are taken to remuneration in contemporary workplaces. There are many senior staff who are paid a gross base salary of less than $75,000 but receive remuneration far in excess of this amount. Ai Group proposes that the definition of "salary" in s.346B of the Bill be amended to reflect the approach adopted within the unfair dismissal laws (s.638 of the Act) with regard to the exemption for high paid award-free employees. That is, the $75,000 cut-off point should be based upon an employee's "remuneration", not upon his or her "gross base salary". This approach has stood the test of time. The definition of "remuneration" is relatively settled given a series of Australian Industrial Relations Commission (AIRC) cases which have considered whether various payments and benefits received by employees are "remuneration" for the purposes of the unfair dismissal exemption.
The Workplace Authority is required to notify the parties to workplace agreements whether the agreement is subject to the fairness test. ***[s.346J]***	**Supported**	This is a sensible approach which should give the parties the opportunity to express any relevant views about the application of the fairness test to the agreement, before the Workplace Authority decides whether the fairness test is met.

Provisions of the *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007*	**Ai Group's Position**	**Basis of Ai Group's Position**
Before a workplace agreement is lodged, an employer may apply to the Workplace Authority to determine that an award is a designated award in circumstances where there is no "relevant award". Designated awards must: • be award/s regulating terms and conditions of employment of employees engaged in the same kind of work as the work performed by the employee/s; and • in the opinion of the Workplace Authority, be appropriate for the purposes of the fairness test; and • must not be an enterprise award. ***[s.346K]***	**Supported**	The criteria for designating awards are appropriate. It is essential that an award only be designated if an appropriate award exists. The Bill does not prevent an enterprise award being used as the basis for the fairness test where such award is a "relevant award" and hence applies to the employees in the relevant enterprise. The Bill simply prevents enterprise awards becoming designated awards and used as the basis for the fairness test in other enterprises. It appears that the Workplace Authority does not have the power to determine that a Notional Agreement Preserving State Awards (NAPSA) is a "designated award". This is perhaps due to the fact that NAPSAs have a maximum term which expires on 27 March 2009. Given that NAPSAs are not able to be designated, the note under paragraph 346K(3) is important because in some industries (eg. clerical) a federal award exists in Victoria which contains more generous terms and conditions than the NAPSAs in other states. It would generally be inappropriate for the Victorian award to be used as the basis for the fairness test for workplace agreements in other States.
After a workplace agreement is lodged, the Workplace Authority must, in circumstances where the fairness test applies and where there is no "relevant award", determine that an award is a designated award. ***[s.346K]***	**Supported**	See comments above re. s.346K which are equally relevant here It is important that the Workplace Authority have the power to revoke or amend a decision to designate an award. Ai Group understands that, notwithstanding that this power is not set out in the Bill, it exists by virtue of the *Acts Interpretation Act 1901.*

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The fairness test A workplace agreement passes the fairness test if: • in the case of an **AWA** – the Workplace Authority is satisfied that the AWA provides "fair compensation" to the employee; • in the case of a **collective agreement** – the Workplace Authority is satisfied, on balance, that the collective agreement provides "fair compensation" in its overall effect on the employees covered by the agreement. In considering whether a workplace agreement provides fair compensation, the Workplace Authority must have regard to: • the monetary and non-monetary compensation that the employee or employees will receive under the workplace agreement; and • the work obligation of the employee/s under the workplace agreement. "Non-monetary compensation" means compensation for which there is a money value equivalent, or to which a money value can reasonably be assigned, and that confers a benefit or advantage on the employee which is of significant value to the employee.	**Supported**	The proposed fairness test is flexible, practical and fair on both employees and employers.

Provisions of the *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007*	**Ai Group's Position**	**Basis of Ai Group's Position**
The Workplace Authority may also have regard to the personal circumstances of the employee or employees, including in particular the family responsibilities of the employee or employees. In exceptional circumstances, and if it is satisfied that it is not contrary to the public interest to do so, the Workplace Authority may have regard to: • the industry, location or economic circumstances of the employer; and • the employment circumstances of the employee/s. ***[s.346M]***		
The relevant time for assessing whether the agreement passes the fairness test is the lodgment date. ***[s.346N]***	**Supported**	This is the logical time.
If the Workplace Authority decides that a workplace agreement passes the fairness test it is required to notify the parties to the agreement of the decision. If the Workplace Authority decides that a workplace agreement does not pass the fairness test, it is required to notify the parties to the agreement of the decision and is also required to:	**Supported**	This is a practical approach. The option of using undertakings in appropriate circumstances, rather than formal variations, will avoid undue delays in agreement-making.

