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# AUSTRALASIAN RAILWAY ASSOCIATION SUBMISSION

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To

The Productivity Commission

On

Inquiry into the Workplace Relations Framework



## 1 THE AUSTRALASIAN RAILWAY ASSOCIATION

The Australasian Railway Association (**ARA**) is a not for profit member-based association that represents the rail sector throughout Australia and New Zealand. Rail is a strong and diverse industry with a prosperous future, employing approximately 110,000 people in a wide range of occupations, disciplines and professions across more than 180 companies.

Our membership comprises both public and private organisations that contribute to the rail sector. These include passenger and freight operators, track owners and managers, manufacturers and suppliers that operate in urban, regional, and rural areas. A full list of members is available [online](#). We contribute to the development of industry and government policies in an effort to ensure Australia's passenger and freight transport systems are well represented and will continue to provide improved services for Australia's growing population.

The ARA in conjunction with its members wishes to make a submission to the Productivity Commission's Inquiry into the Workplace Relations Framework (**Inquiry**) and thanks the Productivity Commission for the opportunity to provide this submission.

For further information regarding this submission, please contact our industry representative, **Nick Dickinson, General Manager, People and Performance of Metro Trains Melbourne** on 03 9610 2411.

## 2 SCOPE OF SUBMISSION

This submission addresses the following matters identified in the Inquiry Issues Papers which are issues arising under the 'Fair Work Laws' that have had the widest effect on its membership:

- (a) Transfer of business (Issue Paper 5 – section 5.7)
- (b) Enterprise bargaining and the effectiveness of the good faith bargaining regime under the *Fair Work Act 2009* (Cth) (**FW Act**) (Issue Paper 3), including:

- (i) the impact of the scope order regime under the FW Act;
- (ii) the legal and practical mechanisms for compelling parties to bargain and the difficulties that arise if there are multiple bargaining representatives; and
- (iii) processes for initiating, and the barriers to ending, industrial action.

Additionally, while not an issue addressed in the Issues Papers, the ARA also takes the opportunity to put forward a submission on the mechanism for indexing the high income threshold for the purpose of a high income guarantee.

The ARA acknowledges that the Productivity Commission welcomes submissions which are evidence based and offer guidance on practical changes to the Workplace Relations framework.

In this submission the ARA seeks to provide examples of the experience of its members in respect of the above matters and, where practicable, put forward suggestions for change.

The ARA trusts that this submission will be of assistance to the Productivity Commission in its examination of the current operation of the 'Fair Work Laws', as required by its Terms of Reference<sup>1</sup>.

## 3 TRANSFER OF BUSINESS

### 3.1 ISSUE

**The transfer of business regime under the FW Act is a disincentive to transfer employees from one business to another and an impediment to productivity and business investment.**

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<sup>1</sup> Terms of Reference to the Productivity Commission by Joe Hockey, Treasurer, 19 December 2014.

The provisions under Part 2-8 of the FW Act (transfers between national system employers) and Part 6-3A of the FW Act (which deals with transfers from the State public sector to the private sector) have changed the basis upon which industrial instruments transfer from one employer to another.

If a 'transfer of business' occurs, the FW Act deals with the transfer of industrial instruments from the old employer to the new employer. Relevant to the rail industry, the instrument is commonly a collective industrial instrument, which may be an enterprise agreement made under the FW Act or a collective agreement made under the predecessor legislation or, in some instances where there is a privatisation of rail services, a State public sector instrument.

The instrument that covered the old employer and the transferring employees immediately before the termination of the employees' employment with the old employer (**transferable instrument**) will transfer to cover the transferring employees' employment with the new employer. This is irrespective of the terms of that instrument and how appropriate or workable they may be within the new employer's business.

Transferable instruments that come across in a business transfer with the transferring employees may also cover subsequent hires who did not previously work in the business with the old employer (**non-transferring employees**) subject to the application of a modern award or enterprise agreement that covers the new employer and the non-transferring employees.

The effect of these provisions is that the default position under the FW Act is that a new employer will inherit, for an unspecified period of time, the agreement the old employer reached with its employees irrespective of the industrial or operational arrangements the new employer has in place in its business.

The legal and practical effect of these provisions is:

- (a) A transferable instrument will apply to a new employer even if the new employer has an enterprise agreement in place that has not reached its nominal expiry date and would cover the transferring employees.

- (b) Multiple industrial instruments can apply to the same employer at the same time within the same enterprise for the same work. In the event of multiple acquisitions, there can be more than one transferable instrument that operates within a business for the same work.
- (c) The transferable instrument will continue to apply for its term even if a new enterprise agreement is made by the new employer that is more suited to the business of the new employer and the prevailing market conditions and industrial environment (subject to any application that is made to terminate the transferable instrument).
- (d) The transferable instrument becomes the natural starting point for the transferring employees and their bargaining representatives to negotiate from for any future enterprise agreement. This can make it inherently difficult to negotiate any new terms and conditions which may be better aligned to the new employer's business and the interests of its workforce. This is particularly problematic when:
  - (i) the old employer is a State public sector employer. Industrial instruments traditionally contain terms and conditions on key issues, such as rostering, which are restrictive and do not promote improvements in productivity. Examples of such provisions are outlined in section 3.2 below; and
  - (ii) there are multiple transferable and non-transferable instruments that apply to the new employer for the same work. The new employer then has the inherent difficulty of rationalising terms and conditions of employment at the time of bargaining for a new enterprise agreement to apply to its workforce.
- (e) The imposition of terms and conditions contained in a transferable instrument(s) that do not suit or impose industrial complexity (due to the continued operation of existing enterprise agreements within the new employer) can have a significant impact on productivity - both from the industrial perspective of managing the application of multiple sets of terms and

conditions and an administrative perspective - all of which amounts to a distraction to getting on with business in an already difficult time of transition.

### Applications to the Fair Work Commission under sections 318 & 319 of the FW Act

While the default position is that the new employer will inherit the transferable instrument 'as is', the FW Act gives the Fair Work Commission (referred to in this submission as the **Tribunal**) power to make the following orders in respect of the coverage or terms of a transferring instrument to change the default position:

- (a) Under section 318 of the FW Act:
  - (i) an order that the transferable instrument will not cover the new employer and transferring employees; or
  - (ii) an order that any existing enterprise agreement or named employer award that covers the new employer will cover the transferring employees in lieu of the transferable instrument.
- (b) Under section 319 of the FW Act:
  - (i) that a transferable instrument not cover any non-transferring employee; or
  - (ii) that a transferable instrument will cover a non-transferring employee who will perform the transferring work.
- (c) Under section 320 of the FW Act, that the transferable instrument can be varied to remove terms that will not be capable of meaningful operation or to remove ambiguity or uncertainty about how the instrument operates or to vary terms to enable the instrument to operate in a way that is better aligned to the working arrangements of the new employer.

However, these orders can only be made on application by the new employer, a transferring employee or a union party to the transferable instrument. In most cases, applications are sought under section 318 of the FW Act and by new employers. Very few have been made by employers under section 320 of the FW Act<sup>2</sup>.

The process of making such applications is not straightforward and such matters are often contested. The decisions of the Tribunal suggest that if the application is opposed by union parties, the prospects of the application being successful are low, and improved only if an employer is willing to provide undertakings to preserve certain terms and conditions. In short, the Tribunal places emphasis on whether the new employees and their representatives support the orders that are to be made.

The ARA's position is that the transfer of business regime under the FW Act:

- imposes an unnecessary administrative burden on a new employer, and the mechanisms and process required to obtain orders under section 318-320 of the FW Act are not effective mechanisms for ameliorating this burden; and
- has a negative impact on productivity post-transfer.

### 3.2 METRO CASE STUDY: EVIDENCE OF THE OPERATION OF THE TRANSFER OF BUSINESS PROVISIONS

Metro Trains Melbourne Pty Limited (**Metro**) took over the franchise for the Melbourne metropolitan public transport rail service in November 2009. When this occurred, three industrial instruments transferred:

- (a) The *Connex Melbourne Collective Agreement 2009-2012* (**Connex EA**), which applied to Operations employees.

