Submission No. 39

# Ai GROUP SUBMISSION

## Queensland Parliament's Finance and Administration Committee

## Industrial Relations Bill 2016

30 September 2016

## About Australian Industry Group

Ai Group is a peak industry association in Australia which, along with its affiliates, represents the interests of more than 60,000 businesses in an expanding range of sectors including manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines and other industries. The businesses which we represent employ more than 1 million employees.

## Ai Group contact for this submission

Maurice Swan, Manager – Queensland Workplace Relations
Telephone:

# Background

This submission of the Australian Industry Group (**Ai Group**) deals with the *Industrial Relations Bill 2016* (Qld) (**Bill**).

As outlined in the Explanatory Speech of the Hon Grace Grace MP, Minister for Employment and Industrial Relations, the Bill follows a review of the State's industrial relations laws carried out by a Reference Group. An Ai Group representative was a member of the Reference Group.

The final report of the Reference Group, entitled *A review of the industrial relations framework in Queensland* (**Report**) was published on 4 March 2016. It contained 68 recommendations some of which were expressly opposed by Ai Group and other employer representatives on the Committee. The recommendations that were expressly opposed by Ai Group include:

1. **Recommendation 3:** As identified on page 34 of the Report, Ai Group opposed the inclusion of a reference to "mutual obligations of trust and confidence" in the principal object of the Act;

2. **Recommendations 13 and 14:** As identified on page 50 of the Report, Ai Group did not support these recommendations which relate to the conversion of temporary and casual employees to permanency.

3. **Recommendation 19:** As identified on page 62 of the Report, Ai Group opposed this recommendation on the basis that awards should provide a minimum safety net rather than reflecting "prevailing conditions of employment".

4. **Recommendations 24 and 25:** As discussed on page 71 of the Report, Ai Group opposed arbitration of enterprise agreement outcomes, other than by consent of the parties.

5. **Recommendation 26:** As discussed on page 73 of the Report, Ai Group opposed the watering down of the requirements for protected action ballots.

6. **Recommendation 27:** As identified on page 74 of the Report, Ai Group opposed the removal of the Minister's power to order that protected action cease.

7. **Recommendations 29, 30 and 31:** As identified on pages 81 and 82 of the Report, Ai Group opposed the recommendations relating to domestic and family violence leave. This is a topic which should be dealt with at the enterprise level.

8. **Recommendations 32 and 33:** As identified on page 87 of the Report, Ai Group opposed the expansion of the anti-bullying jurisdictions.

9. **Recommendation 37:** As noted on page 94 of the Report, Ai Group opposed the proposal to give the Queensland Industrial Relations Commission (**QIRC**) an obligation to "give effect to the need to observe mutual obligations of trust and confidence".

10. **Recommendation 42:** As noted on page 105 of the Report, Ai Group opposed the QIRC having the power to arbitrate in respect of the right to request flexible work arrangements.

11. **Recommendation 43:** As highlighted on page 107 of the Report, Ai Group opposed the extension of carer's leave entitlements to enable an employee to care for any person affected by domestic and family violence – not just members of the employee's family or household.

12. **Recommendation 44:** As highlighted on page 110 of the Report, Ai Group opposed the inclusion of "general protections" provisions in the Queensland legislation.

13. **Recommendation 45:** As referred to on page 111 of the Report, Ai Group opposed amendments to the unfair dismissal laws to expressly deal with domestic and family violence matters. The existing unfair dismissal laws already deal with such matters in an appropriate manner.

A 20 October 2015 submission (**2015 Submission**) that Ai Group made to the Reference Group's review is attached. It is disappointing that a number of provisions in the Bill do not take account of the cogent statements of position and reasoning Ai Group put forward in our 2015 Submission, nor of the opposition that Ai Group expressed to the above recommendations and the reasons for such opposition.

# Ai Group's provision on various specific issues

## Mutual obligations of trust and confidence

Ai Group notes that paragraph 4(e) of the Bill includes amongst the objects of the legislation *"recognising mutual obligations of trust and confidence in the employment relationship".* This ignores not only the views presented by Ai Group in its 2015 submissions (page 4), but also the decision of the High Court in *Commonwealth Bank of Australia v Barker* [2014] HCA 32.

This provision of the Bill should be deleted.

## Right to request flexible work arrangements

Unlike the powers of the Fair Work Commission under the *Fair Work Act 2009*, the Bill would give the QIRC the power to arbitrate if an employer refuses an employee's request for flexible work arrangements. Ai Group opposes this for the reasons set out on pages 13 and 14 of our 2015 Submission.

## Domestic and family violence leave

Ai Group notes that, even before the Reference Group's Report was submitted to the then Minister in December 2015, the Queensland Government announced that the *Industrial Relations Act 1999* would be amended to provide for domestic and family violence leave.

Domestic and family violence is a serious community problem. Federal and State Governments, police forces, courts, community services organisations, health professionals, the legal profession, the media, employers, employees and many others in the community, all have roles to play in addressing the problem.

Ai Group supports appropriate initiatives to educate employers about the issue of domestic and family violence and the role that employers can play in assisting employee victims, e.g. through company human resource policies and flexible work arrangements. The key to success with this important issue is to engage with employers in a positive way. Employers have different capacities to provide support to employees experiencing domestic and family violence.

