Ai GROUP SUBMISSION

Australian Securities & Investments Commission Consultations

CS9 – Proposed extension in employee entitlement fund relief

23 August 2024

INTRODUCTION

The Australian Industry Group (**Ai Group**) welcomes the opportunity to make a submission on the proposal by the Australian Securities & Investments Commission (**ASIC**) to extend the relief currently provided to employee redundancy funds from the Australian Financial Services (**AFS**) licensing and managed investment provisions of the Corporations Act 2001 (Cth) (**Corporations Act**). The relief is due to expire on 1 October 2024.

ASIC's proposes remaking *ASIC Corporations (Employee redundancy funds relief) Instrument 2015/1150* and extending the relief for a period of five years.

As stated in the background information for the consultations on ASIC's website:

> ASIC considers that employee redundancy funds are likely to meet the definition of a managed investment scheme and a financial product, and that the operator of an employee redundancy fund would likely be subject to the requirements to hold an AFS licence, register the employee redundancy fund as a managed investment scheme, and comply with the managed investment provisions of the Corporations Act 2001.

Ai Group agrees that employee redundancy funds would meet the definition of a managed investment scheme and a financial product.

However, Ai Group strongly opposes ASIC's proposed five year extension of the relief from the AFS licensing and managed investment provisions of the Corporations Act, for the reasons set out in this submission.

Any extended relief should be for a period of no more than six months to give employee redundancy funds time to obtain an AFS Licence and meet the other relevant requirements of the Corporations Act.

The following statement on ASIC's consultation webpage is surprising and disappointing given that the statement is not supported by the relevant facts: "*We have assessed that the legislative instrument is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework*".

In fact, the legislative instrument is not operating effectively or efficiently, and is not a necessary or useful part of the legislative framework. The legislative instrument is allowing employee redundancy funds (which hold more than $2 billion in employee entitlements) to remain free from essential regulation and allowing some redundancy funds to continue to engage in inappropriate financial practices, as identified by three Royal Commissions.

Ai Group and its members have a substantial interest in employee redundancy funds:

- Two of the board members of the Australian Construction Industry Redundancy Trust (**ACIRT**) are nominated by Ai Group. ACIRT is one of the largest employee redundancy funds in Australia.

- Ai Group has hundreds of member companies that contribute to employee entitlement funds (including Incolink, Protect, BERT, MERT and others). The contributions typically exceed $100 per week, per employee.

- Many thousands of employees of Ai Group member companies are currently adversely impacted by the inappropriate financial practices of some employee redundancy funds (not ACIRT). These inappropriate practices are continuing as a result of the current lack of regulation of employee entitlement funds.

THE INTERIM EXTENSION OF THE RELIEF IN 2021

In September 2021, the relief provided to employee redundancy funds from the AFS licensing and managed investment provisions of the Corporations Act was only extended on an interim basis until employee redundancy funds were appropriately regulated through the *Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019* (Cth). At the time, this Bill was before Parliament and was expected to be passed in the near future with the support of Crossbench Senators.

ASIC's media release of 9 September 2021 stated:

> ### ASIC extends relief for employee redundancy funds
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> Published 9 September 2021
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> ASIC has extended the relief for employee redundancy funds from the managed investment and associated provisions of the *Corporations Act 2001* until 1 October 2024.
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> Employee redundancy funds pool contributions from employers for employee redundancy payments. They are currently exempt from the requirements to:
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> - hold an Australian financial services (AFS) licence with appropriate authorisations;
> - register the employee redundancy fund as a managed investment scheme; and
> - comply with the managed investment provisions in the *Corporations Act 2001* and other associated provisions, including those relating to product disclosure statements, ongoing disclosure requirements and the anti-hawking provisions.
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> The ASIC relief will provide certainty to affected employee redundancy funds by allowing the existing regulatory framework to continue whilst the *Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019* is before Parliament (refer Background).
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> The extension of the relief is effected by *ASIC Corporations (Amendment) Instrument 2021/0767*, which amends *ASIC Corporations (Employee redundancy funds relief) Instrument 2015/1150* to extend the relief from 1 October 2021 to 1 October 2024.
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> **Background**
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> Originally, class order [CO 02/314] Employee redundancy funds: relief, was issued in 2002 and gave relief to employee redundancy funds from the requirement to comply with certain provisions of the Corporations Act 2001. [CO 02/314] had effect until 1 October 2016.
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> On 4 September 2015, ASIC released *Consultation Paper 238 Remaking ASIC class order on employee redundancy funds: [CO 02/314]* (CP 238), which outlined the proposal to remake [CO 02/314] with minor changes. After the consultation, ASIC released *ASIC Corporations (Employee*