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<sup>2</sup> The Fair Work Commission Annual Report 2013-2014 records that in 2013-2014 period, 92 applications were made under section 318 of the Act and only 9 applications were made under section 320 of the Act.

- (b) The *MainCo Melbourne Enterprise Agreement 2009* (**MainCo EA**), which applied to employees who performed work associated with the Rail Infrastructure assets for the service.
- (c) The *UMTL Enterprise Agreement 2009* (**UMTL EA**), which applied to employees who performed work associated with the provision of Train Fleet asset maintenance for the service.

Each of the above transferring instruments contained in them legacy provisions from previous public and private sector enterprise agreement negotiations. These provisions had wide ranging effects from:

- (a) creating potential disparity in terms and conditions of employment for employees;
- (b) creating an administrative burden on Metro to administer the terms of multiple agreements;
- (c) constraining the ability of Metro to put in place processes for productivity and efficiency and continuous improvement;
- (d) being impractical and not capable of being meaningfully applied within the Metro business.

Examples of such provisions include that under the UMTL EA and MainCo EA there were terms that were terms included at Appendix A of each agreement to purportedly allow for productivity improvements. Problematically, terms dealing with productivity improvements relating to work practices (rostering and employee utilisation) required that any implementation of these practices be with the agreement between the employer, union parties covered by the agreements and the employees. In the event of no agreement being reached, the matter could escalate to a dispute. It is self-evident the constraints these type of provisions can have on productivity.

Additional examples of provisions inherited by Metro with the above effects are set out in **Annexure A**.



### 3.3 PROPOSAL FOR CHANGE - TRANSFER OF BUSINESS

The transfer of business rules impose unfair restrictions on new employers, fetter productivity and efficiency and do not necessarily serve to secure employment of transferring employees or safeguard better terms and conditions because they may act as a disincentive to take on existing workforces.

ARA submits that the transfer of business provisions should be the subject of review and modification to create greater flexibility for businesses who are acquiring new businesses and operations without the time and expense required to use the existing FW Act processes.

Proposed modifications to the provisions, which the ARA considers are proportionate and balanced in the interests of employees and employers, include:

- (a) That the transferable instrument not transfer to the new employer if the new employer has its own enterprise agreement that would cover the transferring employees. Any 'in term' enterprise agreement of the new employer would have been required to pass the Better Off Overall Test and therefore would have suitable safety net terms and conditions to provide protections to employees.
- (b) If in the event the transferable instrument is to apply, it applies only for a defined period and no longer than the expiry of the nominal term of the transferable instrument or the introduction of a new enterprise agreement by the new employer that will cover the transferring employees, whichever occurs first. A similar arrangement for the expiry of a transferring instrument applied under the former provisions under the *Workplace Relations Act 1996* (Cth).

Similarly, section 768AO of the FW Act has the effect that a State instrument that transfers to a new employer will cease to operate after a five year period. While five years would appear an unnecessarily long period of time, there is nonetheless precedence in the current FW Act for providing an end date for the operation of transferring instruments.

- (c) If the position under either (a) or (b) is to be modified, it is only by application by a party in circumstances where, for example, 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.

The above options would afford an employer the flexibility to efficiently put in place at the earliest opportunity industrial arrangements for the transferring employees that best meet operational requirements and will minimise the impact of inheriting legacy provisions that have no meaningful operation for its business or which negatively impact on productivity and efficiency.

## 4 THE BARGAINING FRAMEWORK - GOOD FAITH BARGAINING

### 4.1 GOOD FAITH BARGAINING

The ARA's position is that good faith bargaining requirements are not operating effectively and the mechanisms to facilitate bargaining (scope orders in particular) do not necessarily improve bargaining processes.

In Issues Paper 3, the Productivity Commission has asked:

*To what extent are good faith bargaining requirements operating effectively and what changes are justified? What would be the effect of any of those changes?*

*Are the FWC good faith bargaining orders effective in improving bargaining arrangements?*

The experience of ARA members is that despite the good faith bargaining requirements **not** requiring a party to reach agreement or make concessions during bargaining (see section 228(2) of the FW Act), the suite of mechanisms under the FW Act, including scope orders, which are designed to facilitate bargaining outcomes, have the effect of making parties agree on terms of an enterprise agreement before they may be ready to and whether they want to agree or not.

Therefore, the ARA on behalf of concerned members welcomes the opportunity to put forward a position on the issue of good faith bargaining. Specifically:

- (a) The operation of scope orders. While the Productivity Commission has identified in Issue Paper 3 that '*scope orders are rare*', they are nonetheless a mechanism under the bargaining framework that can be misused and have a negative impact on the bargaining processes and outcomes.
- (b) The practical effect of the good faith bargaining framework that means employers are often compelled to participate in bargaining, even if the employer is not ready to do so, and agree to terms, even if they are not genuinely for the benefit of the employer or employees.
- (c) The absence of a requirement under section 228 of the FW Act for employee bargaining representatives to provide reasons in support of the claims they are advancing as a precursor to the employer providing its response to those proposals.

## 4.2 ISSUE - SCOPE ORDERS

Scope orders are a mechanism for allowing a bargaining representative of a proposed single enterprise agreement to seek orders from the Tribunal about who an agreement should cover.

Scope orders have the effect that who is to be covered by the agreement may not be resolved until late in bargaining and in circumstances where the Tribunal as a third party imposes the scope on the parties – the Tribunal decides who the agreement is to cover. This is a feature of the good faith bargaining regime which is not desirable and the introduction of scope orders, which had not previously been a feature of workplace laws, do not appear to have improved enterprise bargaining processes.

Rather, for employers, including in the rail sector, applications for scope orders made by union bargaining representatives can be used as leverage against employers to agree to union claims, including claims that are inimical to productivity, and have the

effect of increasing the time, cost and resources required for making enterprise agreements<sup>3</sup>.

### 4.3 CASE STUDY – ARTC'S EXPERIENCE WITH SCOPE ORDERS

Australian Rail Track Corporation (**ARTC**) has been the respondent to three separate scope order applications that have been made by various union bargaining representatives since the FW Act commenced:

- (a) ARTC Enterprise Agreement 2010 (B2010/2912 & B2012/2913)
- (b) ARTC NSW Enterprise Agreement 2012 (B2012/911)
- (c) ARTC Enterprise Agreement 2014 (B2013/1538, B2013/1552)

Each application was subject to a contested hearing in the Tribunal and was not successful. However, even though the end result did not change ARTC's preferred scope of the enterprise agreements, the outcome was that:

- (a) ARTC had to invest significant time, money and resources to challenge the applications, regardless of the merits of each application; and
- (b) the bargaining process for a significant number of other employees that were to be covered by the proposed enterprise agreements was delayed.

In two of the cases the bargaining process was in the final stages with the proposed enterprise agreement being provided to employees to vote on, requiring the ARTC to suspend/postpone the voting process. The impact this had on employees was that there were delays to wage and allowance increases.

In the third application, bargaining was disrupted for only a short period but this still impacted on the ability of ARTC and other non-union bargaining representatives to advance their claims.

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<sup>3</sup> In the matter of *Transport Workers Union of Australia v Chubb Security Services Limited* [2012] FWA 2226, the Tribunal found in rejecting the TWU's application that the scope order application was made for strategic reasons

A summary of each case prepared by the ARTC for the purpose of this submission is attached at **Annexure B**.

#### 4.4 PROPOSAL FOR CHANGE - SCOPE ORDERS

Scope orders are a new power of the Tribunal under the FW Act. The absence of such a power in previous workplace relations systems did not appear to be a major issue but the introduction of the power to make an application for a scope order, and for such an order to be made, is an impediment to good faith bargaining and promoting an efficient and effective bargaining process.

Members of the ARA propose that there be amendments to section 238 of the FW Act to limit the making of scope order applications to employers only if they wish to change the scope of coverage by new proposed enterprise agreements and cannot obtain the agreement of the union/employee bargaining representatives to the change.

