Significant Workplace Relations Issues

29 June 2018

EXECUTIVE SUMMARY

- ***On 1 June, the Expert Panel of the Fair Work Commission (FWC) handed down its Annual Wage Review 2017-18 Decision granting a 3.5 per cent minimum wage increase.***

- ***On 18 June Ai Group Workplace Lawyers, on behalf of Mondelēz International, filed an application in the Federal Court of Australia for a declaration relating to the meaning of the phrase '10 days of paid personal/carer's leave' in section 96 of the Fair Work Act. The relevant employees of Mondelēz work 12-hour shifts at the company's Claremont plant in Tasmania. The case has implications for most employers in Australia. An application has been made for the case to be dealt with by the Full Court of the Federal Court.***

- ***The ACTU is continuing to press the Labor Party to commit to making sweeping changes to the Fair Work Act if elected to give unions a lot more power, including much wider rights to strike, more generous worker entitlements, more restrictions on businesses and wider powers for the FWC. The ACTU is campaigning under the slogan 'Change the Rules' and it organised a series of rallies in April and May.***

- ***On 19 June, Ai Group released an economic research paper which debunks the persistent myth perpetrated by the ACTU that job insecurity and casualisation of work are increasing in Australia.***

- ***On 16 May, Ai Group released an economic research paper on Australia's recent experience of slow wages growth and its causes.***

- ***Three important Government workplace relations Bills are before Parliament. The Bills have not yet been called on for debate this year.***

- ***A Government Bill to implement a 12-month one-off amnesty to encourage employers to self-correct historical superannuation guarantee non-compliance has been passed by the House of Representatives and is before the Senate.***

- ***The Federal Government has introduced the Modern Slavery Bill 2018 (Cth) into Parliament. The Bill would establish a modern slavery reporting requirement for businesses with an annual consolidated revenue of $100 million or more (approximately 3,000 businesses). Meanwhile, the NSW Parliament has passed the Modern Slavery Bill 2018 (NSW) which will establish a modern slavery reporting requirement for businesses operating in NSW that have an annual turnover of $50 million or more.***

- ***The Minister for Small and Family Business, the Workplace and Deregulation, Craig Laundy MP, has announced that the Government intends to implement an entitlement to five days of unpaid domestic violence leave through amendments to the Fair Work Act.***

- ***Proceedings are continuing in the FWC to settle the award clause that will implement up to five days of unpaid domestic violence leave.***

- ***Proceedings are continuing in the FWC in the Family Friendly Work Arrangements Case.***

- ***There have been a number of important developments regarding the labour hire licensing schemes in Queensland, South Australia and Victoria.***

- ***On 20 June, the Sex Discrimination Commissioner, Kate Jenkins, announced a National Inquiry into Sexual Harassment in Australian Workplaces.***

- ***Enterprise bargaining has become a minefield for employers, with the majority of enterprise agreements lodged for approval with the FWC being held to be deficient in one way or another.***

- ***On 28 June, a five-Member Full Bench of the FWC handed down a decision in the Loaded Rates in Agreements Case, following a hearing in November last year.***

- ***On 22 June, the Federal Government announced the appointment of Sandra Parker as the Fair Work Ombudsman for a five-year term operative from 15 July 2018.***

- ***On 14 June, the Fair Work Ombudsman released a new guide to assist franchisors to promote compliance in their networks.***

- ***On 25 June, a Full Bench of the FWC issued a decision rejecting an appeal by two employer groups against a decision of Deputy President Gostencnik to approve the merger between the Construction, Forestry, Mining and Energy Union, the Maritime Union of Australia, and the Textile, Clothing and Footwear Union of Australia.***

- ***On 25 June, the Full Court of the Federal Court decided to impose a Personal Payment Order on CFMMEU Victorian branch organiser Joe Myles for breaching workplace relations laws.***

- ***Derrick Belan, the former NSW Secretary of the National Union of Workers, has been sentenced to four years in prison for dishonestly obtaining a financial advantage.***

- ***On 28 June, the FWC listed the Hair and Beauty Industry Penalty Rate Case for Mention and Directions, following the filing of evidence and submissions by all of the parties in the case.***

- ***Single Touch Payroll is a new system for reporting payroll information to the Australian Taxation Office (ATO). The new system started on 1 July 2018 for employers with 20 or more employees.***

- ***On 26 May, the Victorian Government announced that it would introduce amendments to the Victorian Crimes Act to criminalise 'wage theft', if re-elected for a further term.***