Many large employers have relevant policies to assist employees who have been subjected to domestic and family violence, e.g. employee assistance programs, discretionary leave arrangements and numerous other forms of assistance. Often these policies are broader than simply dealing with domestic and family violence; they provide assistance to employees faced with various hardships. Smaller employers often do not have written policies but they typically adopt a reasonable and compassionate approach when their employees suffer genuine hardships.

Employers are required to deal with the impact that numerous social problems have on the lives of their employees, such as mental health issues, relationship breakdown, drug dependence, alcohol dependence, domestic violence and crime generally. Domestic and family violence is only one of many social problems that can have a serious impact on employees.

Paid domestic violence leave is extremely uncommon internationally. The only country that is known to have paid domestic violence leave at a national level is the Philippines, but the entitlement is not well-known in the country or well-enforced. A few US States have granted domestic violence leave, but these entitlements are unpaid and typically only apply to larger businesses.

The notion of an employee “experiencing domestic violence” in the Bill is vague and it is not sufficiently clear that only persons who have been subjected to domestic violence would be entitled to leave, rather than perpetrators. We note that the leave is available to persons who are “preparing for a court appearance related to the violence” or are “attending court for a proceedings related to the violence”, which are both reasons why perpetrators may seek to apply for the leave.

Also, it appears that pro rata entitlements would not apply to part time employees. Therefore, a part-time employee who works 1 day per week would receive 10 days of leave, which would be the equivalent of 10 weeks of leave for the employee.

Only a minority of federal enterprise agreements include domestic violence provisions. These agreements contain a wide variety of different arrangements, leave and non-leave. Most of those that contain leave entitlements contain less than 10 days of leave.

The Fair Work Commission is currently considering a claim by unions (opposed by Ai Group and other employer associations) for inclusion of domestic and family violence leave entitlements in modern awards, which cover the vast majority of the Australian workforce. A decision on whether

to provide such entitlements in the Queensland legislation should await the publication of the considered assessment of the issue by the Fair Work Commission.

## Long service leave provisions

Despite the views expressed in Ai Group's 2015 submission (pages 4-5), the Bill essentially retains the outmoded procedural requirements, inhibiting the availability of the option of cashing out of long service leave entitlements by agreement between an employee and his or her employer.

The Bill also fails to exclude any periods of employment overseas from "continuous service" for the purpose of long service leave entitlements.

These are issues that directly affect many Ai Group members, and the provisions of the Bill ought to be revised to reflect the reasoning put forward in our 2015 submission.

## Role of awards

Consistent with s.140BA(b) of the *Industrial Relations Act 1999* (Qld), awards should provide: *"a fair minimum safety net of enforceable conditions of employment for employees"*. Wage and conditions above the safety net should be dealt with in enterprise agreements and contracts of employment.

Section 141(1) of the Bill is not appropriate. Awards should not *"reflect prevailing employment conditions"*; they should provide a safety net. This provision of the Bill will impede bargaining, and impede flexibility.

## Consultation clauses in agreements

Clause 198 of the Bill provides that any certified agreement under the legislation must contain a clause requiring consultation in a broad, largely undefined, range of circumstances. While the clause is not excessively prescriptive about consultation procedures, the extent of the range of matters on which consultation may be required is not conducive to efficient management of businesses. The provisions in the Bill introduce an unacceptable risk that demands will be made for similar provisions in respect of private sector employers.

Clause 198 of the Bill should be revised to more closely define the circumstances in which a certified agreement under the legislation must require an employer to consult with its employees.

## Suspension or termination of protected industrial action

Section 240 of the Bill is based on s.423 of the *Fair Work Act 2009* but there is a major difference. Under s.423 of the *Fair Work Act 2009*, both the employer and the employees need to suffering significant harm, not just one of the parties as provided for in the Bill. The Bill, as drafted, would enable employees to take strike action and then access arbitration on the basis of the harm that they are causing to themselves. This issue was recently considered during the Productivity Commission (**PC**) Review of the Workplace Relations Framework. The PC made the following relevant recommendation (27.3) about s.423:

*"The Australian Government should amend s. 423(2) of the FW Act such that the FWC may suspend or terminate protected industrial action where it is causing, or threatening to cause, significant economic harm to the employer or the employees who will be covered by the agreement, rather than harm to both parties (as is currently the case). A party engaged in protected industrial action would not be able to seek to have its own industrial action suspended or terminated on the basis of significant economic harm to itself."*

## Easter Sunday public holiday

Ai Group is strongly opposed to the proposal to proclaim an additional public holiday in Queensland on Easter Sunday. Such a move is unnecessary, and would significantly increase the penalty rates paid by a large number of employers. It would be a major blow to Queensland businesses and the broader economy at a time when many businesses are already under enormous pressure in a slowing QLD economy.

An Ai Group survey identified an estimated cost of at least $1 billion in lost sales for Victorian businesses, with a $500 million wage bill on top, as a result of the recently proclaimed AFL Grand Final Public Holiday. It is difficult to make a direct comparison given the Easter Sunday holiday falls on a weekend but the cost implications due to the higher penalty rates that would need to be paid for work carried out by employees of businesses in the retail, hospitality, tourism, transport and other industries are very significant.