redundancy funds relief) Instrument 2015/1150, which extended the relief in [CO 02/314] until 1 December 2015. Subsequently, ASIC extended the relief for a further 24-months until 1 October 2018 and then again for three years until 1 October 2021.

Following the Royal Commission into Trade Union Governance, the Government proposed legislation to introduce a new regulatory framework for employee redundancy funds. Schedule 2 of the *Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019* will introduce a new regulatory framework for employee redundancy funds as worker entitlement funds. At this stage, the Bill is still before Parliament.

The *Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019* was not passed by Parliament and there is no valid case for continuing to allow employee redundancy funds, which hold more than $2 billion in employee entitlements, to remain unregulated.

THE CASE FOR REGULATING EMPLOYEE REDUNDANCY FUNDS

The case for regulating employee redundancy funds is overwhelming. The problems have been analysed in detail by:

- The Royal Commission into Productivity in the Building Industry in New South Wales;
- The Royal Commission into the Building and Construction Industry; and
- The Royal Commission into Trade Union Governance and Corruption.

Chapter 10 of the February 2003 Final Report of the Royal Commission into the Building and Construction Industry provides a comprehensive analysis of the financial practices of all of the major redundancy funds in Australia; financial practices that have largely continued to this day. The following extracts are relevant: (emphasis added)

Recommendations

231 It is apparent that, with the exception of ACIRT, employers contribute to redundancy funds ostensibly for the benefit of their employees and yet neither they nor their employees obtain any meaningful benefit from any operating surplus arising from investment of the fund. Surpluses are instead distributed to employee and employer associations or to other bodies chosen at the direction of the funds' administrators, none of which contributes to the fund.

232 In the Royal Commission Report into Productivity in the Building Industry in New South Wales, Commissioner Gyles stated in relation to the (then) Construction Employees' Redundancy Trust (CERT):

> *The AFCC and the building unions maintain the power to set contributions virtually at will, or at least taking into account criteria which could justify virtually anything, and the distribution of moneys going far beyond the purposes of funding the award redundancy/ severance provisions or anything like them are permitted.*
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> *The potential for maladministration, patronage and corruption remains. The lack of prudential control is just as great. There are not even the most basic safeguards, such as the provision of audited accounts to members. Above all, supported as it is by express and implied industrial and commercial pressure, the arrangement is, in effect, a tax upon the employers of the industry for ill-defined purposes, decided by a small part of the industry with radically different objectives than the majority of employers.*

To suggest that subcontractors and contractors generally would willingly contribute funds to the AFCC and the building unions for them to spend for the benefit of the industry as they see fit is, of course, fantasy. Furthermore, the notion that this elaborate structure is to cover the situation that an employer might not be able to pay the award severance pay is equally absurd. …

In the result, a vast amount of money has been channelled from employers to a fund which has already become a monster with a life of its own at a cost far greater than was necessary to give an over-award payment to workers. I have no doubt the money contributed would have been far better off in the pockets of either the employers or the workers rather than in the clutches of these scheme Trustees.

I have no doubt that the CERT scheme should be unwound, if it is possible to do so. It does not concern me whether the moneys which are the subject of the CERT scheme are returned to the employers or to the workers. If those moneys are to remain where they are, they should be subject to a statutory trust for the purpose for which they were intended and not left to the whim of the AFCC and the BTG.