- ***The Victorian Government's Long Service Benefits Portability Bill 2018 is before the Victorian Parliament. The Bill would establish portable long service leave schemes in the community services, contract cleaning and security industries, funded by an employer levy of up to 3% of ordinary pay.***

- ***The Long Service Leave Act 2018 has been passed by the Victorian Parliament. The Act replaces the Long Service Leave Act 1992 (Vic) and introduces changes to the long service leave entitlements of employees and the obligations of employers. The legislation operates from a date to be proclaimed. Ai Group has been advised by the Victorian Government that the legislation will be proclaimed to operate from 1 October 2018.***

ANNUAL WAGE REVIEW

On 1 June, the Expert Panel of the Fair Work Commission (**FWC**) handed down its *Annual Wage Review 2017-18 Decision*. Key elements of the decision include:

- Award wage rates for full-time adult employees will be increased by 3.5 per cent;
- The National Minimum Wage will be increased to $719.20 per week or $18.93 per hour;
- Junior, apprentice and trainee wage rates will be adjusted proportionately; and
- Wage related allowances and expense related allowances will be increased in accordance with the usual formulas.

Ai Group played a major role in the Annual Wage Review, including strongly opposing the ACTU's proposed $50 per week or 7.2 per cent wage increase. Ai Group proposed a modest 1.8 per cent wage increase given the tough operating environment which many businesses are experiencing.

During the course of the Annual Wage Review, Ai Group filed a number of detailed submissions and appeared before the Expert Panel of the FWC.

The wage increase is operative from the first full pay period that starts on or after 1 July 2018.

MONDELEZ CASE RE. MEANING OF A 'DAY' FOR PERSONAL/CARER'S LEAVE ENTITLEMENTS

On 18 June Ai Group Workplace Lawyers, on behalf of Mondelēz International, filed an application in the Federal Court of Australia for a declaration relating to the meaning of the phrase *'10 days of paid personal/carer's leave'* in section 96 of the *Fair Work Act*. The relevant employees of Mondelēz work 12-hour shifts at the company's Claremont plant in Tasmania. The case has implications for most employers in Australia. An application has been made for the case to be dealt with by the Full Court of the Federal Court.

The Minister for Small and Family Business, the Workplace and Deregulation, Craig Laundy MP, has intervened in the case on behalf of the Commonwealth.

In payroll systems, personal/carer's leave entitlements are typically recorded in hours, not days, on the basis of the number of ordinary hours that an employee works. For example, employees who work 38 hours per week are typically credited with 76 hours of paid personal/carer's leave per year, regardless of whether their ordinary hours are arranged on the basis of 7.6, 8, 10 or 12 hours per day.

The current enterprise agreement agreed to by Mondelēz International states that the employees at the Claremont plant are entitled to 96 hours of personal/carer's leave per year. This is a lot more generous than the 76 hours that employees are entitled to under the *Fair Work Act* if the Act is interpreted in the manner in which Ai Group and Mondelēz contends.

Mondelēz International is being represented in the case by Ai Group Workplace Lawyers, Mr Stuart Wood QC and Mr Dimitri Ternovski of Counsel.

An initial case management hearing has been listed before Justice O'Callaghan on 10 August 2018.

This important case follows a number of unfavourable decisions of relevance to the meaning of the phrase *"10 days of paid personal/carer's leave"* under section 96 of the *Fair Work Act*, in circumstances where an employee works more than 7.6 ordinary hours per day/shift as part of their roster pattern.

The decisions of a Full Bench of the FWC in *RACV v ASU* [2015] FWCFB 2881 and of the Federal Court in *CFMEU v Glendell Mining* [2017] FCAFC 35 and *CFMEU v Anglo Coal* [2016] FCA 689 all support an interpretation that a '*day'* means the ordinary hours that the employee is required to work in a 24-hour period. Ai Group believes that this interpretation is not aligned with the legislative intention of the provisions, that it conflicts with widespread industry practice, and would lead to absurd outcomes (e.g. a part-time employee who works one day per week would arguably be entitled to the equivalent of 10 weeks of personal/carer's leave per year).

The Explanatory Memorandum for the *Fair Work Bill* supports the view that the interpretation in the above decisions is not consistent with the legislative intention.

Members are being urged to contact Ai Group for advice if they are faced with claims or other problems relating to this matter.