Over recent years, public holiday inconsistencies between States have been increasing and unnecessarily adding to business costs in Queensland's already high-cost economy. What is needed is for State and Territory Governments to work with the Federal Government to agree that there will be no more than 11 public holidays per year in each State and Territory. They also need to agree on as much national consistency as possible regarding specific holidays.

In its report on Australia's Workplace Relations Framework, the PC recommended amendments to the *Fair Work Act 2009* to ensure employers are not required to pay for leave or additional penalty rates on any newly designated State and Territory public holidays. This recommendation is eminently sensible.

ATTACHMENT

# Ai GROUP SUBMISSION

## Review of Industrial Relations Laws and Tribunals - Queensland

**Queensland Treasury**
**Office of Industrial Relations**

**20 OCTOBER 2015**

Ai GROUP

## About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines, health, community services and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with many other employer groups and directly manages a number of those organisations.

## Australian Industry Group contact for this submission

Stephen Smith, Head of National Workplace Relations Policy
Telephone:

## 1. Introduction

Ai Group makes this submission with respect to the Review of Industrial Relations Laws and Tribunals – Queensland (**Review**) by the Reference Group.

Some of the matters which are the subject of the inquiry have a wide impact upon Queensland employers in the private and public sector, e.g. long service leave provisions. Other matters predominantly impact upon the public sector.

Ai Group has not responded to all of the matters in the issues papers in this submission, but rather those matters that are relevant to private sector employment and matters relevant to workplace relations more generally.

## 2. Issues paper 2 - Main provisions of the *Industrial Relations Act 1999*

Issues paper 2 identifies a number of matters relevant to employment in the private sector and workplace relations more generally including:

- Harmonisation of the Queensland industrial relations system with the federal or other state systems;
- Public holidays;
- Concept of 'implied mutual trust and confidence' within the context of the discussion about the objects of the *Industrial Relations Act 1999* (**IR Act**);
- Long service leave;
- Freedom of association; and
- Employment and training provisions for apprentices and trainees.

**Harmonisation of the Queensland industrial relations system with the federal or other state systems**

Ai Group takes the view that, generally, and where practicable, harmony should exist between the Queensland industrial relations system and federal industrial relations system. This approach would, amongst other things, minimise the risks and costs to private sector employers that may arise from:

- Inconsistent and/or overlapping federal and State laws in areas where space is left within the *Fair Work Act 2009* (**FW Act**) for the operation of State laws;
- The implementation of excessively generous or excessively inflexible workplace relations arrangements in the Queensland public sector which could lead to:

- Unions pressuring Queensland private sector employers to match such arrangements; and
- The potential flow on of such arrangements to federal laws and/or federal awards in the future.

**Public holidays**

Ai Group has long advocated for greater national consistency in relation to public holidays. This includes the declaration of and process for setting substitute days and additional days.

We draw the Reference Group's attention to Draft Recommendation 4.2 of the Productivity Commission's review into the Workplace Relations Framework. The Draft Recommendation would amend the National Employment Standards to ensure that employers are not required to pay for leave or additional penalty rates for any newly designated State and Territory public holidays. Ai Group has expressed support for this recommendation in our September 2015 submission to the Productivity Commission.

We also draw the Reference Group's attention to Recommendation 8 of the 2012 Fair Work Act Review which would limit the number of public holidays on which penalty rates are payable to a nationally consistent number of 11.

**Concept of 'implied term of mutual trust and confidence' within the context of the discussion about the objects of the IR Act**

The issues paper contemplates varying the objects of the IR Act to include consideration of the 'implied term of mutual trust and confidence'. Ai Group strongly opposes such an approach.

The High Court in *Commonwealth Bank of Australia v Barker* [2014] HCA 32 determined that an implied term of mutual trust and confidence does not exist within the employment relationship in Australia. Writing such a term into legislation would, in effect, represent a blatant and highly inappropriate attempt to overturn the decision of the High Court with respect to employees and employers covered by the Queensland industrial relations system. It could also, in an indirect way, introduce the term into Australian workplace relations, when it does not currently exist.

The issues paper provides no rationale to support the inclusion of the term within the objects of the IR Act, other than to refer to the New Zealand *Employment Relations Act 2000* (NZ). This is not sufficient rationale to make such a significant and inappropriate change to the Australian workplace relations landscape.

**Long service leave**

Ai Group has long advocated in support of a national long service leave standard to be included in the National Employment Standards in the FW Act, most recently in our March 2015 and September 2015 submissions to the Productivity Commission's review into the Workplace Relations Framework.

If a national standard is not achievable in the short term then State and Territory long service leave laws should be harmonized, particularly in following key areas:

- Allowing leave to be cashed out by agreement between the employee and the employer without procedural obstacles. The IR Act imposes procedural obstacles to the cashing out of long service leave which should be removed. Many employees would derive a significant benefit from cashing out their long service leave and, say, paying the amount off their mortgage.

- Allowing leave to be taken, by agreement with the employer, in any number of periods including single days.

- Implementing a consistent definition of 'ordinary pay' for the payment of long service leave entitlements, across each State.

- Clarifying that overseas service is not counted.