ARA submits that such a change would promote a more efficient and effective bargaining platform without impacting on the balance of bargaining power as employee bargaining representatives will still be able to take steps to promote their bargaining position through other means under the FW Act, such as protected industrial action, or if there is a genuine belief bargaining is not proceeding as it should, by making an application for a bargaining order under section 229 of the FW Act.

#### 4.5 ISSUE - BARGAINING WHEN THE TIME IS NOT RIGHT

The experience of many members of the ARA is that under the current enterprise bargaining regime, the timing of when bargaining commences is often at the whim of the union bargaining representatives and not at a time that may operationally suit the business.

ARA recognises that the FW Act is designed to provide balance to the respective bargaining power of the parties during negotiations. However, on the issue of whether a party can be forced to commence bargaining, the employers are in a significantly weaker position.

In particular:

- (a) An employer can be forced to bargain at any time when union/employee bargaining representatives apply for majority support determinations to commence bargaining (section 236 of the FW Act). Majority support determinations (like scope orders) are a new area of regulation under the FW Act.
- (b) On the other hand, there is no corresponding mechanism under the FW Act that applies when an employer may wish to proactively commence bargaining with union/employee bargaining representatives in a meaningful way to attempt to reach genuine agreement on proposed new enterprise agreement terms while an in-term enterprise agreement is in operation.
- (c) If an employer is forced to bargain or volunteers to bargain to avoid the prospect of a majority support determination, there is no option for the employer to suspend its participation in the bargaining process even if the negotiations are not fruitful. This is because of the good faith bargaining requirements under the FW Act.

Bargaining when the time is not right can lead to adverse outcomes such as expensive protracted bargaining processes, protected industrial action (after the nominal term of the in-term enterprise agreement has expired) and undesirable bargaining outcomes such as enterprise agreements that contain terms that do not promote productivity.

Such outcomes are not consistent with a stated objective of the FW Act of 'achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action' (section 3(f) of the FW Act).

#### 4.6 CASE STUDY: THE TIMING OF BARGAINING – METRO'S EXPERIENCE

In January 2012, Metro commenced bargaining in relation to 3 enterprise agreements to cover large areas of the Metro business including Rail Operations, Infrastructure and

Rolling Stock. The enterprise agreements in place at the time covering these workers were transferable instruments due to expire on 30 June 2012.

After months of regular negotiations, mostly weekly, little to no progress had been made in relation to any areas of agreement. It was not until after the nominal expiry date of the agreement had passed, and when employees were able to engage in protected industrial action that discussions progressed in any real earnest, with final agreement not being reached until August, October and November of 2012 respectively.

Consequently, there were 6 months of negotiations (January to June) when a significantly shorter period of time could have been spent negotiating if there were mechanisms available to either compel bargaining representatives to bargain or for an employer to cease participating in bargaining because there was no progress while there was an in-term agreement in place. This consumed significant amounts of time of senior managers of Metro.

Under the FW Act, the only possible mechanism available to assist Metro progress the bargaining once it commenced would have been to make an application for a bargaining order, which could have only been sought at a time no earlier than 90 days before the cessation of the nominal expiry date of each transferable instrument (section 229(3) of the FW Act).

#### 4.7 PROPOSAL FOR REVIEW - COMPELLING BARGAINING TO OCCUR

The ARA submits that the Productivity Commission in its review should consider:

- (a) the impact on bargaining processes and outcomes when employers are made to bargain when they are not ready to do so; and
- (b) whether a balanced framework can be put in place to provide employers with avenues to have time to prepare for bargaining and allowing it to commence at a time that is in the interests of the employer and employees.

#### 4.8 ISSUE – MAKING DEMANDS IS NOT BARGAINING IN GOOD FAITH

One of the requirements of good faith bargaining under section 228 of the FW Act that a bargaining representative must meet is:

*giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals.*

Section 228 of the FW Act does not, however, expressly require that the proposals provided at first instance by a bargaining representative be accompanied with reasons for those proposals. Any such requirement would be based on an interpretation of the requirement to disclose 'all relevant information', which so far has not been tested in this way.

The end result is often that bargaining representatives for employees hand over of a 'wish list' that is expansive and does not explain the basis for the claims that are being made.

Further, the fact of the claims having been made can later be relevant to the granting of a protected action ballot order as the Tribunal will take into account whether a party has been 'genuinely trying to reach agreement'. Relevantly, in the decision of the Full Bench of the Tribunal in the matter of *Total Marine Services Pty Limited v Maritime Union of Australia* [2009] 189 IR 407, the Full Bench stated:

[32] ....*At the very least one would normally expect an applicant to be able to demonstrate that it has clearly articulated the major items it is seeking for inclusion in the agreement, and to have provided a considered response to any demands made by the other side...*

Given that a consequence of not acceding or capitulating to claims made can be protected industrial action, the more important it would seem that such claims are well founded and supported when initially made.



## 4.9 CASE STUDY – BROOKFIELD RAIL

In its 2012 negotiations, Brookfield Rail was presented with 28 different claims/proposals which included, for example:

- increasing the annual leave entitlement from 4 to 5 weeks;
- increasing the superannuation guarantee to 12% from the commencement of the new EA;
- changing working arrangements to a 9-day fortnight; and
- increasing overtime penalty rates.

All of the example proposals listed above were presented without any apparent consideration of, or explanation by the bargaining representatives, of the financial and operational impact of such changes on the business, or suggestions as to how these could be mitigated or offset or what productivity improvements may be provided in return. Rather, the onus was on Brookfield Rail to present a substantiated case as to why it felt these may not be in the interests of the business and/or be feasible.

## 4.10 PROPOSAL FOR REVIEW AND CHANGE – CONTENT OF CLAIMS

ARA members understand that employer bargaining representatives will tend to have more access to data, information and overall operational insight than many employee bargaining representatives (union and non-union).

However, all good faith bargaining should be on the understanding that it is a give and take process for both parties, that private industry needs to be commercially aware and prepared for the future and that productivity should always be a consideration, particularly when having to consider increases in costs.

ARA submits that the good faith bargaining requirements need to be more clear that making demands without any substance is not good faith bargaining. In this regard, a step in the right direction would be to require bargaining representatives at the time of submitting the 'log of claims' to:

- (a) address why the claims are **collectively** beneficial to all or a large proportion of those employees to be covered by the proposed enterprise agreement;
- (b) explain what they believe to be the impact on business operations of the proposal (i.e. cost/ operational coverage/ staffing/ working arrangement implications);
- (c) explain how they would propose to mitigate or offset that impact (i.e. through productivity measures or reducing costs in other areas).

The ARA members recognise that the amendments proposed by the *Fair Work Amendment (Bargaining Process) Bill 2014 (Amendment Bill)*, will go some way in addressing the concerns it has raised above. Specifically:

- (a) Section 443(1A) of Amendment Bill is intended to ensure the Tribunal's focus when granting a protected action ballot order is on the conduct of the applicant for that order, including if they have communicated the major aspects of their claims. However, a technical amendment to provide that the claims have been **clearly** articulated would improve this proposed new provision.
- (b) Section 443(2) prohibits the making of a protected action ballot order if the FWC is satisfied that applicant's claims are '*manifestly excessive*', or would '*have a significant adverse impact on productivity*'. The requirement that there be a 'significant' impact on productivity may, however, be difficult to prove at the time of the protected action ballot order application. As such, a more moderate approach would be that the impact is 'substantial or significant' or '*likely to be a substantial or significant impact*'.

## 5 THE BARGAINING FRAMEWORK – BARGAINING REPRESENTATIVES

### 5.1 ISSUE – THE NUMBER OF POTENTIAL BARGAINING REPRESENTATIVES

Bargaining efficiently for an enterprise agreement can rarely occur in circumstances where an employee can nominate any person as their bargaining representative and in the absence of a nomination the default bargaining representative is each union that employees covered by the proposed enterprise agreement are a member of and which have standing to represent the industrial interests of the employees (section 176 of the FW Act).