THE ACTU'S 'CHANGE THE RULES' CAMPAIGN

The ACTU is continuing to press the Labor Party to commit to making sweeping changes to the *Fair Work Act* if elected to give unions a lot more power, including much wider rights to strike, more generous worker entitlements, more restrictions on businesses, and wider powers for the FWC. The ACTU is campaigning under the slogan 'Change the Rules' and it organised a series of rallies in April and May.

A lot of the information which the ACTU is distributing as part of its campaign is misleading and inaccurate. Ai Group is making regular statements in the media and releasing materials to correct the facts about relevant issues.

NEW Ai GROUP RESEARCH PAPER – CASUAL AND PART-TIME EMPLOYMENT

On 19 June, Ai Group released an economic research paper which debunks the persistent myth perpetrated by the ACTU that job insecurity and casualisation of work are increasing in Australia.

The paper demonstrates that as a proportion of the workforce, casual work has been approximately 20 per cent of the workforce over the past two decades. It is about the same in 2018 (20.6%) as it was in 1998 (20.1%). Further, the proportion of the workforce expecting to be in the same job in a year's time has been steady at 90 percent of the workforce since the Australian Bureau of Statistics started collecting this data in 2001.

The ACTU has now started to include part-time employees in their figures about so called 'precarious employment' to paint a misleading picture about the composition of the Australian workforce. Of course, the vast majority of part-time workers do not want to work full-time. Access to part-time work enables many Australians to participate in the workforce who would otherwise be unable or unwilling to participate including, for example, many women, older workers and students.

NEW Ai GROUP RESEARCH PAPER – TRENDS AND CAUSES OF RECENT TRENDS IN WAGES GROWTH

On 16 May, Ai Group released an economic research paper on Australia's recent experience of slow wages growth and its causes.

The paper draws together key data to highlight that in Australia the key causes of slow wages growth are:

- Weak productivity growth;
- Spare labour capacity; and
- Weak inflation.

Other alleged causes of slow wages growth (such as low levels of union membership, the extent of casual employment, Australia's bargaining laws, and migration) are not significant drivers of wages growth.

The paper highlights that real wages are best strengthened through improved productivity.

Ai Group's media release, which accompanied the release of the paper, commented that the ACTU's argument that it is in the community's interests for the unions to be given more power to force employers to capitulate on union wage claims, conflicts with the economic data and is patently wrong.

The research paper is available on Ai Group's website.

GOVERNMENT FAIR WORK BILLS BEFORE PARLIAMENT

Three important Government workplace relations Bills are before Parliament. The Bills have not yet been called on for debate this year.

The *Fair Work Amendment (Repeal of 4 Yearly Reviews of Modern Awards and Other Measures) Bill 2017* would amend the *Fair Work Act* to abolish 4 yearly Reviews of Awards and give the FWC more discretion to overlook minor procedural non-compliance in the enterprise agreement-making process, provided that the employees are unlikely to have been disadvantaged.

The *Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017* would implement appropriate governance standards for employee entitlement funds such as construction industry redundancy funds. The Bill addresses the widespread, inappropriate current practice of unions deriving millions of dollars a year from money contributed by employers to employee entitlement funds for the benefit of their own employees. The Bill also implements recommendation 47 of the Heydon Royal Commission by requiring that registered organisations (i.e. unions and employer associations) disclose to employers and employees the financial benefits (e.g. commissions) that they receive from income protection insurance and other products

that they promote or arrange.

The *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017* would introduce a public interest test for amalgamations of registered organisations, expand the circumstances in which officials of registered organisations can be disqualified from holding office, and allow the Federal Court to cancel the registration of an organisation on a range of grounds.

SUPERANNUATION AMNESTY BILL

A Government Bill to implement a 12-month one-off amnesty to encourage employers to self-correct historical superannuation guarantee non-compliance has been passed by the House of Representatives and is before the Senate.

The Bill was the subject of a Senate Committee inquiry in May and June. Ai Group made a submission to the inquiry expressing support for the Bill.

In the final report arising from the inquiry, the Government members on the Senate Committee recommended that the Bill be passed, with Labor members recommending that the Bill be rejected.

MODERN SLAVERY LEGISLATION

The Federal Government has introduced the *Modern Slavery Bill 2018 (Cth)* into Parliament. The Bill would establish a modern slavery reporting requirement for businesses with an annual consolidated revenue of $100 million or more (approximately 3,000 businesses). Meanwhile, the NSW Parliament has passed the *Modern Slavery Bill 2018 (NSW)* which will establish a modern slavery reporting requirement for businesses operating in NSW that have an annual turnover of $50 million or more.

