

Ai GROUP SUBMISSION

Traditional Rights and Freedoms -
Encroachments by Commonwealth Laws
Response to Interim Report

**Australian Law Reform
Commission**

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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 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.

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Introduction

Ai Group welcomes the invitation to make submissions to the Australian Law Reform Commission (**ALRC**) with respect to its review of Commonwealth Laws for Consistency with Traditional Rights, Freedoms and Privileges (**Review**) and in particular the ALRC's Interim Report - Traditional Rights and Freedoms - Encroachments by Commonwealth Laws, released in July 2015 (**Interim Report**).

Ai Group is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* and represents employers in industrial matters before the Fair Work Commission, the Courts and other relevant Federal and State tribunals on matters involving matters arising in the workplace context. Ai Group also provides both consulting and legal advice services to employers on workplace relations matters. Our work, and our long history as a registered employer association, enables us to provide a considered, and well informed, response to the Interim Report's comments with respect to workplace relations laws, particularly the *Fair Work Act 2009* (Cth) (**FW Act**).

In particular, Ai Group responds to the following comments raised within the Interim Report:

- Workplace Relations laws that interfere with the freedom of association; and
- Competition laws that interfere with the freedom of speech and expression.

Workplace Relations laws that interfere with the freedom of association

The freedom to belong or not to belong to a trade union or other industrial association is an important feature of Australia's workplace relations laws.

As stated in section 5 of the *Fair Work (Registered Organisations) Act 2009*:

"Parliament recognises and respects the role of employer and employee organisations in facilitating the operation of the workplace relations system".

The objects of the FW Act expressly refer to the right to freedom of association:

"Section 3 Object of this Act

3 The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promote national economic prosperity and social inclusion for all Australians by:

...

(e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms;

..."

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In addition the FW Act acknowledges the right to freedom of association and to be represented by an employee or an employer association (including the right to not be represented) in various parts, including (but not limited to):

- Enterprise bargaining laws, particularly ss.173 to 178 which require that a ‘notice of employee representational rights’ be provided to employees that will be covered by a proposed enterprise agreement. The purpose of the ‘notice of employee representational rights’ is to inform employees of the right to be represented by a bargaining representative for the purpose of enterprise bargaining negotiations. An employee is free to be represented for the purpose of enterprise bargaining by a union, or any other person. If an employee is a member of a union, unless the employee otherwise stipulates, the union will be the employee’s bargaining representative;
- General Protections laws, including:
 - ss.340 to 350, which protect the right of a person to engage in industrial activity and be represented or not represented by an employer or employee association; and
 - ss.365 to 371, which prohibits an employer from terminating the employment of an employee on the basis of trade union membership, the participation in trade union activities, non-membership of a trade union, or seeking office, or acting or having acted in the capacity of, a representative of employees;
- Industrial action laws in Part 3-3 of the FW Act which permit employees and employers to take protected industrial action in pursuit of enterprise bargaining; and
- Right of entry laws in Part 3-4 of the FW Act which permit employee organisations to enter workplaces for the purposes of holding discussions with employees, investigating contraventions of the workplace laws, and on work health and safety grounds.

The Interim Report considers freedom of association in the workplace relations context as the right for an employee to belong to an employee association, i.e. be a union member. However the Interim Report overlooks that freedom of association in the workplace relations context also includes the right for an employee to not belong to an employee association. Also, the freedom extends to employers to belong or not belong to an organisation of employers.

The right to not belong must be respected in the same manner as the right to belong. While we no longer see the practice of ‘closed shops’, i.e. workplaces that required employees to be members of a particular union, it is not unheard of for unions to engage in conduct with the purpose of intimidating or coercing an individual to become a member of the union or engage in particular industrial activities. An individual’s freedom from such intimidation and coercion must be maintained.

The General Protections within the FW Act protect the ‘freedom to associate’ as well as the ‘freedom not to associate’. These provisions are important to ensure an appropriate balance is maintained in workplace relations law, and that freedom of association remains a genuine

freedom, and not merely one which requires an employer or employee (directly or indirectly) to become a member of an employer or employee association respectively.