**Freedom of association and adverse action provisions in the FW Act**

The issues paper suggests that the outcome of *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2013] HCA 32 has 'watered-down' the adverse action provisions of the FW Act because it has caused the onus of proof upon employers to become 'less burdensome'. As held by the High Court, the subjective reason for the action is relevant in determining whether a defendant has contravened the provisions.

This view expressed in the issues paper is one-sided and fails to represent a balanced perspective of the adverse action provisions of the FW Act.

To the extent that 'adverse action' provisions protecting freedom of association are recommended by this Review and inserted into the IR Act, the burden of proof for a defendant (usually the employer) must not circumvent the approach determined by the High Court in the above case.

**Employment and training provisions of apprentices and trainees**

The interaction of federal and State laws relating to the apprentices and trainees is complex.

Disputes relating to the training contract or training plan are able to be dealt with by the Department of Education and Training. For certain disputes, if a party contests the Department's ruling, the party can lodge an appeal and have the matter determined by the Queensland Industrial Relations Commission (**QIRC**).

Ai Group does not support a change to the system which would involve disputes being immediately escalated to the QIRC. Such an approach would be problematic in so far that it would default to a judicial process for the resolution of a dispute, which would often be better resolved at the enterprise level with the assistance of the department.

Furthermore, Queensland's child employment laws present some risks to employers with respect to the engagement of apprentices and trainees. When these laws were introduced in Queensland, Ai Group expressed concern about some aspects of the laws and about how they interact with the entitlements and obligations under federal awards regarding apprentices and trainees.

## 3. Issues paper 3 – Collective Bargaining

Ai Group responds generally to matters raised in issues paper 3 about collective bargaining in so far as the matters raised have the capacity to influence private sector bargaining and also bargaining with respect to infrastructure projects commissioned, in part or wholly, by the Queensland Government.

Issues paper 3 discusses 'good faith bargaining' and questions the adequacy of the current arrangements around good faith bargaining in the contemporary industrial relations system. Ai Group sees no benefit in extending good faith bargaining beyond what is already required. Any further extension (or prescription) around 'good faith bargaining', even as it would apply only to the Queensland public sector, is not supported by Ai Group.

It is common for consultation clauses to be included in collective agreements applying to Queensland Government employees, and a consultation clause is prescribed as a term to be included in an enterprise agreement made under the FW Act. However, the IR Act should provide a minimum standard and not simply import onerous consultation provisions that may currently exist within collective agreements applying to public sector workers.

With respect to industrial action, the issues paper refers to the Productivity Commission's review into the Workplace Relations Framework which suggested the 'simplification' of protected action ballots. This suggestion by the Productivity Commission was strongly opposes by Ai Group and numerous other employer representatives, and therefore the final report may express a very different view.

Ai Group opposes any expansion of industrial action rights, or the relaxation of any procedural requirements for industrial action, under the IR Act.

## 4. Issues paper 5 - Functions, powers and composition of the ICQ and the QIRC

The QIRC is relevant to Ai Group's members to the extent it arbitrates WorkCover appeals.

In certain circumstances, WorkCover matters arising under the *Workers Compensation Act 2003* (QLD) may be taken on appeal from decisions of the Regulator. Generally, this jurisdiction of the QIRC has worked reasonably well.

However, two issues have recently emerged:

- It has occasionally taken longer than reasonably anticipated for some QIRC Members to deliver their decisions and provide reasons; and

- In relation to pre-hearing compulsory conferences, the experience of Ai Group members over a number of years with QIRC Commissioners handling such conferences had been positive and efficient. However, in the last 18 months or so, a trend has emerged that representatives of the Regulator attending such conferences have usually been unprepared, thus making the conferences less effective than previously. Also QIRC Commissioners have not been calling the Regulator or its employees to account for their unpreparedness.

There have been suggestions in the past that the QIRC should be given a broad jurisdiction in relation to work health and safety matters. Ai Group has opposed such proposals in the past and continues to oppose them. Implementing such a proposal would confer upon the QIRC a jurisdiction to hear prosecution proceedings for contravention of the *Work Health and Safety Act 2011* (QLD) when possession of qualifications as a lawyer is not a requirement for appointment to the QIRC.

## 5. Issues paper 6 – Regulation of Industrial Organisations

Ai Group is a registered organisation under the *Fair Work (Registered Organisation) Act 2009*.

Ai Group's predecessor organisations were first registered in the NSW industrial relations system in 1902 and federally in 1926. We have maintained continuous registration ever since.

The Australian Industry Group, Industrial Organization of Employers (Queensland) (**QAIG**) was established in 1943 under the Queensland *Industrial Conciliation and Arbitration Acts 1932-1942.* QAIG was an entirely separate legal entity from Ai Group and was subject to the compliance obligations of the IR Act. Since the organisation operated purely for compliance purposes under the unique Queensland industrial relations representation system, its constitution and governance principles were replicas of Ai Group's federal Rules.

For several years, QAIG obtained an exemption (Certificate of Invalidities) to enable the Queensland organisation to be a mirror of its federal counterpart: officers elected to the Queensland branch of Ai Group were deemed to be officers of QAIG; members of the Queensland Branch were also members of QAIG and so on.