Provisions of the *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007*	Ai Group's Position	Basis of Ai Group's Position
• advise them as to how the agreement could be varied to pass the fairness test (including by way of an undertaking); and • state that compensation may be payable by the employer to the employee/s. ***[s.346P]***		
If a workplace agreement is in operation when the Workplace Authority decides that it does not pass the fairness test, the employer may: • in the case of an **AWA** - lodge a variation or give a written undertaking; • in the case of a **collective agreement** – give a written undertaking. If the employer does not take the above action within 14 days of the date specified in the notice issued by the Workplace Authority, then at the end of that period: • the workplace agreement ceases to operate; and • back-pay is payable to the employee/s. The Workplace Authority may extend the 14 day period in circumstances prescribed by the Regulations. ***[s.346R]***	**Supported**	The proposed approach is fair and practical. It enables agreements to come into operation without delay. The Regulations need to give relatively wide powers to the Workplace Authority to extend the 14 day period in appropriate circumstances. There are numerous circumstances where an extension could be warranted such as: • Where the employer needs to consult its employees about undertakings to be given to ensure that the fairness test is met and, say, the agreement is a collective one which applies to a large workforce on multiple sites; • Where the employer needs to consult multiple unions about undertakings to be given relating to a collective agreement; • Where the 14 day period includes a major holiday period such as Christmas/New Year; • Where the relevant employee who is a party to an AWA is sick or on annual leave during the 14 day period and the employer is unable to discuss the proposed variation with the employee; and • Where the employer does not receive the notice issued by the Workplace Authority in a timely manner due to mail delays.

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If an agreement ceases to operate on a particular day (the "cessation day") because it does not pass the fairness test, the employer and employee/s from that day are bound by: • The instrument/s that, but for the agreement coming into operation, would have bound the employee/s; or • If there is no such instrument, the designated award to the extent that it contains protected award conditions. "Instrument" includes (amongst others) a workplace agreement, an award, a pre-reform certified agreement, a pre-reform AWA, a Preserved State Agreement and a NAPSA. ***[s.346Y plus clauses 25B and 52AAA of Schedule 8]***	**Supported with modification**	The same approach needs to be taken under both s.346C and s.346Y. That is, in respect of an employer and employee/s covered under a designated award, protected award conditions: • Should have effect for the purposes of determining whether the agreement meets the fairness test; but • Should not have ongoing effect as employment entitlements. Ai Group submits that paragraph 346Y(2) needs to be redrafted to ensure that protected award conditions do not apply to an employer who has lodged an agreement which has failed the fairness test, if such conditions would not have applied to the employer if it had not lodged the agreement. Alternatively, if the intention of paragraph 346Y(2)(b) is to ensure that protected award conditions apply to employers who have commenced operations since 27 March 2006 in industries which are usually regulated by an award, then the Bill should be redrafted to ensure that protected award conditions only apply to this group.
If back-pay is owing to an employee because a workplace agreement does not pass the fairness test, the employer must pay the employee within 14 days of the date when the agreement ceases to operate or the date on which the variation was lodged to enable compliance with the fairness test. ***[s.346ZD]***	**Supported**	This requirement is reasonable.

Provisions of the *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007*	Ai Group's Position	Basis of Ai Group's Position
Civil remedy provisions It is unlawful for an employer to: • fail to take reasonable steps to ensure that all persons covered by a collective agreement are given a copy of the Workplace Authority's notices relating to the fairness test as soon as practicable; ***[s.346ZE]*** • dismiss or threaten to dismiss an employee because a workplace agreement does no pass the fairness test; ***[s.346ZF]*** • coerce an employee to agree to exclude or modify a "protected award condition"; ***[s.346ZH]*** • require an employee to sign an AWA as a condition of continued employment when a business is transmitted. ***[s.400]***	**Supported**	These requirements are reasonable.
Schedule 2 – Workplace Authority	**Supported**	Ai Group supports the provisions of this Schedule. However, Ai Group proposes that s.150B – Functions of the Workplace Authority Director, be amended to include reference to the function of providing a pre-lodgement facility to check agreements against the fairness test.

