1. **Introduction**

The following submissions have been prepared by Allens Arthur Robinson for the purpose of the post-implementation review of the Fair Work Act by the Fair Work Act Review Panel.

2. **Safety Net**

2.1 **Modern awards**

The complicated mix of industry and occupational modern award coverage often makes it difficult for employers to determine which award and classification applies to an employee.

It would assist parties to employment arrangements if they could take advantage of a mechanism to apply to Fair Work Australia (FWA) or the Fair Work Ombudsman (the FWO) for an advance determination as to award coverage and classification for a particular role.

An analogous process exists in the context of taxation status via determination by the Australian Tax Office. The ruling might be binding and protect an employer from claims relating to incorrect award coverage, subject to a right for the employee to appeal the ruling within a certain period of time.

The process could be extended to other ambiguities within modern awards. Such a process would avoid the problem that arose in *Restaurant and Caterers Employers Association of Queensland Industrial Organisation of Employers v Liquor, Hospitality and Miscellaneous Union* [2010] FWA 4579, where FWA disagreed with the interpretation of a modern award that the FWO had provided to the employer.
2.2 Individual flexibility arrangements

Individual Flexibility Arrangements (IFAs) have failed as a mechanism to achieve award flexibility. Employers have largely ignored them as a viable option. We note in particular the following difficulties:

(a) **Termination on 28 days' notice**

IFAs can be terminated without bringing the employment relationship to an end. This removes certainty for businesses and employees alike, since either party can have the arrangements discontinued on short notice. This deficiency was noted by the Full Bench of FWA in *Re Inghams Enterprises Pty Ltd* [2011] FWAFB 6106. IFAs should operate for a set period (say not exceeding three years), with earlier termination only if both parties agree or by an order of FWA.

(b) **IFAs cannot be a condition of employment**

The fact that IFAs cannot be made as a condition of employment creates the difficulty that employers that have reached agreement with existing employees on flexible arrangements (e.g. regarding rostering) cannot ensure that new employees are subject to the same terms and conditions without entering into an enterprise agreement.

We recommend that employers and prospective employees be able to negotiate and agree to pre-employment IFAs as a condition of employment. Further, if employment was offered only on the basis of an IFA (it being the basis on which from the outset a role is offered), termination of the IFA should permit termination of employment without triggering a redundancy.

2.3 Allowing reasonable deductions for overpayments

The *Fair Work Act* prohibits most deductions from employee salaries, except in limited circumstances set out in section 324. Deductions should be available in circumstances where an employer has made an overpayment to the employee, given that there is no quick and cost-effective method to pursue modest claims.

To protect employees from a cashflow perspective, the right to deduct overpayments might be subject to a maximum impact on the employee’s take home pay (e.g. the national minimum wage).

3. General protections

There has been wide public and academic comment regarding the ramifications of *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14 (*Barclay*), which is now on appeal to the High Court.

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1 At [30]
One of the key issues in the case is the reverse onus of proof and causation. The potential impact of the decision is apparent from Mr Barclay’s submissions to the High Court, which include the following example:

‘In some cases, in order to see whether the reverse onus has been discharged in respect of the reason or cause of the adverse action, it will be necessary to ask more than one question. Thus, if an employer credibly asserts that adverse action was taken because an employee was late for work, a court may have to ask why he was late for work. If the answer suggested by direct evidence or preferable inference is that he was late because he was discharging some duty or function as a shop steward, the employer will not have discharged the onus of dissociating the adverse action from one the proscribed reasons.’ (underlining added, at paragraph 28, page 8, Respondent's Submissions)

Using the example from Mr Barclay’s submissions to the High Court, a union delegate could not be disciplined for tardiness or absenteeism where they assert that they were discharging a duty or function as a union official. Taken to an extreme, a union delegate could attend at work but spend his or her work time discharging union duties or functions, using the employer's facilities, and the employer would be obliged to continue to pay the union delegate and the union delegate would be immune from disciplinary action. This cannot be how the general protections were intended to operate.

We recommend the introduction of a 'but for' test of causation, which was argued before but rejected by the 2-1 majority of the Federal Court. That is, a defendant will have breached the provision if, but for the prohibited reason, the adverse action would not have occurred. This is consistent with the High Court's decision in the Purvis discrimination case, and with how freedom of association provisions have been previously interpreted (i.e before the Fair Work Act and the Barclay case). Defendants would still have to rebut the reverse onus.