The Interim Report, in a number of paragraphs makes, or identifies, comments which suggest an interference with freedom of association by the FW Act. Ai Group disagrees with a number of these comments, which are set out below:

- The statement at paragraph 5.71 of the interim report is an incorrect statement of fact. Pattern bargaining is not restricted under the FW Act – only industrial action in pursuit of pattern bargaining. Such industrial action is restricted for both employees and employers under the FW Act. The FW Act only permits employers to take protected industrial action if it is in response to protected industrial action by employees.
- The statement at paragraph 5.73 of the Interim Report is misleading to the extent that it fails to recognise that, while the FW Act requires that at least 50% of the employees on the ‘roll of voters’ must actually vote, the roll of voters may not represent the entire workforce or even every employee that will be covered by the enterprise agreement the subject of bargaining.¹ The number of employees on the ‘role of voters’ may be small and thereby a majority not difficult to achieve. Applications for a protected action ballot order made to the FWC in almost all circumstances are granted. Those applications that fail usually do so not because of the merits of the application, but because of procedural failings by the applicant. We draw the ALRC’s attention to s.443 of the FW Act which requires the Fair Work Commission (FWC) to approve an application for a protected action ballot:

“Section 443 When FWC must make a protected action ballot order

443 (1) FWC must make a protected action ballot order in relation to a proposed enterprise agreement if:

(a) an application has been made under section 437; and

(b) FWC is satisfied that each applicant has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted.

(2) FWC must not make a protected action ballot order in relation to a proposed enterprise agreement except in the circumstances referred to in subsection (1).

(3) A protected action ballot order must specify the following:

(a) the name of each applicant for the order;

(b) the group or groups of employees who are to be balloted;

(c) the date by which voting in the protected action ballot closes;

(d) the question or questions to be put to the employees who are to be balloted, including the nature of the proposed industrial action.

¹ Fair Work Act 2009 (Cth), sections 452 and 453.

(4) If FWC decides that a person other than the Australian Electoral Commission is to be the protected action ballot agent for the protected action ballot, the protected action ballot order must also specify:

(a) the person that FWC decides, under subsection 444(1), is to be the protected action ballot agent; and

(b) the person (if any) that FWC decides, under subsection 444(3), is to be the independent advisor for the ballot.

(5) If FWC is satisfied, in relation to the proposed industrial action that is the subject of the protected action ballot, that there are exceptional circumstances justifying the period of written notice referred to in paragraph 414(2)(a) being longer than 3 working days, the protected action ballot order may specify a longer period of up to 7 working days.

Note: Under subsection 414(1), before a person engages in employee claim action for a proposed enterprise agreement, a bargaining representative of an employee who will be covered by the agreement must give written notice of the action to the employer of the employee.”

It is clear, when considered in detail, that the FW Act does not unduly seek to limit the taking of industrial action by employees, it simply sets out procedural requirements which applicants must satisfy before industrial action can be lawfully permitted.

These procedural requirements, including requiring that the employer and employees be engaged in enterprise bargaining, are important to ensure the stability of the enterprise, the workforce and the economy.

- Paragraph 5.75 of the Interim Report refers to comments by the ACTU and AIER “*that the powers of the Fair Work Commission to suspend or terminate industrial action on various grounds, including economic harm, health and safety, third party damage and cooling off, are cast too broadly and unjustifiably interfere with the right to freedom of association.*” Ai Group does not agree.

The Fair Work Commission may only suspend or terminate industrial action if:

- There is significant economic harm to the employer/s and employees who will be covered by the enterprise agreement;²
- The industrial action is endangering life, the personal safety or health, or the welfare, of the population or of part of it or causing significant damage to the Australian economy or an important part of it³.
- There is significant harm to a third party other than the bargaining representatives for the enterprise agreement or an employee who will be covered by the enterprise agreement;⁴

² Fair Work Act 2009 (Cth), section 423.

³ Fair Work Act 2009 (Cth), section 424.

⁴ Fair Work Act 2009 (Cth), section 426.

These provisions have been exercised infrequently under the FW Act, and under the predecessor provisions in the *Workplace Relations Act 1996*.

The evidentiary threshold required for the satisfaction of the notion of ‘significant harm’ is set very high. This was acknowledged in the Productivity Commission’s Draft Report into Australia’s Workplace Relations Framework.⁵ In light of the evidence provided by participants to the Productivity Commission’s Inquiry into Australia’s Workplace Relation’s Framework, it sought further input from stakeholders on how ‘significant harm’ ought to be defined under sections 423 and 426 of the FW Act to enable parties easier access to these provisions. Ai Group, in its response, strongly disagreed with any watering down of the provisions. Ai Group said:

“Ai Group does not agree that the phrase “significant harm”, as used in s.423 and 426 of the FW Act, needs to be defined as queried in the Information Request on page 689 of the Draft Report.

It is appropriate that a high bar apply in all circumstances where the right to take industrial action is terminated and arbitration can be imposed, because the concept of compulsory arbitration is inconsistent with enterprise bargaining. The outcome of arbitration is of course not an enterprise agreement but an outcome which is imposed on the parties by a third party.