Under section 176 of the FW Act, the automatic bargaining representatives for a proposed enterprise agreement are the employer and a union that has a member who will be covered by the proposed agreement (and who is entitled to represent that member). However, any employee, even if entitled to be represented by the union, can elect to appoint another person to be their bargaining representative, including nominating themselves.

The inevitable result is that there can be multiple parties that an employer must recognise and bargain with to ensure it complies with the good faith bargaining requirements under section 228 of the FW Act. The only qualification to this is if the employer has grounds to make an application for a good faith bargaining order on the basis that the bargaining process was not proceeding efficiently or fairly (sections 229 and 230 of the FW Act) and such an application were successful in limiting the number of bargaining representatives the employer was to deal with.

Additionally, an unintended but not unexpected consequence of allowing for multiple bargaining representatives, which may include individual employees as their own representative, is that employee (non-union) representatives may be more prone to bargaining to a personal agenda rather than presenting collective views.

## 5.2 CASE STUDY – BROOKFIELD’S EXPERIENCE

In its negotiations for a new enterprise agreement in 2012, Brookfield Rail received nominations for 10 employees from a workforce total of 76 located across metropolitan Perth and regional Western Australia (i.e. 13%) to be the bargaining representatives for a number of employees.

The employer asked if all those nominated could consider whether a smaller number could effectively represent the views of the workforce to minimise disruption to business operations, which was accommodated (down to 8 = 10.5%). Despite this, the numbers at the bargaining table were:

- (a) 1 x bargaining representative from the Australian Rail Tram and Bus Industry Union (**RTBU**);
- (b) 1 x bargaining representative from CEPU;
- (c) 3 x Company bargaining representatives;
- (d) 3 x HR facilitators;
- (e) 1 x bargaining representative for 5 staff engaged in Communications classifications;
- (f) 4 x bargaining representative for 25 staff engaged as Signal Maintainers;
- (g) 2 x bargaining representative for 31 staff engaged as Signal Technicians (4 originally nominated); and
- (h) 1 x bargaining representative for 20 staff engaged as PerWay Patrollers.

The employer found that the number of bargaining representatives was not only a challenge to manage from a business operational impact, but also increased the time needed to go through the negotiation process (presenting 28 different claims between them, not including the proposals presented by the employer).

While the employer will consider in future how it can respond to the above situation to minimise disruption to the business (for example, refining how and when meetings are

held), it will be inevitable that there will be disruption to business operations in circumstances where there are multiple employee bargaining representatives. This is particularly unavoidable given the 24/7 nature of rail operations and that many employees have 'on call' work arrangements.

### 5.3 PROPOSAL FOR CHANGE – BARGAINING REPRESENTATIVE

ARA members consider that additional mechanisms are required in the workplace relations bargaining framework to allow the number of bargaining representatives to be limited so as to ensure that representatives are focused on understanding and representing collective views.

Fewer bargaining representatives would also minimise the impact on business operations when participating in enterprise bargaining processes and assist with a more efficient bargaining process.

### 5.4 ISSUE - IDENTIFICATION OF UNION MEMBERS

The FW Act does not require a union to identify which employees it represents in bargaining negotiations. In contrast, an employee that wishes to nominate his or her own bargaining representative must necessarily identify who that representative is and then in turn, who they are. This can create an imbalance to bargaining and difficulties for the employer when managing and responding to industrial action.

Section 176(1) of the FW Act allows an employee organisation (union) be the default bargaining representative for members who will be covered by a proposed enterprise agreement. There is no requirement under the FW Act for a union to declare either how many members will be covered by the proposed agreement or to identify who the members are.

By contrast, an affected employee who chooses not to be represented by a union (either through not being a member of a relevant union, or through revoking their union's status as bargaining representative), must necessarily identify himself or herself as being represented by a particular representative.

This difference in approach creates a number of issues:

- (a) **Bargaining imbalance:** Where an employee, or group of employees nominates a bargaining representative, the other bargaining representatives are aware, at least in numerical terms, of the bargaining strength of the bargaining representative. Union bargaining representatives, on the other hand, can conceal the extent of their workforce backing. They might be representing one employee, or one hundred employees, but are not obliged to reveal their bargaining power giving them an advantage over employer and employee-nominated representatives.
- (b) **Inherent difficulties in developing contingency planning when there is industrial action:** Under section 437 of the FW Act a bargaining representative of an employee may apply for a protected action ballot order. Where the employee bargaining representative making the application is appointed under section 176(1)(c) of the FW Act the employer is aware of the identities of the employees who are covered by the protected action ballot order, and, if industrial action is taken, is aware of which employees are entitled to take (and are likely to participate in) protected industrial action.

On the other hand, if an application is made under section 437 of the FW Act by a union bargaining representative, the identity of the employees covered by the protected action ballot order is not known to the employer. The employer is made aware, on the declaration of the ballot, of how many of its employees are represented by the union. But where this number is less than 100% of employees covered by the agreement, or where more than one union is covered by a protected action ballot order, the identification of those employees entitled to take protected industrial action is severely diminished.

The Tribunal has recognised that a notice of intended industrial action should contain detail of the nature of the intended action sufficient to '...put the employer in a position to make reasonable preparations to deal with the effect of the industrial action' (*Telstra Corporation Limited v CEPU [2009] FWA 1698 (Telstra)*).

In finding the notice of intended industrial action to be inadequate, the Full Bench in Telstra said:

*In order to prepare for all eventualities contemplated by the notice in this case, Telstra would have to plan on the basis that every CEPU member would be on strike for the whole of the day in question. Yet that is not what the notice says. Given the nature of Telstra's operations some greater specification would be required. Indeed, on one view the notice conceals more than it reveals about the industrial action that will in fact occur (at [16]).*

The concealment of the identity of employees covered by a union bargaining representative protected action ballot order places the employer in a similar position to the employer in Telstra; the employer cannot tell which employees are entitled to take protected industrial action and which are not, and so therefore must plan on the basis that all employees will be taking action.

This is particularly true where the employees to be covered by an agreement are located at geographically distinct locations (such as is common in the rail industry). While the employer might know that only (say) 80% of employees overall are covered by a protected action ballot order, the employer does not know the distribution of these employees. Some locations to be affected by industrial action might have 100% union membership, while another might have 5% membership, yet in each case the employer must plan to mitigate the impact of industrial action on the assumption that all employees will be participating.

There is a history of unions seeking to conceal the identity of members on the basis that employers might attempt to intimidate or victimise those employees who are union members. However, section 346 of the FW Act provides protection for employees (and others) in respect of union affiliation and participation in industrial activity.

It would be curious if the provisions of the FW Act were intended to be adequate protection for employees who nominate bargaining representatives other than unions, but inadequate to protect those employees who chose to be represented in bargaining by unions.

## 5.5 CASE STUDY - AUSTRALIA WESTERN RAILROAD

In 2011 Australia Western Railroad Pty Ltd (**AWR**) (a subsidiary of Aurizon (or QR National as it was then)) was engaged in bargaining for an enterprise agreement to cover locomotive drivers and operational maintainers (shunters) employed at 11 depots in Western Australia.

The agreement would cover 589 employees employed in the classifications covered by the agreement. The only employee bargaining representative was the RTBU which was a default bargaining representative. No employees nominated a bargaining representative. In March 2011, the RTBU applied for and was granted a protected action ballot order. The voter roll for the ballot indicated that the union had 444 members who would be covered by the agreement.

After giving notices of intended industrial action at three depots the RTBU issued a communique which stated in part:

*The proposed stoppages follow on from action taken at Kwinana and Narngulu depots. All employees who are covered in the classifications in your current Agreement are protected by law to do so.*

And in response to advice to employees from AWR that only union members could take protected action the RTBU countered:

*Quite clearly [AWR] do not know what is occurring or what has occurred, or the Fair Work Act. Those eligible to take protected action are Union Members or employees who were not union members but wanted those around the negotiating table to represent them for bargaining.*

In the face of union attempts to broaden the impact of its proposed industrial action by enlisting the support of employees not eligible to take protected industrial action, AWR was unable to identify which employees at each affected depot were entitled to take protected industrial action and thus was further prevented from taking 'reasonable preparations to deal with the effect of the industrial action'.