There is also too much ambiguity attaching to the scope of “a complaint or inquiry” in section 341. As drafted, it may not require the concern to be expressed to a person who has the capacity to do something about it, and may be nothing more than unproductive and or destructive behaviour that goes against the whole concept of dispute resolution procedures and the universally recognised benefit of channelling complaints through an internal process. An amendment would not require an external complaint, as the case used to be under earlier legislative schemes. But it would require more than informal criticism or complaining about day to day issues in the workplace, which are commonplace and of no import.

4. **Union Right of Entry**

In our view, trade union access to non-member records is inconsistent with freedom of association and commonly accepted standards of privacy. Trade union access to non-member records creates the potential for improper use of non-member information

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2 Purvis v State of New South Wales (Department of Education and Training) [2003] HCA 62
including for industrial purposes, as was highlighted in *Fair Work Australia* [2011] FWA 4096. In that case, FWA noted the following issues with the union's entry:

- there were serious reservations about the accuracy of the material provided to FWA before the union was granted access to the non-member records;
- there were legitimate grounds for suspecting the union sought access to the non-member records as part of a campaign to increase its membership, rather than investigating suspected contraventions of the *Fair Work Act*;
- the union took video footage of workers while exercising its right of entry to access non-member records. These actions were found not to be undertaken to assist the investigations of underpayment, but rather to be used as part of the union's industrial campaign; and
- the union misused the non-member information it obtained to invite non-members to a union meeting. This was found to be an abuse of the basis on which the information was provided, and contrary to the employees' privacy.

Only the FWO should be entitled to access to non-member records.

### 5. Transfer of Business

Section 313 of the *Fair Work Act* provides that if there has been a transfer of business resulting in employees transferring to a new employer, the industrial instrument that covered the old employer and the transferring employees will automatically transfer to cover the new employer and the transferring employees.

The transfer of business rules apply even where the new employer has an in-term enterprise agreement that would cover the transferring employees. In our opinion, where there is an enterprise agreement applying to the work the transferring employee will perform at the new employer, the transfer rules impose an unnecessary administrative burden on the new employer. The new employer will have multiple industrial instruments applying to the same work at the same time within the same enterprise. Given the new employer's enterprise agreement will have passed the better off overall test, this automatic transfer cannot be justified by safety net protection.

In our view, the transfer of business provisions should not operate if the new employer has an in-term enterprise agreement that would cover the transferring employees. That is, a transferable instrument should not transfer to the new employer if the new employer has its own enterprise agreement that would cover the transferring employees.

A party could apply to have the old instrument transferred to the new employer, for example where the terms and conditions of that instrument are more appropriate to cover the employees or where the new employer agrees to the transfer of the old instrument.
Since the better off overall test would have been applied to the in-term enterprise agreement, transferring employees would be adequately protected. At the same time, the new employer could apply its own terms immediately and without an application to FWA.

**6. Enterprise Bargaining**

The 'matters pertaining' limitation seems unnecessarily complicated and over reliant on difficult and often inconsistent case law. For that reason, we support a two step amendment to permitted content:

1. allowing employers and employees to agree on any matter; but
2. employees only being allowed to take protected action in support of content that is not prohibited.

That is, enterprise agreements could include any content agreed by the parties, but employees may only take protected action if they are not pursuing 'prohibited' content. Further, we think that it is appropriate to exclude employees from taking protected industrial action in support of content that was prohibited content under Work Choices. Work Choices allowed employers to retain better control over matters that had traditionally been within their discretion.

**7. Industrial Action**

If the FWA Full Bench decision in the *JJ Richards* case[^3] is not overturned on appeal to the Federal Court later this month, we think legislative amendment is necessary.

In our view, the *Fair Work Act* was not intended to operate so that protected industrial action could be used to compel an employer to bargain. We think the *Fair Work Act* was intended to operate so that if an employer refuses to bargain, a bargaining representative must seek a majority support determination to force bargaining to commence.

We say this because the *Fair Work Act* and explanatory materials suggest that protected industrial action must only occur during bargaining.[^4] That seems a sensible approach to us, and is symmetrical with the employer's right to take response action only during bargaining.

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[^3]: *JJ Richards & Sons Pty Ltd v Transport Workers’ Union of Australia* [2011] FWAFB 3377
[^4]: See for example the Explanatory Memorandum to the *Fair Work Bill 2008* (Cth), at p.iii; r.166 of p. xxxvii; r.283, r.284, and r.287 of p.lix; and [90] of p.14