The principle underpinning s.424 is that when industrial action is threatening harm to the community or an important part of it, the interests of the community outweigh the interests of the bargaining parties. In such circumstances, compulsory arbitration is appropriate. This same principle does not apply under s.423 because this section deals with industrial action which is inflicting significant harm on the bargaining parties.

Ai Group does not support Draft Recommendation 19.2 that s.423 of the FW Act should be amended to refer to significant harm to “either” party, rather than “both” parties. Such a proposal was debated at great length when the Fair Work Bill was being developed and ultimately rejected because it would have enabled employees to commence strike action and shortly thereafter seek arbitration on the basis that their industrial action was significantly harming them. Any change to s.423 would need to prevent employees gaining access to arbitration as a result of their own industrial action.

The following extract is from a submission made to then Deputy Leader of the Opposition, the Hon Julia Gillard MP, in relation to a similar proposal to Draft Recommendation 19.2 in Labor’s Forward with Fairness Policy:

⁵ Productivity Commission, Workplace Relations Framework, Interim Report, August 2015, page 688.

“Under Labor’s policy, if industrial action is causing significant harm to one of the parties, Fair Work Australia would have the power to end the industrial action and arbitrate an outcome. This would apply even if the party is inflicting the harm upon itself through the taking of strike or lock-out action. When employees are on strike they can of course end the harm at any time by returning to work. Similarly, when a company has locked out its employees it can end the harm at any time by ending the lock-out. It is inappropriate and unfair to allow access to arbitration based upon harm to one of the bargaining parties - particularly where the harm is self-inflicted by the party who wants arbitration.

After several days of strike action a union would be able to readily argue that employees are struggling to pay their mortgages and car payments and therefore that significant harm is occurring to one of the bargaining parties. Accordingly, the Commission would have the power to arbitrate and impose an outcome on the parties.

Arbitration should only be available in extremely limited circumstances because once a workplace agreement outcome is arbitrated against the will of one or more of the parties it is, of course, no longer “an agreement”. Arbitration under the current system (and under the Keating Government’s laws) is accessible only in the very limited circumstances where a dispute is threatening to damage an important part of the economy, or the safety or welfare of the Australian population. The rationale for arbitration in such circumstances is that the interests of the community outweigh the interests of the bargaining parties.

If a negotiating party is aware that arbitration is available, there is less incentive for the party to make concessions in order to reach agreement. A union would be able to make a series of excessive claims which no company would agree to, organise industrial action in pursuit of those claims and then wait for a “compromise” position to be arbitrated. This would represent a return to the old days of arbitration around ambit claims. Arbitrated outcomes (particularly those favourable to unions) would undoubtedly flow-on across industries. This would occur as a result of unions pressing other employers to accept the arbitrated outcome and also through other similar outcomes being arbitrated by Fair Work Australia and the doctrine of precedent.

On page 15 of Labor’s policy, it is stated that parties would not be forced to make concessions during bargaining or sign up to an agreement if they do not agree to the terms - but allowing unions to have ready access to

arbitration would enable similar unacceptable outcomes to be imposed upon employers.”

With regard to the Information Request on page 692 of the Draft Report, Ai Group strongly opposes any dilution of the existing requirements in s.424 of the FW Act. Ai Group has represented the relevant employers in a number of cases relating to applications under s.424 or predecessor provisions under the Workplace Relations Act 1996. The predecessor provisions to s.424 were the focus of the High Court’s decision in the Coal and Allied case.⁶ The FWC imposes a very high bar when determining applications under s.424. The phrases “endanger”, “significant damage”, “the population”, “economy” and “important part” have been consistently interpreted by the FWC and its predecessors in a very rigorous manner which prevents suspension or termination in any circumstances other than where a threat is serious and widespread. Very isolated examples provided to the Productivity Commission by unions, of alleged lack of rigour by the FWC in dealing with s.424 applications, must not allowed to water down this critical provision of the FW Act which protects the community from harm.”

- Paragraph 5.78 of the Interim Report suggests that some limitations on the right of entry for employee representatives may be characterised as interfering with an employee’s right to freely associate with a union. Ai Group does not agree.

Ai Group has identified two significant problems that are occurring with right of entry laws and these are contributing to unlawful and unacceptable union conduct. The problems are:

- The right of entry laws in Part 3-4 of the FW Act need to be tightened; and
- The ‘unlawful terms’ in s.194 of the Act need to be tightened to prevent unions coercing employers to include provisions in enterprise agreements which undermine the right of entry laws.