Provisions of the *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007*	Ai Group's Position	Basis of Ai Group's Position
Schedule 3 – Workplace Ombudsman	**Supported**	Ai Group supports the provisions of this Schedule.
Schedule 4 – Prohibited content Workplace agreement provisions which breach freedom of association laws or which require or permit payment of a "bargaining services fee" are prohibited content.	**Supported**	The Bill transfers the prohibited content provisions relating to workplace agreement clauses which breach freedom of association laws or impose bargaining agent's fees on non-union members from the Regulations to the Act. This is beneficial as it enhances protection against such offensive provisions. Perhaps the most unfair aspect of compulsory bargaining fee clauses is that they restrict an individual's freedom of choice and coerce non-union members into joining a union. Bargaining fees represent a mere financial variation of the closed shop. While unions seek to promote bargaining fees as a "neutral" arrangement which applies equally to unionist and non-unionist alike, this simply masks the fact that they are a form of compulsory contribution aimed at non-unionists. In practice, union members are not required to pay the fee. Moreover, although unions frequently argue that compulsory bargaining fees do not mandate union membership, this ignores the financial reality of bargaining fees. Under the standard clause which was being pursued by unions around 2000/01 before bargaining agent's fees were outlawed, an individual non-union member who does not wish to join the union is faced with a stark "choice": either pay the exorbitant "service fee" levied under the relevant workplace agreement, or face the prospect of disciplinary action. Given the choice of a hefty service fee or disciplinary action (possibly including termination of employment), the individual non-unionist is driven towards taking out union membership. This is a draconian and unfair situation.

Provisions of the *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007*	Ai Group's Position	Basis of Ai Group's Position
		It is also fundamentally unfair for two parties (ie. the employer and the union) to agree to impose something on a third party which so fundamentally affects that third party's civil liberties – in this case, his or her freedom of association or dissociation in the workplace. Those in favour of compulsory bargaining fees argue that such arrangements are legitimised by the democratic concept of "majority rules" in collective bargaining. Union "service fees" are only imposed, so the argument runs, where a majority of the workforce and the employer are in favour of it. It is employees within the particular workplace who ultimately make the decision about whether or not service fees should be imposed. However, the fatal flaw with this argument is that it affords priority to collective consent over fundamental rights and freedoms of an individual – in this case, an individual's freedom of choice about whether or not to belong to a union. Under this argument, the concept of "majority rules" can be used to sanction highly coercive arrangements. It is highly inappropriate that old-fashioned concepts of compulsory union membership be pursued by unions under the guise of "service fees". It is essential that bargaining agent's fees continued to be outlawed.

Provisions of the *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007*	Ai Group's Position	Basis of Ai Group's Position
Schedule 5 – Membership requirements for registered organisations		The amendments relax the requirements for state registered organisations to gain federal registration but, importantly, the amendments do not disturb the criteria for registration of associations, as set out in clause 19 of Schedule 1 – Registration and Accountability of Organisations, and in the Regulations relating to this clause. The preservation of such criteria is essential, for example, to prevent state branches of unions registering as federal bodies and competing for membership.

3.0 Workplace Relations (Restoring Family Work Balance) Amendment Bill 2007

Ai Group is supportive of the need to assist employees to balance their work and family responsibilities. There is very wide recognition amongst employers in Australia of the importance of this.

Every day in thousands of workplaces, employers and employees reach agreement on arrangements to assist employees to balance their work and family responsibilities. Most of these agreements are informal in nature.

It is important that the *Workplace Relations Act* recognise the importance of work / family balance. The best approach to achieve this is through a flexible framework which facilitates agreement making at the workplace level. Such flexible framework already exists in the Act.

Whilst Ai Group is supportive of the recognition that the *Workplace Relations (Restoring Family Work Balance) Amendment Bill 2007* gives to the need to assist employees to balance their work and family responsibilities, the amendments proposed in the Bill would create significant operational difficulties for employers.

Ai Group's position on the specific provisions of the Bill is set out below.

Preservation of existing redundancy entitlements

In December 2006, the *Workplace Relations Act* was amended to provide that the redundancy entitlements in a workplace agreement continue to operate for up to 12 months:

- if the agreement is unilaterally terminated by the employer after its expiry and a new agreement is not made;
- if a pre-reform workplace agreement is terminated by the AIRC on public interest grounds and a new agreement is not made; or
- if the agreement relates to a business which is transmitted from one employer to another and a new agreement is not made.

The Bill extends the 12 month preservation period to five years.