## 5.6 CASE STUDY – AURIZON OPERATIONS LIMITED

In Queensland, Aurizon Operations Limited is engaged in bargaining for an agreement to cover locomotive drivers. There are two default union bargaining representatives RTBU and the Australian Federated Union of Locomotive Employees (**AFULE**). Each union has, separately, been granted a protected action ballot order.

Employees to be covered by the agreement are based at a number of depots throughout Queensland. Aurizon Operations Limited received notices of intended industrial action in the form of 24 hour stoppages of work from both unions. The RTBU action was to take place at 4 depots. The AFULE action was to take place at 6 depots (including the 4 affected by the RTBU action) two days later. The proposed protected industrial action would disrupt train services and severely impact service to customers.

Because Aurizon did not have details of which employees were entitled to take protected industrial action in accordance with which notice (and, consequently, which employees had no entitlement to take protected industrial action because they were not members of either union) it was unable to take 'reasonable preparations to deal with the effect of the industrial action' and effectively had to assume that at any depot, at least on the first occasion of any action, all employees might engage in the industrial action.

## 5.7 ARA POSITION AND PROPOSAL FOR CHANGE

The concealment of the identity of those employees to whom a protected action ballot order applies where the bargaining representative is a union by default, has the effect of extending the mischief caused by the industrial action beyond that which can be effected by a bargaining representative that is nominated by employees.

In the example of AWR, the issue could have been resolved if there had been provisions in the FW Act similar to that in section 438 of the former *Workplace Relations Act 1996* (Cth), which rendered unprotected any industrial action engaged in concert with one or more unprotected persons, or intended to be engaged in by other than protected persons. However, the enforcement of such a provision is problematic where the identity of protected and unprotected persons is not known because of the concealment of the identity of union members.

The ARA submits that the Productivity Commission should consider in its review the problems that arise when the identity of union members is not known in the context of protected action ballot orders and protected industrial action.

## 6 ENTERPRISE AGREEMENT CONTENT

### 6.1 ISSUE - RESTRICTIONS ON AGREEMENT CONTENT AND THE REQUIREMENT TO CONSIDER PRODUCTIVITY IMPROVEMENTS IN AGREEMENT CONTENT

The threat of industrial action in the rail sector often means agreements are made which contain terms that are uncommercial and, in some instances, no more than an 'agreement to agree' on key productivity matters. The current enterprise bargaining framework does not prohibit such terms being agreed.

Issues Paper 3, states:

*The Commission seeks feedback on practical options in this area, and why they are needed within the current bargaining process. In particular, why are there not already sufficient commercial incentives (and competitive pressures) for parties to improve productivity, either as a commitment under an enterprise agreement or during the normal operation of the enterprise?*

*The Commission also requests views about the effectiveness of existing productivity clauses, and whether there are any features of the industries, unions and firms that explain why some forge such agreements and others do not.*

In response to these matters, the ARA submits that many of its members have external stakeholder influences and pressures which impact on their right to manage and to take action available to them under the FW Act (namely employer response industrial action) to continue to advance their positions in enterprise bargaining negotiations.

When these members are faced with protected industrial action, the limited recourse available under the FW Act for the employer can make the environment challenging for ARA members leaving them with the difficult issue of whether to accede to demands or

continue to refuse them and face future industrial action. The end result can be agreement on provisions which are no more than 'agreements to agree'. These terms can be in respect of key areas of productivity.

Under ordinary principles of contract law, a term that is no more than an 'agreement to agree' may well be void for uncertainty. However, in the enterprise bargaining framework, such provisions are permitted even though they can inhibit productivity.

Similarly, employers that have legacy provisions in past industrial instruments from the public sector (as is the case for many ARA members) often have terms in enterprise agreements that constrain the ability of the employer to manage staff levels appropriate to the economic climate and the circumstances of the business. Notably, provisions which constrain the ability of the employer to implement a compulsory redundancy program even if redundancies are required. Such provisions in the private sector are uncompetitive and can have a negative impact on the recruitment of employees on a permanent basis.

## 6.2 CASE STUDY – SCHEDULE 1 OF THE METRO TRAINS INFRASTRUCTURE ENTERPRISE AGREEMENT 2012 – AN AGREEMENT TO AGREE

The *Metro Trains Melbourne Infrastructure Enterprise Agreement 2012* at Schedule One deals with work arrangements and rosters. These are key productivity matters. The Schedule provides:

*Metro and Unions will endeavour through this process, to have agreed rosters finalised by 21 December 2012, to commence in January 2013 to support timetable changes and business requirements....*

The *Metro Trains Melbourne Infrastructure Enterprise Agreement 2012* commenced operation on 31 October 2012. Rosters were not agreed and implemented until approximately 12 months later. This followed long periods of negotiation and disputation about the roster and work arrangements, which could have been avoided if the enterprise agreement contained terms on work and roster arrangements which were certain.

## 6.3 ISSUE - ROSTERING ARRANGEMENTS

A key issue for the rail sector is rostering and the ability to be able to create and implement rosters in response to any change in demand for services. The minimum requirement under the FW Act that enterprise agreements contain terms mandating consultation on changes to rosters inhibits the flexibility of the employer and does not promote productivity.

A common issue faced by the rail sector is that it is commonplace in the sector for there to be terms within industrial instruments which require at best, changes to rosters to occur only if reasonable notice of the changes is given; or more problematically, changes to rosters to occur only if they are agreed by employees (and their unions). The problems which can arise from such terms and the impact they can have on operating a business efficiently and cost effectively is illustrated in the case study set out in section 3.2.

From 1 January 2014, the FW Act has prescribed under section 205 of the FW Act that enterprise agreements include a mandatory term about consultation on changes to employees' regular rosters or ordinary hours of work. If such a term is not included, the model consultation clause prescribed under regulation 2.09 and Schedule 2.3 of the *Fair Work Regulations 2009* is deemed to apply. While the model consultation term may appear balanced and its purported intention is to promote discussion about the personal impact a change of roster can have on an employee, it is only a suggested minimum term and, in all the circumstances, is not a provision which promotes productivity or flexibility for businesses.

The concern of ARA members is that the requirement to include a term about consultation on roster changes provides leverage for employee bargaining representatives to negotiate terms that further entrench the right of employees and unions to agree on any changes to rosters before they are implemented. The requirement for consultation also provides an opportunity for any proposed changes to agreements to be stalled by the invoking of dispute resolution procedures if employees or their representatives take the view that consultation processes have not been strictly followed.

If the mechanism for finally resolving a dispute about changes to rosters is through arbitration by the Tribunal, this can take considerable time and resources, with no certain outcome for an employer. It also means that a decision about how an employer can manage the rosters for its workforce for the benefit of the profitability of the business and service delivery is determined by a third party.

## 6.4 PROPOSED WAY FORWARD

### Restrictions on agreements to 'agree' and compulsory redundancy provisions

As set out in section 4.10, the Amendment Bill, if passed, may go some way to preventing bargaining outcomes where parties do no more than 'agree to agree' on productivity terms.

However, ARA submits that the Productivity Commission should consider if further reforms are required that prohibit the inclusion of terms in enterprise agreements that:

- (a) are merely an agreement to agree and which inhibit productivity, and
- (b) make unlawful the implementation of compulsory redundancy programs to meet the needs of the business.