Difficulties arose some years ago when the Certificate of Invalidities was no longer able to respect the essential national structure and practice that Ai Group used throughout the other States and federally. We made representations to the QLD State Government to have the IR Act amended to enable national organisations like Ai Group to be registered in the QAIG without the need for inefficient and unnecessary State-based arrangements such as:

- The requirement that there be a separate QLD Committee of Management to the Committee of Management of the QLD State Branch of the federally registered organisation; and

- The requirement that there be separate accounts for the QLD entity.

After our calls to have the IR Act changed to enable Ai Group to remain registered under the Act were not responded to, in 2013 we arranged for the QAIG to be deregistered.

The correspondence in **Attachment A** and **Attachment B** is relevant.

The IR Act should be amended to address these problems. The NSW legislation may provide a suitable model.

## 6. Issues paper 7 – Contemporary and emerging issues

Ai Group makes comment with respect to the following matters which have an impact on workplace relations generally:

- Workplace bullying;
- Domestic and family violence;
- 'Right to request flexible working arrangements';
- Employment security; and
- Vulnerable workers and the notion presented by the issues paper that casual workers are in some way vulnerable.

We also note that developments in workplace relations, such as the addition of further employee benefits codified in legislation (as opposed to negotiated in an enterprise agreement) have the capacity to influence developments in the federal workplace relations system. We have particular concern with respect to any extension of the safety-net of terms and conditions of employment which could impose further obligations and red tape on employers.

**Workplace bullying**

To date, the anti-bullying provisions within the FW Act have not had an adverse impact on most businesses. The reasons for this include:

- Importantly, there is no compensation payable under the jurisdiction and therefore employees are discouraged from making unmeritorious claims and lawyers are unable to offer representation on a contingency fee basis;
- The FWC has made it clear publicly that no compensation is payable under the jurisdiction and its mediators will not be involved in facilitating monetary settlements; and
- To access the jurisdiction, an employee must remain employed and most employees are reluctant to pursue FWC claims against their employers.

These factors were also acknowledged by the Federal Government in preliminary notes with respect to its post-implementation review the anti-bullying laws. For example, it suggested that the impact of those laws was somewhat less than had been anticipated, for two reasons:

- The laws did not provide for any compensation; and
- In its handling of bullying complaints, the Fair Work Commission places emphasis on the need for stopping the bullying occurring rather than compensating the victims of it.

Submissions to the post-implementation review have now closed.

We also note that the Productivity Commission's review into the Workplace Relations Framework does not recommend any changes to the laws.

The December 2014 decision by a Full Bench of the FWC in the *DP World*[1] case has created risks and uncertainty for employers regarding the use of social media by employees. The Full Bench decided that the Commission's anti-bullying jurisdiction is limited to circumstances where a worker has been bullied while 'at work' and that this will generally be at a time when the worker is performing work for the employer or engaged in some other activity which is authorised or permitted by the employer. However, with posts on social media sites the Full Bench has decided that for the purposes of the Commission's jurisdiction to issue anti-bullying orders:

- There is no requirement that the person who made the posts be at work at the time the comments were posted;
- Posts which constitute bullying behavior, result in the behaviour continuing for the entire time that the posts remain on the social media site; and
- It is sufficient that the worker who accessed the posts be at work at the time.

Any contemplation by the Queensland Government to introduce similar laws in the IR Act must be considered against the following context:

- The anti-bullying provisions within the FW Act have a very broad coverage, the effect of which is that only a small proportion of employees (perhaps 10%) are left without a remedy in relation to workplace bullying;
- A remedy may be available to employees who suffer an injury or illness because of workplace bullying under the *Workers Compensation Act 2003* (Qld). This remedy is not restricted by the operation of the provisions within the FW Act; and

[1] *Bowker, Coombe and Zwarts v DP World, MUA and Others*, [2014] FWCFB 9227.

- An employer may also, in appropriate circumstances, be liable under the *Work Health and Safety Act 2011* (Qld) for bullying and harassment conduct occurring at a workplace. Ai Group notes that, under the legislation that preceded that Act, there was a Code of Practice dealing specifically with Workplace Harassment.

**Domestic and family violence**

Family violence is an important community problem. Federal and State governments, police forces, courts, community services organisations, health professionals, the legal profession, the media, employers, employees and many others in the community, all have roles to play in addressing the problem.

The problem is currently receiving considerable attention by governments. For example, the Communique from the 17 April 2015 Meeting of the Council of Australian Governments (COAG), records that the Commonwealth and State Governments agreed upon the following measures at the meeting:

> ***"Reducing Violence against Women***
>
> *As of 13 April, the media had reported 31 women who have died in Australia in 2015 as a result of violence. The most recent verified annual data show that on average one woman a week is killed by her current or former partner.*
>
> *COAG agreed to take urgent collective action in 2015 to address this unacceptable level of violence against women.*
>
> *By the end of 2015:*
>
> - *a national domestic violence order (DVO) scheme will be agreed, where DVOs will be automatically recognised and enforceable in any state or territory of Australia;*
> - *progress will be reported on a national information system that will enable courts and police in different states and territories to share information on active DVOs – New South Wales, Queensland and Tasmania will trial the system;*
> - *COAG will consider national standards to ensure perpetrators of violence against women are held to account at the same standard across Australia, for implementation in 2016; and*
> - *COAG will consider strategies to tackle the increased use of technology to facilitate abuse against women, and to ensure women have adequate legal protections against this form of abuse.*
>
> *COAG agreed to jointly contribute $30 million for a national campaign to reduce violence against women and their children and potentially for associated increased services to*