Under both pieces of legislation, businesses are required to publish annual public statements on what steps they have taken, and will take, to address modern slavery in their supply chains and operations.

A Modern Slavery Business Engagement Unit will be established within the Commonwealth Department of Home Affairs to advise and support businesses in implementing the requirements in the Federal legislation. The Australian Government has committed to developing detailed guidance materials for businesses in consultation with stakeholders, including Ai Group, before the modern slavery reporting requirement comes into operation.

BILL TO IMPLEMENT UNPAID DOMESTIC VIOLENCE LEAVE

The Minister for Small and Family Business, the Workplace and Deregulation, Craig Laundy MP, has announced that the Government intends to implement an entitlement to five days of unpaid domestic violence leave through amendments to the *Fair Work Act*.

This legislation would have the effect of extending the unpaid leave entitlement determined by the FWC for award-covered employees (see next item below) to those employees who are not covered by an award.

The legislation is expected to be introduced into Parliament later this year, most likely in August.

FWC UNPAID DOMESTIC VIOLENCE LEAVE CASE

Proceedings are continuing in the FWC to settle the award clause that will implement up to five days of *unpaid* domestic violence leave.

After last year's decision to reject the ACTU's claim for 10 days of *paid* domestic violence leave, a Full Bench of the FWC decided to take a measured approach to the issue of *unpaid* domestic violence leave. The Commission decided to implement an award entitlement to up to five days of *unpaid* leave per year for those who need to deal with the impact of domestic violence. An employee will only be able to take the leave if it is necessary for them to do something to deal with the impact of the domestic violence, and it is impractical for them to do it outside of working hours.

The FWC issued a draft award clause for public comment in May and Ai Group and other parties made submissions on aspects of the clause. A conference before the President of the Commission, Justice Iain Ross, took place on 21 June.

Ai Group has played a leading role in representing employers throughout the case.

FWC FAMILY FRIENDLY WORK ARRANGEMENTS DECISION

Proceedings are continuing in the FWC in the *Family Friendly Work Arrangements Case.*

The FWC issued a draft award clause for public comment in May. Ai Group and other parties made submissions on the clause as well as various jurisdictional issues. The clause is aimed at facilitating discussion between employers and employees about flexible work arrangements.

A conference before the President of the Commission, Justice Iain Ross, took place on 21 June.

Ai Group is playing a leading role in representing employers in the case. If the ACTU's claims had been accepted, all awards would have been varied to give employees the right to dictate to their employer what hours and days they work, with the employer having no right to refuse regardless of the circumstances.

LABOUR HIRE LICENSING LEGISLATION IN QUEENSLAND, SOUTH AUSTRALIA AND VICTORIA

There have been a number of important developments regarding the labour hire licensing schemes in Queensland, South Australia and Victoria, including:

- The labour hire licensing scheme in Queensland in now fully operational. Providers of labour hire services (defined very broadly) were required to apply for a licence by 15 June 2018, and from this date businesses must only use licensed labour hire providers.

- Following strong representations from Ai Group about the uncertain coverage of the South Australian labour hire licensing scheme, on 5 June the South Australian Government announced that the requirement for labour hire providers to obtain a license will not be enforced before 1 February 2019.

- The *Victorian Labour Hire Licensing Act 2018* passed through Parliament on 20 June. The provisions of the Act relating to the establishment of the Labour Hire Licensing Authority commenced on 27 June but a date has not yet been proclaimed for the implementation of the licensing requirements upon

businesses. Ai Group understands that the licensing requirements in Victoria are unlikely to come into operation before early 2019.

In a further important development, Ai Group was instrumental in having the relevant Minister express to Parliament, during the Parliamentary debate on the Bill, the Victorian Government's intention to implement a substantial list of relevant exemptions from the licensing requirements.

NATIONAL INQUIRY INTO SEXUAL HARASSMENT IN AUSTRALIAN WORKPLACES

On 20 June, the Sex Discrimination Commissioner, Kate Jenkins, announced a National Inquiry into Sexual Harassment in Australian Workplaces. The inquiry is scheduled to continue for a one year period.

In its media comments in response to the announcement, Ai Group said:

"There is no place for sexual harassment in the workplace and the National Inquiry announced by the Sex Discrimination Commissioner will hopefully provide further advice for employers on best practice strategies to create safe and harmonious workplaces."

"Employers overwhelmingly work hard to provide workplaces where harassment is not tolerated and have in place action plans to prevent or deal with such behaviour should it arise. It will be important for the inquiry to hear from employers who do things well and have been effective in transforming workplace culture.".