The ARA notes that with respect to these matters, under the federal *Building and Construction Industry (Fair and Lawful Building Sites) Code 2014*, a framework for such a prohibition exists. The Code provides that an entity covered by the Code is not permitted to be covered by an enterprise agreement that contains in it terms that: *imposes or purport to impose limits on the rights of the code covered entity to manage its business or to improve productivity.*

### Roster arrangements and the model consultation term

The ARA considers that there are sufficient safeguards that exist for employees under anti-discrimination legislation, the National Employment Standards within the FW Act, and work health safety legislation that inform the approach an employer must take to ensure its roster arrangements are lawful, safe and fair to employees. In such circumstances, the ARA proposes that:

- (a) the requirement to include a model consultation term on changes to rosters is not a necessary requirement and can be removed without any material impact on employees;
- (b) if such term is to exist, the ARA proposes that section 205 of the FW Act is amended to prohibit a term that requires that there be agreement on roster changes before they are implemented; or
- (c) if such a term is to exist, a mechanism is included in the FW Act that requires the Tribunal to deal with disputes about changes to roster arrangements on an expedited basis. This is to limit the financial impact the delay such proceedings can have on the financial viability of an employer's business.

## 7 HIGH INCOME THRESHOLD FOR 'HIGH INCOME EMPLOYEES'

### 7.1 ISSUE – METHOD OF INDEXING THE HIGH INCOME THRESHOLD AND EXTENT OF AWARD APPLICATION

The method of determining the high income threshold in line with Average Weekly Ordinary Time Earnings and not the percentage rate of award rate increases can have an adverse impact on flexibility. This is particularly the case in industries such as rail where the coverage of the modern award (the *Rail Industry Award 2010*) applies to highly paid classifications.

The FW Act provides at section 47(2) that a modern award does not apply to an employee (or to an employer, or employee organisation, in relation to the employee) at a time when the employee is a high income employee. Section 329 then defines the meaning of a high income employee for the purpose of section 47(2) of the FW Act.

In simple terms, a high income employee is an employee whose guarantee of annual earnings exceeds the high income threshold.

The high income threshold is the amount prescribed by, or worked out in the manner prescribed by, the *Fair Work Regulations 2009* (**Regulations**).

Since its inception in the Forward with Fairness Policy Implementation Plan (**Policy**) released by the Australian Labor Party in August 2007, the high income threshold has been adjusted with reference to Average Weekly Ordinary Time Earnings (**AWOTE**), seasonally adjusted, for full-time adult employees in Australia (see Regulation 2.13). In August 2007, the amount in the Policy was \$100,000.

On the commencement of the FW Act from 1 July 2009 the amount of the high income threshold was \$108,300. This amount was set through indexing the initial \$100,000 from 27 August 2007 in line with the Regulations (see Explanatory Statement, Select Legislative Instrument 2009 No 112, paras 83-87) and applied to the application of modern awards from 1 January 2010.

The stated purpose of the exclusion of award application above the high income threshold was to allow employees earning above the high income threshold:

*to be free to agree their own pay and conditions without reference to awards [which] will provide greater flexibility for common law agreements which have previously been required to comply with all award provisions, no matter how highly paid the employee (Policy page 9).*

However, the indexing of the high income threshold in line with AWOTE has meant that employers engaging employees with annual earnings higher than, but close to the high income threshold must increase earnings annually by at least the annual change in AWOTE in order to retain the flexibility of the employer and employee agreeing conditions not prescribed by the relevant award. This is particularly an issue for employers in the rail industry where the coverage of the *Rail Industry Award 2010* extends to reasonably highly paid classifications and can have adverse impact on employers' remuneration policy.

While it is true that some awards, including the Rail Industry Award 2010, allow for the payment of annualised salaries, and in some cases exempt higher income employees from overtime payments, many awards require annualised salaries to be reviewed at least yearly to ensure that the amount paid is at least as much as would have been payable were all award conditions applied. This requires ongoing recording of actual hours worked and calculation of penalties and allowances that would have been paid

under the award, and does not remove restrictions that might apply to when work is performed or the number of consecutive shifts that may be worked etc. The increased administrative burden and potential restrictions on how work is performed severely reduces the flexibility available under such arrangements.

Individual flexibility arrangements available under awards provide no real solution given that they also require an ongoing assessment against the Better Off Overall Test and can be terminated on 13 weeks' notice by an employee, therefore limiting the ability of the employer to have certainty about the terms and conditions for its high income employees.

## 7.2 EXPLANATION OF THE ISSUE- WHY CALCULATING THE THRESHOLD BASED ON THE AWOTE IS PROBLEMATIC

AWOTE is a measure of the level of average gross weekly earnings associated with employees in Australia<sup>4</sup> and is affected by changes in the composition of the labour force more than by changes to rates of pay. For example, if four front-line supervisors were together in a room the AWOTE of the group might be \$100,000. If they are then joined by a CEO the AWOTE of the group (now 5) in the room would rise dramatically, but no one would have received a pay increase.

Since 2009, increases in the high income threshold have been, in all but one year, higher than annual increases in the Wage Price Index<sup>5</sup>, which is generally considered to be the more relevant indicator for underlying wage growth<sup>6</sup>, and considerably higher than the increases to award rates of pay granted by the Tribunal under the Annual Wage Review conducted pursuant to the FW Act.

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<sup>4</sup> Labour Statistics: Concepts Sources and Methods, 2013 Australian Bureau of Statistics Cat 6102.0.55.001 at 29.2

<sup>5</sup> Wage Price Index, Australia, Australian Bureau of Statistics Cat 6345.0

<sup>6</sup> See for example Australian Fair Pay Commission, Wage-Setting Decision and Reasons for Decision, July 2008 p11.



**Table 1** below shows the difference in the increases in high income threshold, wage price index<sup>7</sup> and award wages:

	2010	2011	2012	2013	2014
<b>High Income Threshold</b>	5.08%	3.78%	4.40%	4.87%	2.86%
<b>Wage Price Index</b>	3.1%	3.9%	3.5%	3.2%	2.6%
<b>Award Wages</b>	\$26pw <sup>8</sup>	3.4%	2.9%	2.6%	3.0%

Table 1

An employer engaging an award covered employee on 1 January 2010 at a rate of pay marginally above the high income threshold would as at 1 July 2014 have had to increase the employee's wages by 22.81% to maintain annual earnings above the high income threshold and continue to avoid award application. In the same period the Wage Price Index moved 17.39% and award wages 17.04%<sup>9</sup>.

In a system where award scope, award conditions and increases to award minimum rates of pay are set by the Tribunal, there is little logic in having award application determined by factors outside the Tribunal's control – particularly as the AWOTE mechanism has the effect of inflating wage increases and limiting the flexibility it was designed to create.

Table 2 below compares the rate of the high income threshold under the current indexing arrangement (AWOTE) with a high income threshold based on award increases

<sup>7</sup> Calculated as the difference between the March quarters figure in the relevant year and the March quarter figure in the previous year.

<sup>8</sup> A flat rate increase of \$26.00 per week was applied to all award wages from 1 July 2010.

<sup>9</sup> The increase in award wages has been calculated as a percentage increase at the C10 rate in the Manufacturing and Associated Industries and Occupations Award 2010. This methodology incorporates the flat rate increase in 2010 as a 4.1% wage increase.

taking the common starting point of \$100,000 on introduction of the Policy (27 August 2007).

	27.08.07	1.09.07	1.09.08	1.07.09	1.07.10	1.07.11	1.07.12	1.07.13	1.07.14
HIT (AWOTE)	\$100,000			\$108,300	\$113,800	\$118,100	\$123,300	\$129,300	\$133,00
Award increases		\$5.30 pw <sup>(a)</sup>	\$21.66pw <sup>(b)</sup>	-	\$26.00pw <sup>(c)</sup>	3.4%	2.9%	2.6%	3.0%
HIT (Award increases.)		\$100,300 <sup>(d)</sup>	\$101,400	\$101,400	\$102,800	\$106,300	\$109,400	\$112,200	\$115,600

Table 2

**NOTES:**

(a) Australian Fair Pay Commission Wage-Setting Decision, July 2007; \$5.30 per week for all adult pay scales that provide for a basic periodic rate of pay above \$700.00 per week. Annual increase calculated by multiplying weekly rate increase by 52.1667.

(b) Australian Fair Pay Commission Wage-Setting Decision, July 2008; increase of 'approximately \$21.66' per week for all adult Pay Scales. Annual increase calculated by multiplying weekly rate increase by 52.1667.