*support women seeking assistance. It noted the importance of ensuring frontline services in all jurisdictions continue to meet the needs of vulnerable women and children.*

*This campaign will build on efforts already underway by states and territories. It will be based on extensive research, with a focus on high-risk groups, including Indigenous women.*

*COAG will be assisted with this work by the COAG Advisory Panel on Reducing Violence against Women, chaired by the former Victorian Police Chief Commissioner, Mr Ken Lay APM, and with 2015 Australian of the Year, Ms Rosie Batty as a founding member."*

Ai Group supports the above measures and many other programs and forms of assistance that have been implemented by governments, police forces, courts, community groups, and others within the community.

Ai Group also supports appropriate initiatives to educate employers about the problem of family violence and the role that employers can play in assisting employee victims. In Ai Group's view, the key to success with this important issue is to engage with employers in a positive way, not for heavy handed and inappropriate industrial claims to be pursued, such as those being pursued by the unions in the Fair Work Commission's 4 Yearly Review of Awards, or the imposition of inappropriate legislative provisions. Inappropriate approaches risk the generation of negative views amongst employers, when most employers would be willing participants in workable initiatives to address this community problem.

Many large employers have relevant policies and procedures to assist employees who are victims of family violence. These policies, for example, often providing access to the following measures for victims of family violence

- Employee support programs;
- Annual leave, personal / carer's leave and/or unpaid leave; and
- Flexible work arrangements, consistent with the right to request provisions of the National Employment Standards .

In addition, employer policies sometimes provide guidelines for receptionists and other staff to follow when a violent family member seeks to contact a victim at the workplace.

Family violence is not appropriately dealt with through specific clauses in awards or through specific provisions in legislation requiring the provision of paid family violence leave.

If family violence is to be dealt with through a specific clause in awards or through specific legislation providing for paid leave, why not street crime, drug dependence, alcohol dependence, illiteracy, homelessness, mental health, age discrimination, gender inequality, road accidents, traffic congestion, environmental degradation, and so on? All social problems interact with the workplace in one way or another.

With most community problems, employers have a role to play but the role is usually nowhere near as significant as that of governments and others in the community, as is the case with family violence. Employers of course are in no way the cause of the problem of family violence or a contributor to it. With most community problems, the best way to facilitate employers playing a constructive role is to educate them and encourage their participation, not to impose heavy handed and inappropriate measures upon them.

Ai Group is working with the Australian Human Rights Commission on policies and materials for employers in relation to the domestic and family violence issues that manifest at the workplace. These policies and materials are intended to assist employers to provide support to employees who are the subject of domestic and family violence.

Ai Group notes that the Bryce Report on domestic and family violence has recommended that the IR Act provide for paid leave for victims of domestic and family violence.

Leave entitlements for employers covered by the FW Act are dealt with in the Act and in federal awards. Therefore, any inclusion of domestic and family violence leave in the IR Act would apply only to Queensland State and Local Government employees.

Ai Group opposes paid domestic and family violence leave being implemented as a minimum standard, for the reasons outlined above. In addition, we oppose the imposition of a legislative requirement that employers train and make available contact officers in the workplace to deal with domestic and family violence matters occurring outside the workplace.

With any paid domestic and family violence leave arrangement, a number of important issues arise, including:

- The types of circumstances in which domestic and family violence leave will be made available;
- How domestic and family violence leave would interact with other leave entitlements, such as personal / carer's leave and annual leave;
- Issues of confidentiality; and
- The evidence that the employee would be required to provide to the employer.

**'Right to request flexible working arrangements'**

The issues paper considers the right to request flexible working arrangements as it appears in the National Employment Standards of the FW Act and whether the right should be included in the IR Act.

The right to request was included in the FW Act to promote discussion between the employer and an individual employee about flexible work. It was never intended to be expanded to be a direct right to flexible working arrangement and it was never intended to be a matter which would be able to be arbitrated by the Fair Work Commission.

The intention of the 'right to request' provisions is apparent from the following extract from the NES Discussion Paper released by the Federal Labor Government during the development of the NES:

> '***Can Fair Work Australia impose a flexible working arrangement on an employer?***
>
> *No. The proposed flexible working arrangements NES sets out a process for encouraging discussion between employees and employers. The NES recognises the need for employers to be able to refuse a request where there are 'reasonable business grounds'. Fair Work Australia will not be empowered to impose the requested working arrangements on an employer.'*

The above extract, while in response to a question about arbitration, makes it clear that the 'right to request' was included in the NES so as to encourage discussion about flexible work at the workplace level.

This is also reflected in the Explanatory Memorandum to the *Fair Work Bill 2008* in paragraph 258, which explained that 'the intention of these provisions is to promote discussion between employers and employees about the issue of flexible working arrangements'.