"The methodology used in the inquiry will be particularly important as will an understanding by the inquiry of how harassment is dealt with through workplace laws.

"Ai Group will be liaising with the Commissioner and providing whatever support is necessary for this important inquiry."

ENTERPRISE AGREEMENT APPROVAL REQUIREMENTS

Enterprise bargaining has become a minefield for employers, with the majority of enterprise agreements lodged for approval with the FWC being held to be deficient in one way or another.

The problems that are being experienced are due to:

- Problems with the wording of the *Fair Work Act*, including:
    - The requirement that "each" employee be better off overall, rather than just logical groups of employees;
    - The absence of a provision to give the FWC the ability to overlook minor procedural deficiencies in the bargaining process. (This issue would be addressed if the *Fair Work Amendment (Repeal of 4 Yearly Reviews of Modern Awards and Other Measures) Bill 2017* is passed by Parliament);
- The FWC's current extremely technical approach to the enterprise agreement approval process, which often lacks practicality;
- The opportunistic approach of some unions, notably the CFMMEU, in pursuing countless arguments about why particular enterprise agreements that they oppose breach the requirements of the *Fair Work Act*;

- Employers assuming that just because their previous enterprise agreement was approved by the FWC, a replacement enterprise agreement in similar terms will also be approved, without consideration of the numerous decisions of the High Court, Federal Court and FWC that have been issued over the past couple of years relating to the enterprise agreement approval requirements; and

- Employers making errors in the procedural steps required in the enterprise agreement approval process (e.g. issuing a Notice of Employee Representational Rights that is not exactly in the required terms, or failing to fully adhere to the timeframes in the Act for particular steps in the agreement-making process).

The 12 June 2018 decision of Gostenknic DP in *BGC Contracting Pty Ltd* [2018] FWC 1466 (amongst a long list of other relevant decisions) highlights what a minefield the enterprise agreement approval process has become. In this decision, the Deputy President held that because the relevant enterprise agreement incorporated the terms of the *Black Coal Industry Award 2010*, the employer had an obligation to explain the terms of the Award, and the effect of those terms, to the employees before they voted on the agreement, and not just explain the specific terms in the enterprise agreement.

Members are urged to contact Ai Group for advice before lodging enterprise agreements for approval.

FWC LOADED RATES IN AGREEMENTS DECISION

On 28 June, a five-Member Full Bench of the FWC handed down a decision in the *Loaded Rates in Agreements Case*, following a hearing in November last year.

Ai Group made a detailed submission in this case arguing that in recent times the FWC has often adopted an overly theoretical approach when assessing enterprise agreements at the approval stage, and that a more practical approach needs to be taken. Ai Group's submission proposes a set of principles drawn from relevant cases and legislative provisions, aimed at delivering a more practical enterprise agreement approval process.

The Full Bench declined to adopt the set of principles proposed by Ai Group, but articulated the following principles applicable to application of the Better Off Overall Test (**BOOT**) to enterprise agreements that contain loaded rates of pay:

> "(1) The BOOT requires every existing and prospective award covered employee to be better off overall under the agreement for which approval is sought than under the relevant modern award. If any such employee is not better off overall, the agreement does not pass the BOOT.
>
> (2) Section 193(7) permits the Commission to assume that if a class of employees to which a particular employee belongs would be better off under the agreement than under the relevant modern award, then the employee would be better off overall in the absence of evidence to the contrary. However the selection of class for the purpose of s 193(7) will only be of utility if the agreement affects the members of the class in the same way such that there is likely to be a common BOOT outcome. If the Commission is not satisfied on the evidence that an existing or prospective award covered employee is not better off overall, the Commission cannot approve the agreement, at least not without undertakings or in the confined circumstances set out in s 189.

(3) The application of the BOOT to a loaded rates agreement will, in order for a meaningful comparison to be made, require an examination of the practices and arrangements concerning the working of ordinary and overtime hours by existing and prospective employees that flow from the terms of the agreement. This will likely require classes to be identified based on common patterns of working hours, taking into account evening, weekend and/or overtime hours worked.

(4) The starting point for the assessment will necessarily be an examination of the terms of the agreement in order to ascertain the nature and characteristics of the employment for which the agreement provides or permits. For example if an enterprise agreement makes express provision for employees to be required to work ordinary hours on weekends, those provisions cannot be ignored for BOOT purposes simply because the employer asserts it does not currently utilise those working hours or roster patterns.