233 It is a matter of history that CERT was subsequently wound up and ACIRT established, which provides for distribution of surpluses to employee members. It appears to me that other funds have not followed suit because of the vested financial interests that sponsors would lose by doing so.

234 It is plain that redundancy funds now operate for purposes well beyond funding redundancy entitlements. Large sums of money are provided for training, insurance, education and other purposes. Often employee and employer associations have interests in those other concerns.

223 Excepting ACIRT, the funds provide substantial income streams to employer and employee associations in the form of surplus distributions. There is an incentive for those bodies to negotiate or agree to increases in employer contributions in the course of pattern EBA negotiations.

235 Employers' contributions finance these funds and yet employers derive negligible if any benefit from them. They are paying for benefits and activities well beyond the purpose of meeting their potential redundancy obligations to their employees.

237 There is no legislation requiring contributions to redundancy funds, as exists in the case of superannuation and long service funds, to which a suitable condition could be added. The funds are administered by private trustee companies in accordance with trust deeds drafted in the broadest terms. The directors of those companies are appointed by the employer and employee associations which (excepting ACIRT) are the primary beneficiaries of surpluses generated by the funds. Those associations have vested interests in maintaining the status quo. Employers and employees alike are locked into the nominated funds by the pattern EBA process.

238 In my view, the initiative lies with government.

239 It is anomalous that superannuation and long service leave funds are subject to prudent and appropriate regulation, yet redundancy funds are not. Redundancy funds have matured throughout Australia to become a significant component of the industry's financial structure. Approximately $500 million is currently under management. The repercussions would be enormous should any of these funds diminish or collapse for reasons of mismanagement, misappropriation or abuse. The opportunities for any of these events to occur are manifest. Governments' role, through agencies such as ASIC, APRA and the ATO, to put in place safeguards against such events is apparent. Government would be exposed to unarguable criticism should any of the principal redundancy funds considered in this chapter misapply funds and the employees for whom the funds are ostensibly established be left without recourse.

240 The manner in which appropriate safeguards should be implemented requires consultation with industry to achieve acceptance by industry

241 Compliance with prescribed accounting, auditing and reporting requirements can properly be incorporated into criteria to be met in order for a redundancy fund to be prescribed as a fund exempt from fringe benefits tax.

Issue

Redundancy funds have matured throughout Australia to become a significant component of the industry's financial structure. Approximately $500 million is currently under management yet they function without any prudential control. The repercussions would be enormous should any of these funds diminish or collapse for reasons of mismanagement, misappropriation or abuse. The opportunity for any of these events to occur is manifest.

Recommendation 169

Legislation be enacted to implement a uniform system of financial reporting, external auditing, actuarial assessment and annual reporting to a prudential authority for redundancy funds. The systems presently applying for superannuation and long service leave funds should be points of reference. Documents produced, in compliance with the legislation, be public documents.

Recommendation 170

Compliance with those requirements be a prerequisite to a redundancy fund being prescribed as a fund exempt from fringe benefits tax.

As stated in the above extract from the Final Report of the Royal Commission into the Building and Construction Industry (para 239):

- It is anomalous that superannuation and long service leave funds are subject to prudent and appropriate regulation, yet redundancy funds are not.
- Redundancy funds have matured throughout Australia to become a significant component of the industry's financial structure.
- The repercussions would be enormous should any of these funds diminish or collapse for reasons of mismanagement, misappropriation or abuse. The opportunities for any of these events to occur are manifest.
- It is the Government's role, through agencies such as ASIC, to put in place safeguards against such events.
- Government would be exposed to unarguable criticism should any of the principal redundancy funds misapply funds and the employees for whom the funds are ostensibly established be left without recourse.

When the Final Report of the Royal Commission into the Building and Construction Industry was published in 2003, employee redundancy funds had approximately $500 million under management.