Section 65 of the FW Act was expanded by the *Fair Work Amendment Act 2013* (Cth) to include a wider group of employees in section 65(1) and additional entitlements in section 65(1B). The Explanatory Memorandum to the *Fair Work Amendment Bill 2013* echoed the original intention of 'right to request provisions':

> *"28. … Consistent with the current operation of the right to request provisions and the intent of these provisions to promote discussion between employers and employees about flexible working arrangements, there is no evidence requirement attaching to the request. It would be expected that documentation relating to the particular circumstances of an employee would be addressed in discussions between employers and employees."*

It is important that the intention of the right to request provisions in the FW Act is not lost in any move by the Queensland Government to adopt the same or similar provisions into the IR Act.

**Employment security**

The issues paper refers to the changes to the IR Act made by the *Industrial Relations (Restoring Fairness) and Other Legislation Amendment Act 2015* (Qld) which repealed amendments made in 2013 by the previous Queensland Government to outlaw 'job security' clauses in collective agreements.

Ai Group opposed the *Industrial Relations (Restoring Fairness) and Other Legislation Amendment Bill* on the basis that it would have an adverse impact on Ai Group Members who enter into outsourcing arrangements with Queensland State Government entities.

Ai Group has long opposed 'job security clauses' or 'contractor clauses' in enterprise agreements as they stifle competition and impose major inefficiencies on employers. We have called on the Federal Government to outlaw such terms from enterprise agreements made under the FW Act.

Ai Group's March 2015 submission and September 2015 submission to the Productivity Commission's Inquiry into the Workplace Relations Framework deals with Ai Group's position in significant detail.

Ai Group, in our September 2015 submission to the Productivity Commission, submitted:

> *"Ai Group strongly supports Draft Recommendation 20.1, as it relates to the prohibition of terms in enterprise agreements which restrict the engagement of independent contractors and labour hire, or regulate the terms of their engagement. As explained in Ai Group's March 2015 submission, this recommendation would reinstate the prohibitions which were in place in these areas prior to the FW Act.*

**Vulnerable workers and the notion presented by the issues paper that casual workers are in some way vulnerable**

The issues paper inaccurately describes casual workers, in particular long term casuals, as vulnerable workers needing special protection. We strongly refute any suggestion that casual workers are 'vulnerable'.

The following points about casual employment are important:

- The flexibility to engage casuals is critical for businesses as it assists them to better balance the supply of labour with demand for the businesses' products or services. The availability of casual employment is also critical for many employees who need or want the flexibility that casual employment offers.

- It is commonly but incorrectly stated by the unions that the Australian workforce is increasingly being casualised. The proportion of people who work on a casual basis has been reasonably stable since 1998 at 19% to 20% of all workers. The proportion peaked at 20.9% in 2007 then fell to 19.0% in 2012 and was 19.4% in November 2013.

- Nowadays it is widely recognised that many casuals work on a long-term, regular and systematic basis and most have no desire to convert to permanent employment.

## 7. Matters relating to the public sector

Ai Group represents predominately employers operating in the private sector and thereby matters concerning public sector employment are not always directly relevant to our membership. However our members do have an interest in the developments within workplace relations in the public sector.

Our members are businesses that are stakeholders within the Queensland economy. For example, they are taxpayers, users of public goods and services, and can be engaged to provide services to the Queensland Government. They thereby are financially affected by public expenditure and cost-efficiency of not only Queensland public sector agencies, but also public expenditure used for infrastructure projects partnered with private businesses or on which private businesses are engaged to perform work.

The terms and conditions of public sector employment, and the degree to which the public sector imposes terms and conditions of employment on the private sector (for example contracting-out and outsourcing of Government functions to the private sector) have a significant impact on financial viability of the private sector. This may be through increases in taxation and other government charges imposed on those businesses and flowed on to their customers. Other ways may be through the imposition of generous terms and conditions of employment or inefficient and restrictive work practices which increase the cost of doing business relative to other Australian or international businesses with whom the employer may compete.

The following significant factors must be taken into account in reviewing the Queensland industrial relations system:

- The overarching need for the Queensland industrial relations system to operate in the public interest;
- The need for delivery of quality public sector services in a timely, cost-efficient and effective manner;
- The need for an appropriate level of contestability for the right to deliver taxpayer funded services:
    - To the Queensland community generally; and
    - To businesses in Queensland;
- The needs of Government to have the capacity to respond flexibly and cost effectively to:
    - Changes in technology;
    - Variations in levels of need for delivery of particular types of public sector services; and

  - Unanticipated changes in circumstances.

- The need for the Queensland industrial relation system to not stifle, by the overregulation of terms and conditions of employment in the public sector agencies:

  - The development of efficient, flexible and productive policy;

  - The administration of Government functions;

  - The delivery of Government provided services to the community, including to industry and businesses; and

  - The independence of Government, including the duty to seek independent advice in discharging the role of Government.

In addition, considerations of any expectation that the Government should be a 'model' employer should be limited to the following:

- Conducting itself in compliance with the same standards of fairness and equity as apply to private sector employers;

- Offering terms and conditions of employment that:

  - Represent fair remuneration for the level of skill, responsibility and diligence required of the employers' employees; and

  - Promote work practices and establish employee obligations that are directed to achieving the functions of the employing agency.

- Not dominating the labour market in terms of demand (thereby affecting supply levels and labour costs) or otherwise acting as a pacesetter in respect of terms and conditions of employment in the labour market in general or any particular section of it.