(5) In the case of existing employees, this may involve an examination of existing roster patterns worked by various classes of employees as at the test time. The use of sample rosters to compare remuneration produced by a loaded rates pay structure compared to the relevant modern award may be an effective method of doing this. There may be objective evidence that a particular pattern of working hours or roster pattern permitted by an enterprise agreement is not practicable, or cannot or is unlikely to be worked.

(6) In the case of prospective employees, the assessment will necessarily involve a degree of conjecture. In the case of an enterprise operating at a defined workplace or workplaces, the Commission may be in a position to make sensible predictions about the basis upon which prospective employees might be engaged based on the roster patterns worked by existing employees. However if a business is small and/or still at the development stage, or the agreement would cover a wider range of classifications, work locations and/or roster patterns that are not in existence as at the test time, useful predictions may not readily be drawn from the way in which the existing workforce operates. In that situation the assessment will require an examination of the terms of the agreement in order to ascertain the nature and characteristics of the employment which the agreement provides for or permits.

(7) If the information concerning patterns of working hours needed to assess whether a loaded rates agreement passes the BOOT is not contained in the employer's Form F17 statutory declaration accompanying the approval application, it may be necessary for the Commission to request or require the production of such information.

(8) The BOOT involves the making of an overall assessment as to whether an employee would be better off under the agreement, which necessitates identification of the terms in the agreements which are more and less beneficial to the employee than under the relevant award.

(9) The overall assessment required will essentially be a mathematical one where the terms being compared relate directly to remuneration. The assessment will be more complex where the agreement contains some superior entitlements which are non-monetary in nature, accessible at the employee's option or which are contingent upon specified events occurring.

(10) In respect of non-monetary, optional or contingent entitlements in an agreement, the assumption cannot readily be made that they have the same value for all employees. In the case of a contingent benefit, it will be necessary to make a realistic assessment about the likelihood of the benefit crystallising during the period in which the agreement will operate.

(11) Where a loaded rates agreement results in significant financial detriment for existing or prospective employees compared to the relevant award, it is unlikely that a non-monetary, optional or contingent entitlement under the agreement will sufficiently compensate for the detriment for all affected employees such as to enable the agreement to pass the BOOT."

In Ai Group's view, the above principles are unlikely to result in a significant change in the FWC's existing highly technical approach to assessing enterprise agreements at the approval stage.

ENTERPRISE AGREEMENTS WHICH INDIRECTLY DISCRIMINATE AGAINST EMPLOYEES

On 4 June, the FWC granted permission to the Minister for Small and Family Business, the Workplace and Deregulation, Craig Laundy MP, to intervene in proceedings relating to the approval of an enterprise agreement covering the Metropolitan Fire and Emergency Services Board.

A key issue in the proceedings is whether or not the provisions in the enterprise agreement are discriminatory, and what tests should apply in determining this. Under s.194 and 195 of the *Fair Work Act*, a 'discriminatory term' is an 'unlawful term'. Under s.186 of the Act, the FWC must be satisfied that an enterprise agreement does not include any 'unlawful terms' before it can approve the agreement.

There is arguably some inconsistency in the Federal Court authorities in respect of whether or not a term in an enterprise agreement that *indirectly* discriminates against an employee on one of the specified grounds in s.195 of the Act (e.g. race, sex, age, religion) breaches the requirements of the *Fair Work Act*.

APPOINTMENT OF FAIR WORK OMBUDSMAN

On 22 June, the Federal Government announced the appointment of Sandra Parker as the Fair Work Ombudsman for a five-year term from 15 July 2018.

Ms Parker has had a distinguished career within the Department of Jobs and its predecessors, including as Deputy Secretary for the past eight years. Ai Group has worked closely with Ms Parker over the past decade during the terms of the Coalition and Labor Governments.

Ms Parker replaces Natalie James whose five-year term is about to expire.

NEW FWO GUIDE FOR FRANCHISORS

On 14 June, the Fair Work Ombudsman (FWO) released a new guide to assist franchisors to promote compliance in their networks.

The *Guide to Promoting Workplace Compliance in your Franchise Network* provides advice and strategies that franchisor businesses can implement to promote compliance with workplace laws in their networks.

The guide has been developed to assist franchisors to comply with the Vulnerable Worker Amendments to the *Fair Work Act* that came into operation last year.