In 2015, the funds under management had grown to more than $2 billion, as identified by the Royal Commission into Trade Union Government and Corruption.[1]

Once again the absence of regulation for employee redundancy funds was identified as a major problem for employees, employers and the broader community. The following extracts from Chapter 5 of the Royal Commission into Trade Union Governance and Corruption's Final Report identify some of the major problems that need to be addressed: (emphasis added)

> **Problems with existing regulation**
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> 63. There are a number of problems with the existing regulatory framework surrounding worker entitlement funds.
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> 64. *First*, the startling consequence of Class Order [CO 02/314], which was initially intended to operate as an interim measure, is that worker entitlement funds are not subject to any mandatory disclosure requirements. For example:
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> (a) There is no requirement on worker entitlement funds to disclose the commissions and other payments made by the fund to unions and employer organisations.
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> (b) There is no required disclosure of the amounts deducted by the funds by way of fees and charges.
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> (c) There is no requirement to explain to workers the circumstances in which they will, or will not, be entitled to a payment from the fund.
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> 65. Further, there is no statutory requirement on worker entitlement funds to provide annual reports or accounts to persons with an interest in the fund.
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> 66. *Secondly*, another consequence of Class Order [CO 02/314] is that the entities operating worker entitlement funds are not subject to the requirement in s 601FC(1)(d) of the *Corporations Act* 2001 (Cth) to treat members (for example, workers) who hold interests of the same class equally and those who hold interests of different classes fairly. The BERT case study illustrates the potential for worker entitlement funds under current law to give preferential treatment to union members over non-union members with the aim of generating union membership. In circumstances where there is no difference of interest between union and non-union members of the funds, there is no justification for differential treatment.
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> 67. *Thirdly*, apart from ACIRT, worker entitlement funds invariably distribute the income generated on contributions received to industry parties (for example, unions and employer organisations) to be used for purposes they see fit.
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> 68. There are a number of reasons why this is a problem.
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> 69. One reason is that there is an inherent unfairness in taking contributions paid by employers on behalf of employees, generating substantial income from those contributions, and then distributing the money to other persons in circumstances where many employees will never receive the benefit, either directly or indirectly, of the income generated. The point is starkly

[1] *Royal Commission into Trade Union Governance and Corruption*, Final Report, Volume 5, December 2015, p. 298.

illustrated by the submission by ElecNet (Aust) Pty Ltd (**ElecNet**), the trustee of the Protect Severance Scheme, that:

> Approved worker entitlement funds, such as Protect, do not share the purpose of managed investment schemes: producing maximum financial benefits for members of the scheme. Their aim is to protect workers' entitlement to ensure workers' financial security when faced with the insolvency of employers and cycles in the economy. *Workers have no entitlement to financial benefits above the return of amounts contributed to the fund for them by their employer*.

It may be accepted that the purpose of a worker entitlement fund is to secure the payment of entitlements. Consequently such funds might prudently adopt a risk adverse investment strategy. However, it does not follow that, because the generation of income is not the purpose of the fund, workers should not be entitled to any return which is made on the contributions. In fact, it is contrary to the underlying premise of such a fund – to operate solely for the benefit of employees – that the income should be used to benefit others.

70. It is also worth making the point that apart from 'genuine redundancy accounts', most so-called redundancy funds are not limited to making a payment in circumstances of genuine redundancy: workers (or their estates) are commonly entitled to a benefit when they cease employment, retire, reach a particular age or die. Thus, the contributions paid by employers are, in effect, a deferred entitlement of the employees on whose behalf the contributions are made. The consequence of the circumstances revealed in ElecNet's submission is that worker entitlements are subject to the effect of inflation, thereby reducing their value in real terms, whilst all returns generated from those entitlements are skimmed off to be used by unions and employer organisations.

71. Another problem is that the very substantial revenue flows to unions generate significant conflicts of interest and potential breaches of fiduciary duty on the part of unions and union officials negotiating enterprise agreements. The reasons for this are dealt with at length in earlier Volumes of this report. In short, the union and union officials owe a duty to act in the interests of union member employees when negotiating enterprise agreements. At the same time, there is a significant potential and incentive for the union to act in its own interests to generate revenue.