Furthermore, reasonable restrictions on the right of an employee representative to enter a workplace are necessary to prevent misuse of entry rights by unions. For example, Ai Group members have reported the widespread misuse of Work Health and Safety entry rights by construction industry unions during the pursuit of bogus safety disputes.⁷

Ai Group members have also reported an increased incidence of entry to their workplaces by particularly unions. In some cases, this has involved multiple union officers attending simultaneously to hold discussions with employees and remaining on the work premises for extended hours.

⁶ [2000] HCA 47.

⁷ The Work Health and Safety entry rights, unlike entry for discussion or investigation purposes, do not require unions to provide 24 hours’ notice of entry to an employer.

- Ai Group agrees with the submission of the National Farmers' Federation referred to in paragraph 5.89 of the Interim Report, with regard to the emphasis of the FW Act on compulsory bargaining. Prior to the FW Act, Australia had a voluntary bargaining system, whereby neither an employer nor employee was compelled to enter into enterprise bargaining. The FW Act now operates to compel an employer to bargain for an enterprise agreement via a majority support determination, or via a protected action ballot order if the FWC determines that an employer is not 'genuinely trying to reach agreement'.

In addition, the object of the FW Act in s.3 contemplates that collective enterprise bargaining is the only way whereby an employer and its employees can negotiate the terms and conditions of employment at the workplace.⁸ The object expressly identifies the intention of the FW Act to prevent the making of statutory individual agreements.⁹

The introduction of compulsory enterprise bargaining and the removal of the right to bargain at the individual level, interferes with freedom of association to the extent that an employer and employee may not wish to negotiate collectively when negotiating the terms and conditions of employment.

Competition laws that interfere with the freedom of speech and expression

The Interim Report identified the *Competition and Consumer Act 2010* (Cth) (**CC Act**) as a law which interferes with freedom of speech and expression by effect that it places restrictions on engaging in secondary boycotts, including through activist campaigning.¹⁰ Ai Group strongly supports the secondary boycott provisions in sections 45D to 45DE of the CC Act. The Royal Commission into Trade Union Governance and Corruption (**Royal Commission**) has revealed that while the secondary boycott provisions exist as a deterrent to anti-competitive behaviour, the provisions have not been effectively enforced by the Australian Competition and Consumer Commission.

We urge the ALRC to consider the evidence provided to the Royal Commission by Boral whom has been the subject of a secondary boycotts by the CFMEU.¹¹ The Interim Report released by the Royal Commission refers to evidence from Boral detailing the cost of the secondary boycott on the company from its commencement to the end of June 2014 as totalling approximately \$8 million to \$10 million.¹²

⁸ Fair Work Act 2009 (Cth), section 3(f).

⁹ Fair Work Act 2009 (Cth), section 3(c).

¹⁰ Interim Report, paragraph 3.153.

¹¹ Royal Commission into Trade Union Governance and Corruption, Interim Report, <http://www.tradeunionroyalcommission.gov.au/reports/Pages/default.aspx>

¹² Royal Commission into Trade Union Governance and Corruption, Interim Report, Volume 2, Page 1055, <http://www.tradeunionroyalcommission.gov.au/reports/Pages/default.aspx>

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As identified in the example above, the cost of secondary boycotts to employers, employees (of the company subject of the boycott), the economy and community generally, can be significant. The prohibition on secondary boycotts by the CC Act must not be watered down or removed in favour of uncompetitive behaviour justified by a perceived freedom of speech or expression of employees (or their representatives), which invariably would cause greater damage to a larger portion of the economy and community, than the reason for the behaviour itself.

Ai Group's most recent submission to the Royal Commission expresses the view that the Australian Competition and Consumer Commission should enforce the secondary boycott with increased vigour. This is consistent with the view expressed in Ai Group's submission to the recent Competition Policy Review commissioned by the Federal Government and undertaken by Professor Ian Harper.

International obligations

Some unions argue that the FW Act does not comply with relevant International Labour Office (ILO) conventions. Ai Group does not agree.

The former Labor Government provided a number of detailed reports to the ILO setting out the reasons why the FW Act complies with relevant ILO conventions, including:

- *The Freedom of Association and Protection of the Right to Organise Convention, 1948* (Convention 87),
- *The Right to Organise and Collective Bargaining Convention, 1949* (Convention 98),
- *The Equal Remuneration Convention, 1951* (Convention 100),
- *The Discrimination (Employment and Occupation) Convention, 1958* (Convention 111),
- *The Employment Policy Convention, 1964* (Convention 122), and
- *The Tripartite Consultation (International Labour Standards) Convention, 1976* (Convention 144).

Ai Group, ACCI and the ACTU were consulted in the preparation of those detailed reports.

Ai Group agrees with the Australian Government's view that the FW Act complies with Australia's international labour obligations.



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