The *Fair Work Act* imposes responsibilities upon franchisors for breaches of workplace relations laws and instruments by franchisees. Franchisors may be held responsible for contraventions by franchisees of awards, enterprise agreements, the National Employment Standards and other specified provisions of the Act, if the franchisor knew or could reasonably be expected to have known that the contravention would occur.

The *Fair Work Act* includes a defence for a franchisor that is able to demonstrate that it took 'reasonable steps' to prevent the contravention by the franchisee. The FWO's guide provides advice on what steps can be taken to meet the 'reasonable steps' requirement.

APPEAL AGAINST THE MERGER OF THE CFMEU, MUA AND TCFUA

On 25 June, a Full Bench of the FWC issued a decision rejecting an appeal by two employer groups against a decision of Deputy President Gostencnik to approve the merger between the Construction, Forestry, Mining and Energy Union, the Maritime Union of Australia, and the Textile, Clothing and Footwear Union of Australia.

The new union is called the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU). The merger took effect on 27 March 2018.

FIRST FEDERAL COURT PERSONAL PAYMENT ORDER

On 25 June, the Full Court of the Federal Court decided to impose a Personal Payment Order on CFMMEU Victorian branch organiser Joe Myles for breaching workplace relations laws.

The Federal Court's decision follows a decision of the High Court in February this year which confirmed the ability for Courts to order that union officials pay their own fines.

In media comments about the Federal Court's decision, Ai Group stated: "Hopefully, today's decision will finally lead to CFMMEU officials taking responsibility for their own actions and complying with the law like every citizen in a civilised society is rightly expected to do".

FORMER NUW NSW LEADER JAILED

Derrick Belan, the former NSW Secretary of the National Union of Workers, has been sentenced to four years in prison for dishonestly obtaining a financial advantage. The Court held that Mr Belan had used his union credit card for personal expenses and was part of a scheme to submit false invoices for IT services to the union.

Mr Belan's criminal conduct was uncovered by the Royal Commission into Trade Union Governance and Corruption.

HAIR AND BEAUTY INDUSTRY PENALTY RATES CASE

On 28 June, the FWC listed the *Hair and Beauty Industry Penalty Rate Case* for Mention and Directions, following the filing of evidence and submissions by all of the parties in the case.

Ai Group Workplace Lawyers is representing Hair and Beauty Australia (HABA) in the case in seeking a reduction in Sunday penalty rates from double time to time and one half, and in public holiday rates from double time and one half to double time and one quarter.

In the FWC's major *Penalty Rates Case* last year, the Commission decided to lower Sunday and public holiday penalty rates in the retail, fast food, hospitality and pharmacy industries. In its decision, the Commission announced that penalty rates would also be reviewed in the hair and beauty industry.

HABA's submission argues that:

- There are obvious similarities between the hair and beauty industry and the retail and pharmacy industries:
    - Businesses in each of these industries predominately sell to consumers;
    - A large range of hair and beauty products are sold by businesses in each of the industries;
    - Businesses in each industry operate from similar locations, such as shopping strips and shopping malls;
    - The opening hours of businesses in the three industries are often similar; and
    - Lease arrangements for businesses in each industry are similar, with many businesses required by the terms of their leases to open on Sundays.
- For the same reasons that penalty rates have been adjusted in the retail, fast food, hospitality and pharmacy industries, penalty rates need to be adjusted in the hair and beauty industry. The existing penalty rates are no longer fair or relevant in contemporary workplaces.

Ai Group Workplace Lawyers will represent HABA at hearings before a Full Bench of the FWC which will take place later this year. The case is listed for further Mention and Directions on 24 August.

SINGLE TOUCH PAYROLL – NEW ATO REQUIREMENTS FROM 1 JULY 2018

Single Touch Payroll is a new system for reporting payroll information to the Australian Taxation Office (ATO). The new system started on 1 July 2018 for employers with 20 or more employees. Employers with 19 or less employees will need to report through Single Touch Payroll from 1 July 2019, subject to legislation being passed by Parliament.

Information about the new Single Touch Payroll requirements is available on the ATO's website, including:

- An explanation of the new requirements;
- A fact sheet, checklist, webinars and other resources; and
- A list of payments that need to be reported through Single Touch Payroll.

Employers should speak to their payroll software provider about the new Single Touch Payroll requirements, and find out when and how their payroll software will be updated for the new requirements. The ATO is able to grant deferrals to payroll software providers and employers who are not ready by 1 July 2018.

VICTORIAN LABOR POLICY TO CRIMINALISE WAGE THEFT

On 26 May, the Victorian Government announced that it would introduce amendments to the Victorian Crimes Act to criminalise ‘wage theft’, if re-elected for a further term.