72. The substantial revenue flows to unions also lead to a greater potential for coercive conduct by unions who seek to compel employers in enterprise negotiations to contribute to funds from which the union will derive a financial benefit. Circumstances in which this has occurred are explored in the case studies relating to Universal Cranes and the ACT CFMEU.

The above extract from the Final Report of the Royal Commission into Trade Union Governance and Corruption explains that:

- Class Order [CO 02/314] was initially intended to operate as an interim measure.
- The 'startling consequence' of Class Order [CO 02/314] is that worker entitlement funds are not subject to any mandatory disclosure requirements, including:
    - There is no requirement on worker entitlement funds to disclose the commissions and other payments made by the fund to unions and employer organisations.
    - There is no required disclosure of the amounts deducted by the funds by way of fees and charges.

- There is no requirement to explain to workers the circumstances in which they will, or will not, be entitled to a payment from the fund.

The Royal Commission recommended the establishment of a specific scheme of regulation for worker entitlement funds. The recommended scheme would have been implemented had the *Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019* been passed by Parliament.

The failure of the above Bill to be passed by Parliament is no reason for ASIC to allow the current unacceptable situation to continue by extending the relief currently provided to employee redundancy funds from the AFC licensing and managed investment provisions of the Corporations Act for a further period of five years.

THE FAIR WORK (REGISTERED ORGANISATIONS) AMENDMENT (ADMINISTRATION) BILL 2024

The *Fair Work (Registered Organisations) Amendment (Administration) Bill 2024* was passed by Parliament on 20 August 2024.

The Bill will lead to the Construction and General Division (and its branches) of the Construction, Forestry and Maritime Employees Union (**CFMEU**) being placed into administration due to serious allegations about the conduct of the CFMEU.

The CFMEU is represented on the boards of most of the employee redundancy funds.

The fact that the Federal Government and the Opposition have agreed on the urgent need for the CFMEU to be placed in administration is a further reason why the current lack of regulation of employee redundancy funds cannot be allowed to continue.

Every year, many millions of dollars are transferred from employee redundancy funds to the CFMEU.

THE CFMEU'S ATTEMPTS TO REPLACE ACIRT WITH INCOLINK

As highlighted by the Royal Commission into the Building and Construction Industry, ACIRT is the only employee redundancy fund that distributes investment earnings to the employee members of the fund rather than to the sponsoring unions and employer groups.

ACIRT has distributed more than $380 million in annual payments to employees since the fund was established in 1984. In the 2022/23 financial year $24.76 million was paid to employee members of the fund and in the 2021/22 financial year $19.11 million was paid to employee members.[2]

[2] Financial Report for the Australian Construction Industry Redundancy Trust for the year ending 31 July 2023, p.5.

The value that employees place on these payments is highlighted by the following extract from the Royal Commission's Final Report:

> 193 The 2000-01 annual report states that for that financial year '25 805 members received between $50 and $5475 depending on their account balance. …Total member distributions equalled $6.74 million'. Mr Frank Chambers, a member of the ACIRT Board, stated:
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> *With ACIRT, the interest goes back to members – members love that cheque once a year.*

Employee redundancy entitlements are, as the name implies, the entitlements of employees. They do not belong to unions or employer associations. Also, the investment earnings on the employees' redundancy entitlements do not legitimately belong to unions or employer associations.

Investment earnings on employee entitlements cannot legitimately be regarded as 'profits' or 'surpluses', to be transferred to unions or employer associations. The investment earnings should belong to the workers. Who would accept the idea of a superannuation fund that regards the investment earnings on employer superannuation contributions as the property of the sponsoring unions or employer associations? No-one would of course. The whole idea is offensive. The same principle needs to apply to employee redundancy funds.

The CFMEU is currently attempting to coerce employers into contributing into Incolink, rather than ACIRT, through the terms of a new construction industry pattern enterprise agreement that it is pursuing in New South Wales.