Ai Group's position:

Ai Group has seen no evidence that the existing protections are not operating effectively and fairly. The Act was only recently varied to implement a 12 month preservation period and time is needed to assess the effectiveness of the existing provisions before any extension is contemplated.

Ordinary hours of work

The Bill defines ordinary hours of work as the hours between 6am and midnight and requires that an employee be paid not less than time and one half (or any higher rate applicable to overtime) for the hours between midnight and 6am and for any additional hours worked beyond 38 hours. The Bill prevents this requirement being modified via a workplace agreement.

Ai Group's position:

The proposed amendment is unworkable and would impose an unreasonable cost burden on employers.

Employees in numerous industries work their ordinary hours between midnight and 6am (eg. hotel workers, essential services workers, security guards, continuous shift workers in manufacturing plants, etc). Shift penalties of around 15% for rotating night shifts and 30% for fixed night shifts are common in awards. Increasing such penalties to 50% as the Bill would do is unreasonable and unnecessary.

The award system is best placed to deal with definitions of ordinary hours and compensation for time worked outside of ordinary hours because different approaches are appropriate in different industries and occupations.

For managerial and professional staff, whether award covered or award free, the arrangements relating to any requirement for work outside of ordinary hours are typically and appropriately left to the relevant employer and employee to determine between themselves.

Meal Breaks

The Bill prevents workplace agreements modifying or excluding the existing legislative requirement (s.607 of the *Workplace Relations Act*) that employers not require an employee to work for more than five hours continuously without a meal break.

Ai Group's position:

The Bill fails to take into account common work patterns which involve work periods of more than five hours.

Most awards (other than awards applying to professional staff) contain meal break provisions. The meal break provision in the *Metal, Engineering and Associated Industries Award* (clause 6.3) is relatively standard and provides that: an employee must not be required to work for more than five hours without a break for a meal; and by agreement between an employer and the employees, the five hour period can be extended to six hours. The ability to extend the five hour period to six hours by agreement has been included in numerous workplace agreements. This flexibility is strongly supported by employees in many workplaces. For example, a common method of arranging the 38 hour week in the manufacturing industry is to work eight hours per day between Monday and Thursday with six hours (without a meal break) worked on Fridays. Most employees working this arrangement would not wish to remain at work for six and one half hours on Fridays due to the need for a half hour unpaid meal break to be taken.

Within workplace agreements, there are an extremely large variety of arrangements concerning meal breaks. It is important that such arrangements are not disturbed, as the Bill would do.

Public holidays

The Bill provides that where an employee is required or requested by an employer to work on a public holiday the employee is entitled to a day off paid at not less than the rate of time and one half.

***Ai Group's position**:*

It would is inappropriate and unworkable for the Act to prescribe a standard approach to compensating employees for time worked on a public holiday.

The Act currently entitles employees to a day off on public holidays, subject to an employer's right to request that employees work on public holidays, and an employee's right to refuse requests to work if reasonable in the circumstances. The Act contains a list of factors of relevance when considering whether any refusal to work on a public holiday is reasonable. A term in a workplace agreement or award which is contrary to these requirements has no effect. If employees are required to work on a public holiday, the terms of any relevant federal award, NAPSA, workplace agreement or contract of employment are relevant in determining their entitlements regarding payment for the time worked.

In many industries, public holiday work is essential (eg. aluminium smelters, airlines, electricity generation, hotels, resorts and restaurants) and in some cases public holidays are peak times.

Many federal awards prescribe penalty rates for work carried out on a public holiday – commonly double time and one half. However, awards applicable to professional employees (eg. the *Information Technology Industry (Professional Employees) Award*) typically do not prescribe penalty rates for time worked on public holidays. For senior staff, whether award covered or award free, the arrangements relating to any requirement for work to be carried out on a public holiday are typically left to the relevant employer and employee to determine between themselves.

Numerous enterprise agreements require that work be carried out on some public holidays and contain compensation for such work. In many instances, the compensation is built in to an averaged or annualised salary. The Bill is inflexible in its approach to compensation – a "one size fits all" penalty is not appropriate.

The Bill entitles employees to a full day off in lieu of any public holiday worked, paid at the rate of time and a half. This would result in double dipping in most circumstances. The employee would be entitled to the penalty rate in the relevant award or workplace agreement (commonly double time and one half) and a further full day off in lieu, paid at the rate of time and one half.