In its media comments, Ai Group expressed the following views:

“There is no need for new State laws in this area. Federal laws already comprehensively address the issue."

"The *Fair Work Act* already contains very large penalties for employers who underpay workers and those who do not keep the required pay records. These penalties were recently increased by up to 20 times.”

"Underpaying workers is not acceptable behaviour. However, ‘Wage theft' is an emotive term coined by the union movement and designed to tarnish all employers. It describes something which is already effectively and comprehensively addressed in legislation.”

"Australia's workplace relations laws and awards are extremely complex and underpayments can be the result of genuine misunderstanding and pay errors. Criminalising underpayments and labelling underpayments as 'theft' would deter business owners from employing people and investing,"

VICTORIAN PORTABLE LONG SERVICE LEAVE BILL – COMMUNITY SERVICES, CONTRACT CLEANING AND SECURITY INDUSTRIES

The Victorian Government’s *Long Service Benefits Portability Bill 2018* is before the Victorian Parliament. The Bill would establish portable long service leave schemes in the community services, contract cleaning and security industries, funded by an employer levy of up to 3% of ordinary pay.

Entitlements under the schemes would be based on service in the relevant industry, rather than service with one employer.

Ai Group has made a detailed submission to the Government, Opposition and key Crossbenchers expressing opposition to the legislation and highlighting numerous problems with the Bill, including excessively broad coverage provisions that would lead to many companies outside the community services, contract cleaning and security industries becoming covered by the schemes and being required to pay the levy.

NEW LONG SERVICE LEAVE ACT IN VICTORIA

The *Long Service Leave Act 2018* has been passed by the Victorian Parliament. The Act replaces the *Long Service Leave Act 1992* (Vic) and introduces changes to the long service leave entitlements of employees and the obligations of employers. The legislation operates from a date to be proclaimed. Ai Group has been advised by the Victorian Government that the legislation will be proclaimed to operate from 1 October 2018.

The new Act will implement the following changes:

- There will be flexibility for employees to take long service leave in any number of periods with the agreement of the employer, including single days of leave.

- An employee will be able to take long service leave after seven years of continuous employment. (Currently pro rata long service leave is payable on termination of employment after seven years of service but leave can only be taken after 10 years of service).

- New averaging arrangements will apply when calculating entitlements for employees who have worked different ordinary hours during their employment with a company.

- Unpaid parental leave that is taken after the date when the legislation comes into operation will count as continuous employment. (In most circumstances, only the first 52 weeks of leave is included).

- Where employment ends and the employee is re-employed within 12 weeks, continuous employment will not be broken.

- New continuity of employment arrangements will apply for casual and seasonal workers.

- New transfer of business / employment arrangements will apply.

- Penalties for breaches of the long service leave legislation will be increased.

- Departmental officers will have new inspection and enforcement powers.

NATIONAL WORKPLACE RELATIONS POLICY AND ADVOCACY TEAM

This report has been prepared by Ai Group's National Workplace Relations Policy and Advocacy Team. The Team represents the interests of Ai Group Members through:

- Protecting and representing the interests of Ai Group Members in relation to workplace relations matters;
- Writing submissions and appearing in major cases in the Fair Work Commission and Courts;
- Pursuing appeals and other cases in Tribunals and Courts on issues of importance to Ai Group Members;
- Representing Members' interests in modern award cases and reviews;
- Keeping Ai Group Members informed and involved in workplace relations developments;
- Providing forums for Ai Group Members to share information on best practice workplace relations approaches, and to influence developments, e.g. through Ai Group's PIR (Policy-Influence-Reform) Forum and PIR Diversity and Inclusion Forum;
- Developing policy proposals for worthwhile reforms to workplace relations laws;
- Making representations to Government and Opposition parties in support of a more productive and flexible workplace relations system;
- Leading and influencing the workplace relations policy agenda;
- Writing submissions and appearing in numerous inquiries and reviews carried out by a wide range of bodies including Parliamentary Committees, the Productivity Commission, the Australian Human Rights Commission, the Australian Law Reform Commission, and others; and
- Opposing union campaigns on issues which would be damaging to competitiveness and productivity.

Ai Group welcomes and values your input and support. Should you wish to discuss any of the issues in this report, please contact Stephen Smith, Head of National Workplace Relations Policy on email stephen.smith@aigroup.com.au or telephone 02 9466 5521.