(c) Fair Work Australia Annual Wage Review, June 2010; Increase of \$26.00 per week to all modern award minimum weekly wages. Annual increase calculated by multiplying weekly rate increase by 52.1667.

(d) Rounded to nearest \$100.

Indexing the high income threshold on award minimum rates increases, rather than AWOTE, results in a reduction of \$17,400 in the high income threshold as at 1 July 2014.

## 7.3 PROPOSAL FOR CHANGE

The ARA members are not advocating for a reduction in employee wages or minimum terms and conditions. However, indexing the high income threshold for the purpose of the high income guarantee under section 329 of the FW Act in accordance with modern award minimum rates increases is, in the ARA's view, a more appropriate measure and

would better achieve the intended purpose of setting a high income threshold. The ARA submits that this approach would:

- (a) provide a mechanism for determining the upper limit of modern award application that is within the control of the Tribunal;
- (b) provide an escalation to the high income threshold and modern award coverage that is aligned to real wage growth;
- (c) provide greater certainty in the application of flexible award-free working arrangements;
- (d) reduce the potential for award-free employees who receive an income comparable to the high income threshold to come under award application due to changes in the composition of the labour force;
- (e) reduce the need for employers to provide above average and market pay increases to award free employees to maintain their award-free status;
- (f) reduce the risk of non-compliance with award conditions due to timing of enterprise remuneration cycles;
- (g) reduce the potential administrative burden on employers.

## Annexure A - Metro transferable instruments - legacy provisions

Transferring instrument	Legacy provisions
<b>Connex EA</b>	<ul style="list-style-type: none"> <li>Redundancy provisions that were more generous for Connex employees with continuous service who were previously employed by the state's Public Transport Corporation.</li> <li>Redundancy provisions that were more generous for Connex employees who were in the employment of three prior private rail franchise operators.</li> <li>Salary maintenance provisions that were more generous for employees engaged prior to 1 July 2004.</li> <li>An entitlement for employees to an Employee Free Travel Authority that was not able to be issued by Metro because this could only be authorised by a State government department.</li> <li>An entitlement for retired employees to a Retired Employee Free Travel Authority that was not able to be issued by Metro because this could only be authorised by a State government department.</li> <li>More than forty operating or proposed productivity initiatives that were either highly prescriptive and/or required union agreement before they could be implemented. One example of this was a commitment by both parties to implement and maintain the <i>'Fault Management Protocol and train operating improvements and to jointly review performance to ensure that agreed operational capability objectives were achieved and maintained'</i>. Metro initiated consultation on improving the Fault Management Protocol in May 2011 and it took until December 2012 to finalise that matter after numerous consultation meetings, conferences in the Tribunal and a joint review that was chaired by a former Commissioner of the Tribunal.</li> <li>Pay rate schedules that included undefined public sector classifications for "Senior Officers" with base rates of greater than \$120,000 per year.</li> </ul>

Transferring instrument	Legacy provisions
<b>MainCo EA</b>	<ul style="list-style-type: none"> <li>▪ The incorporation of terms and conditions of 12 named awards and agreements as they applied at 1 March 2006.</li> <li>▪ Five additional bonus days' leave provided to employees arising from successful achievement of MainCo's Operating Performance Regime. A benefit that had no relevance to the Metro business.</li> <li>▪ A grievance procedure that provided employees access to 'a system of review when there is a belief an employee has been treated unfairly'. Issues dealt with under the procedure were those that were 'non-industrial and personal in nature'. If and employees issue could not be resolved under this process they had recourse to the Dispute Settlement Procedure.</li> <li>▪ A Dispute Settlement Procedure that included a step that allowed the parties to refer the matter to specified individuals (who were named in person in the procedure) for conciliation.</li> <li>▪ A Performance Management Process that included four stages prior to dismissal, other than in the cases of serious misconduct where either a Final Warning or Summary Dismissal could apply.</li> <li>▪ An entitlement for employees to an Employee Free Travel Authority that was not able to be issued by the company because it was done by state government department.</li> <li>▪ An entitlement for retired employees to a Retired Employee Free Travel Authority that was not able to be issued by the company because it was done so by state government department.</li> <li>▪ Redundancy provisions that were more generous for MainCo employees who were in the employment of the previous franchise operators.</li> <li>▪ Redundancy provisions that were more generous for MainCo employees with continuous service who were previously employed by the state's Public Transport Corporation.</li> <li>▪ A separate agreement as annexure to the enterprise agreement that contained a number of terms and conditions different to other MainCo employees for Metrol Signals Section employees as well as the incorporation of a 1993 Agreement made by the Association of Railway Professional Officers of Australia and the</li> </ul>

Transferring instrument	Legacy provisions
	<p>Public Transport Corporation of Victoria in respect of a '<i>revised method of working Metrol staff responsible for the maintenance of the Metrol Computer System</i>' (including Metrol Signals Section employee rosters).</p> <ul style="list-style-type: none"> <li>Pay rate schedules that included undefined public sector classifications for both "Senior and Executive Officers" with base rates greater than \$160,000 per year.</li> </ul>
<b>UMTL EA</b>	<ul style="list-style-type: none"> <li>The incorporation of terms and conditions of 12 named awards and agreements as they applied at 1 March 2006.</li> <li>Five additional bonus days' leave provided to employees arising from UMTL's Operating Performance Regime.</li> <li>Construction Site 'Jump Up' provisions, even though employees never worked on construction sites.</li> <li>Grievance and Dispute Resolution Procedures the same as the procedure under the MainCo EA.</li> <li>A Performance Management Process that included three stages prior to dismissal, other than in the cases of serious misconduct where either a Final Warning or Summary Dismissal could apply.</li> <li>An entitlement for employees and retired employees a Free Travel Authority the same as under the MainCo EA that could not be issued by Metro as these benefits could only be authorised by a State government department. .</li> <li>Redundancy provisions that were more generous for UMTL employees who were in the employment of the previous franchise operator.</li> <li>Redundancy provisions that were more generous for UMTL employees with continuous service who were previously employed by the state's Public Transport Corporation.</li> <li>Pay rate schedules that included undefined public sector classifications for "Senior and Executive Officers" with base rates of greater than \$120,000 per year</li> <li>Incorporation by attachment of an Overtime Shift Payment agreement for various categories of employees at nominated</li> </ul>

Transferring instrument	Legacy provisions
	<p>maintenance depots reached with the Alstom company.</p> <ul style="list-style-type: none"> <li>▪ An attachment that specified a list of tools that were to be provided to each classification of maintenance employee.</li> </ul>

## Annexure B - ARTC's scope order case summaries

Case	Summary
<b>ARTC Enterprise Agreement 2010 (B2010/2912 &amp; B2012/2913)</b>	<ul style="list-style-type: none"> <li>ARTC commenced negotiations to replace the ARTC Workplace Agreement 2006 in October 2009. This agreement covered all ARTC employees based outside of NSW, and excluded infrastructure maintenance employees based in South Australia, Victoria and Western Australia.</li> <li>ARTC bargained with the RTBU SA/NT Branch and the Australian Municipal, Administrative, Clerical and Services Union SA Branch (<b>ASU</b>), and a bargaining representative nominated by staff, as provided for under the FW Act.</li> <li>The RTBU and ASU tabled a log of claims to ARTC on 12 October 2009 and the parties met several times to consider each of the claims throughout the meetings held. The other bargaining representative requested maintaining the current provisions of the ARTC Workplace Agreement 2006.</li> <li>In March 2010, ARTC provided a draft Agreement to the bargaining representatives, however there remained some outstanding issues within a group of the workforce, known as Network Controllers. To try to alleviate their concerns the organisation held sessions with the Network Controllers. These information sessions were well attended by Network Controllers and provided them with an opportunity to discuss the current issues with their managers.</li> <li>A further bargaining meeting was held on 15 April 2010 where ARTC tabled the final draft ARTC Enterprise Agreement 2010.</li> <li>During the latter stages of the negotiation process the combined Union bargaining representatives advised ARTC that they were considering taking protected industrial action. In addition after the meeting held 15 April 2010, they advised that they may seek assistance from the Tribunal in resolving their issues that they believed had not been adequately addressed.</li> <li>The draft proposed enterprise agreement was sent on 16 April 2010 to those it covered for their consideration and information sessions scheduled to explain the terms of the Agreement. ARTC had prepared an online voting system which was to be</li> </ul>