**Dual role of State Government as a legislator and regulator of employment terms and conditions and as an employer**

All public sector bodies performing the role of an employer must be conscious that they are expending public funds when engaging employees and that Queensland taxpayers' have a fundamental right to expect and receive value for their money in terms of the efficiency and effectiveness of the services delivered.

In respect of a Government role as a legislator and regulator of employment terms and conditions, primarily for the public sector, the legislative and regulatory function must be discharged in a non-partisan manner, by persons with the relevant training, experience and skills. With respect to the QIRC and the Industrial Court of Queensland, with quasi-judicial and judicial functions, independence ought to be assured.

However, for legislators, the consideration of the fiscal impact on the Queensland economy of the terms and conditions of public sector employment cannot be ignored and regulatory impact statements must be routinely sought when change to legislation is considered.

**Security or permanency of employment in public sector agencies**

The terms of reference for the Review emphasises the *permanency of employment* in the public sector. This emphasis is concerning because it pre-supposes, as an outcome of the Review, that the Queensland industrial relations system ought to give particular certainty to employment, or 'security of employment', in the Queensland public sector.

Enshrining in the IR Act 'secure employment' for employees within the public sector would have a significant negative impact on all businesses that engage with Government, and in particular those that contract with Government or provide labour hire services.

It is generally accepted that governments have a responsibility to act in a manner that promotes economic conditions fostering levels of availability and stability of employment conducive to and consistent with the implementation of best practice business conduct and the achievement of optimal economic outcomes in the interests of the whole Australian community.

In addition, government, as an employer, is subject to higher standards of ethical and financial probity than private sector employers simply because government agencies are reliant on taxpayer and public funds to operate. That is, government agencies have less freedom to expend funds without justification on the basis of the public interest than private sector employers, who may only be answerable to shareholders.

There should be no inordinate emphasis on the need for public sector employment to be 'permanent'. The permanent nature of any employment within the public sector ought to be dependent on factors specific to the job and relevant Government agency, including the fiscal viability of a job being 'permanent', if in fact the task is truly temporary in nature or could be performed more cost effectively if outsourced to the private sector.

The capability of the private sector to be able to deliver taxpayer-funded services and conversely provide services to the public sector is also relevant to the Review. It is important that the Government is not closed minded to considering the capabilities of the private sector, particularly where the benefits exceed any disadvantages. It is also important that the Government ensures that the process whereby preferred private sector suppliers are selected is:

- Transparent (subject only to any requirements of commercial confidentiality);
- Conducted by a person or body without any vested interest in the outcome; and
- Otherwise compliant with requirements of financial and ethical probity.

Therefore, there is no more reason for governments to provide 'security of employment' for government employees than for private sector employers, except perhaps for employees engaged in strategic-level policy advising and the supervision of compliance with statutory obligations.

The principles developed in the Northcote-Trevelyan Report (referred to in issues paper 1)[2] and its aftermath, in so far as they may require security and permanency of public sector employment, are applicable to a far smaller portion of the public sector workforce in a modern government than was the case when the report was published in the 19th century.

AUSTRALIAN INDUSTRY GROUP METROPOLITAN OFFICES
**SYDNEY** 51 Walker Street, North Sydney NSW 2060, PO Box 289, North Sydney NSW 2059 Tel 02 9466 5566 Fax 02 9466 5599
**CANBERRA** 44 Sydney Avenue, Forrest ACT 2603, PO Box 4986, Kingston ACT 2604 Tel 02 6233 0700 Fax 02 6233 0799
**MELBOURNE** Level 2, 441 St Kilda Road, Melbourne VIC 3004, PO Box 7622, Melbourne VIC 8004 Tel 03 9867 0111 Fax 03 9867 0199
**BRISBANE** 202 Boundary Street, Spring Hill QLD 4004, PO Box 128, Spring Hill QLD 4004 Tel 07 3244 1777 Fax 07 3244 1799
**ADELAIDE** 45 Greenhill Road, Wayville SA 5034 Tel 08 08 8394 0000 Fax 08 08 8394 0099
REGIONAL OFFICES
**ALBURY/WODONGA** 560 David Street Albury NSW 2640 Tel 02 6041 0600 Fax 02 6021 5117
**BALLARAT** Suite 8, 106-110 Lydiard St South, Ballarat VIC 3350, PO Box 640, Ballarat VIC 3350 Tel 03 5331 7688 Fax 03 5332 3858
**BENDIGO** 87 Wills Street, Bendigo VIC 3550 Tel 03 5440 3900 Fax 03 5444 5940
**NEWCASTLE** Suite 1 "Nautilos", 265 Wharf Road, Newcastle 2300, PO Box 811, Newcastle NSW 2300 Tel: 02 4925 8300 Fax: 02 4929 3429
**WOLLONGONG** Level 1, 166 Keira Street, Wollongong NSW 2500, PO Box 891, Wollongong East NSW 2520 Tel 02 4254 2500 Fax 02 4228 1898
**AFFILIATE: PERTH** Chamber of Commerce & Industry Western Australia
180 Hay Street, East Perth WA 6004, PO Box 6209, East Perth WA 6892 Tel 08 9365 7555 Fax 08 9365 7550

**www.aigroup.com.au**

[2] Issues paper 1, page 21.