If it is successful, thousands of employees who currently receive annual distributions of investment earnings from ACIRT will no longer receive these funds. Instead, the investment earnings will be transferred to the CFMEU and the other unions and employer associations that sponsor Incolink.

IT IS APPROPRIATE TO SUBJECT EMPLOYEE REDUNDANCY FUNDS TO THE AFS LICENSING AND MANAGED INVESTMENT PROVISIONS OF THE CORPORATIONS ACT

The following extract from Chapter 5 of the Final Report of the Royal Commission into Trade Union Governance and Corruption explains some of the implications of subjecting employee entitlement funds to the AFS licensing and managed investment provisions of the Corporations Act:

> 55. A worker entitlement fund is generally considered a managed investment scheme under the definition in s 9 of the *Corporations Act* 2001 (Cth), and an interest in the fund is a financial product for the purposes of Chapter 7 of the *Corporations Act* 2001 (Cth).[3] Further, subject to any relief by way of class order, a worker entitlement fund would ordinarily be required to be registered under s 601ED of the *Corporations Act* 2001 (Cth).

[3] *Corporations Act* 2001 (Cth), s 764A(1)(b), (ba).

56. Thus, subject to any relief by way of class order:

(a) Pursuant to s 601ED a worker entitlement fund would need to be registered, and the corporate trustee would need to hold an Australian Financial Services Licence (**AFSL**). Together, this would subject the corporate trustee of the fund to a range of additional requirements including:

(i) requirements to have a compliance plan and compliance committee;

(ii) capital requirements;

(iii) audit requirements;

(iv) an obligation to maintain certain competence requirements and ensure that its representatives were adequately trained and competent; and

(v) a requirement to ensure responsible officers are of good fame and character.

(b) Sections 992A and 992AA, which contain prohibitions on the hawking of certain financial products and interests in a managed investment scheme, would apply.

(c) The corporate trustee, as an AFSL holder, would be required to provide a variety of disclosures under Part 7.7 of the *Corporations Act* 2001 (Cth). In addition, Part 7.9 of the *Corporations Act* 2001 (Cth) would apply, requiring among other things a Product Disclosure Statement (**PDS**) to be provided to persons acquiring an interest in the fund before they acquire their interests.

There is no valid reason why the above requirements should not apply to employee redundancy funds, particularly given that these funds hold over $2 billion in employee entitlements.

Appropriately, the AFS licensing and managed investment requirements would ensure that employee redundancy funds:

- Have a compliance plan and a compliance committee;
- Comply with capital requirements;
- Comply with audit requirements;
- Ensure that their officers are adequately trained and competent; and
- Ensure that their officers are of good fame and character.

CONCLUSION

For the reasons set out in this submission, Ai Group strongly opposes ASIC's proposed five year extension of the relief from the AFS licensing and managed investment provisions of the Corporations Act.

Any extended relief should be for a period of no more than 6 months to give employee redundancy funds time to obtain an AFS Licence and meet the other relevant requirements of the Corporations Act. The suggested 6-month timeframe is double the amount of time that was given to litigation funders when the previous Federal Government introduced a requirement for such funders to have an AFS Licence.

ABOUT THE AUSTRALIAN INDUSTRY GROUP

The Australian Industry Group (Ai Group®) is a peak employer organisation representing traditional, innovative and emerging industry sectors. We are a truly national organisation which has been supporting businesses across Australia for nearly 150 years.

Ai Group is genuinely representative of Australian industry. Together with partner organisations we represent the interests of more than 60,000 businesses employing more than 1 million staff. Our members are small and large businesses in sectors including manufacturing, construction, ICT, transport & logistics, engineering, food, labour hire, mining services, the defence industry and civil airlines.

Our vision is for thriving industries and a prosperous community. We offer our membership strong advocacy and an effective voice at all levels of government underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international) we have the resources and the expertise to meet the changing needs of our membership. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We listen and support our members in facing their challenges by remaining at the cutting edge of policy debate and legislative change. We provide solution-driven advice to address business opportunities and risks.

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