Case	Summary
	<p>activated later in the month. This process was suspended on 27 April 2010 after ARTC received correspondence from the two bargaining representatives covering the Network Controllers, the RTBU and the ASU, advising that they would be applying to the Tribunal for a scope order for a separate enterprise agreement to cover Network Controllers only.</p> <ul style="list-style-type: none"> <li>■ A significant amount of time, money and resources were required to prepare evidence, submissions and witness statements for the hearing. In addition the organisation had to suspend its planned vote, which prevented employees who were not party to the scope order application to be disadvantaged in terms of being able to determine if they were in favour of the Agreement or not. Due to their being a very limited number of scope orders dealt with by the Tribunals at that time, ARTC engaged legal counsel to assist in the complex hearing process.</li> <li>■ The main arguments that the combined unions presented to have their own Agreement included, they had previously been covered by a separate agreement prior to coming to ARTC; they have always had their own 'section' and therefore argued that a move to their own Agreement is warranted; and that the bargaining power of Network Controllers had diminished since ARTC has expanded, despite the group still being the largest proportion of employees covered by the draft Agreement. They also stated that the log of claims from the Network Controllers in the latest round of bargaining was not dealt with satisfactorily despite conceding that ARTC had bargained in good faith.</li> <li>■ ARTCs position was that the scope order should be dismissed immediately as prerequisites for the making of the application had not been met by the union bargaining representatives. ARTC also argued, as per the requirements of the FW Act, that there was not enough evidence to suggest the Network Controllers were operationally, organisationally or geographically distinct to warrant a separate agreement and that since the Network Controllers have been covered by all of the agreements in place for staff outside of NSW since 1999, the status quo should remain and the scope order should be rejected.</li> <li>■ ARTC maintained that at all times the bargaining process was conducted fairly and efficiently and that maintaining the coverage of the proposed enterprise agreement as it proposed would preserve the benefits for both employees and the business including maintaining cohesion and commonality of</li> </ul>

Case	Summary
	<p>terms and conditions for employees.</p> <ul style="list-style-type: none"> <li>In August 2010, some 10 months since bargaining had initially commenced, ARTC received advice that the scope order application had been dismissed, on the grounds that the application was made too late in the bargaining process.</li> </ul>
<b>ARTC NSW Enterprise Agreement 2012 (B2012/911)</b>	<ul style="list-style-type: none"> <li>Negotiations for a replacement agreement for the <i>ARTC (NSW) Enterprise Agreement 2009</i> commenced in March 2012. That agreement covered all employees in New South Wales, excluding non-supervisory infrastructure maintenance employees. ARTC bargained with the RTBU NSW Branch, the ASU NSW Branch, APESMA NSW Branch and the Electrical Trades Union NSW Branch (<b>ETU</b>) for the new proposed enterprise agreement.</li> <li>Several bargaining meetings were held up to April 2012. In April 2012, ARTC wrote to the combined unions regarding the scope of the proposed agreement, as in the combined log of claims the unions had essentially sought to negotiate four different agreements: one covering employees based just in the Hunter Valley; a second covering just Network Controllers; a third covering just engineering, technical, professional and administrative employees; and a final covering all the remaining supervisory infrastructure maintenance and signal electrical employees of NSW. ARTCs correspondence indicated that the organisation felt there was no substantive reason for the split nor would it facilitate a more efficient or effective bargaining process.</li> <li>Several more meetings were held, with a final meeting in late June 2012 where ARTC tabled a draft ARTC (NSW) Enterprise Agreement 2012 to the bargaining representatives.</li> <li>The draft proposed enterprise agreement was sent out via email to employees for their consideration, along with information regarding the process for voting. Employees were advised they were to be provided the opportunity to vote to approve the agreement by participating in an on-line vote that was to commence in July.</li> <li>ARTC received correspondence on 27 June 2012 from the RTBU representing the Network Controllers, advising that they have applied to the Tribunal for a scope order for a separate enterprise agreement to cover Network Controllers only. Additionally they submitted a bargaining order to the Tribunal to</li> </ul>

Case	Summary
	<p>force ARTC to cease the proposed vote while the scope order matter was dealt with. ARTC subsequently suspended the bargaining process and postponed the proposed voting period.</p> <ul style="list-style-type: none"> <li>Similar to the first case due to the complexity and few definitive scope order decisions, ARTC engaged legal representation to assist in dealing with this matter. Significant amount of time, money and resources were required to prepare and lodge evidence submissions, statements as well as the time spent at the hearing putting forward both parties cases.</li> <li>The scope order hearing occurred in July 2012 over several days. The RTBU argued that the requested scope order would promote fair and efficient bargaining in so far as they believed that it had not proceeded fairly to this point in relation to a number of Network Controller claims. They also argued that they were a minority group in the proposed agreement and therefore they could not adequately address their concerns when covered by the existing scope of the enterprise agreement. They argued Network Controllers were geographically, operationally or organisationally distinct due to their shift working pattern, worked at specific locations and their classification structure.</li> <li>The FWC ultimately determined that the Network Controllers were not a group fairly chosen, were not geographically, operationally or organisationally distinct, nor would the scope order sought promote fair and efficient bargaining. Subsequently the scope order was dismissed.</li> </ul>
<b>ARTC Enterprise Agreement 2014 (B2013/1538, B2013/1552)</b>	<ul style="list-style-type: none"> <li>Bargaining commenced in August 2013 with individual and union bargaining representatives to replace the <i>ARTC Enterprise Agreement 2010</i> and <i>Australian Rail Track Corporation Services Company Enterprise Agreement 2008</i>, with one single proposed agreement.</li> <li>ARTC bargained with the RTBU SA/NT Branch and ASU SA Branch, Australian Workers Union SA Branch (<b>AWU</b>) and two bargaining representative nominated by staff.</li> <li>The combined Unions (RTBU, ASU and AWU) bargaining representatives highlighted their concerns as to the scope of the proposed single agreement. The unions discussed having a separate agreement to cover Network Control employees and a separate agreement to cover the employees under the <i>Australian Rail Track Corporation Services Company Enterprise</i></li> </ul>

Case	Summary
	<p><i>Agreement 2008</i>, known as Signal Workers.</p> <ul style="list-style-type: none"> <li>Five meetings were held before bargaining was suspended in November 2013 following the unions advising notice of their intention to apply to the Tribunal.</li> <li>Again a significant amount of time, money and resources was required to prepare and lodge evidence submissions, statements as well as the time spent at the Tribunal putting forward both parties cases.</li> <li>A hearing on the application was held over two days in February 2014. The union parties argued that the scope of the propose agreement was so broad as to disadvantage the operationally and organisationally distinct groups of employees, as they saw the Network Controllers and Signallers being, due to differing work patterns, work locations and classification structures. They also argued that they were a minority of the employees to be covered and that their claims were not being adequately addressed. In particular they argued that since the Signal Workers had previously had their own agreement, this should remain.</li> <li>ARTC argued that it was inherently unfair and inefficient to expect that is conduct three sets of negotiations for three different Agreements with the overlapping parties regarding conditions that are common to all employees. The organisation also believed that it would have led to a divergence in common conditions in circumstances where the negotiating parties sought different changes to the same provision. Further ARTC indicated that is remained committed to negotiating in good faith for one replacement agreement that included coverage of Network Controllers and Signal Workers and discussion specific issues relevant to those groups.</li> <li>At the conclusion of the hearing, the Tribunal found in favour of ARTC and the request was denied on the basis that the Network Controllers were not found to be geographically distinct nor operationally or organisationally distinct to any significant degree; and that overall a change in scope would lead to fairer and/or more efficient bargaining when all of the circumstances and the interests of all parties taken into account</li> </ul>