Significant Workplace Relations Issues

17 May 2018

EXECUTIVE SUMMARY:

- ***The Labor Party has been floating various workplace relations policy proposals that will be very problematic for businesses if implemented.***

- ***The ACTU is pressing the Labor Party to commit to making sweeping changes to the Fair Work Act (FW Act) if elected to give unions a lot more power, including much wider rights to strike, more generous worker entitlements, and wider powers for the Fair Work Commission (FWC). The ACTU is campaigning under the slogan "Change the Rules" and it organised a series of rallies in April and May. A rally in Melbourne on 9 May was attended by tens of thousands of unionists and caused significant disruption to commuters and businesses. The rally led to the closure of the Port of Melbourne when waterside workers walked off the job.***

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

- ***Ai Group will appear before the Expert Panel of the FWC on 16 May in the final consultations for this year's Annual Wage Review. Ai Group has filed a main submission, a reply submission and a post-Budget submission in the Review. The submissions contain a detailed economic analysis and argue that a modest wage increase of 1.8 per cent is warranted. This equates to an increase of about $12.50 per week in the National Minimum Wage and about $14.60 per week at the base trade level.***

- ***Ai Group is currently representing Mondelez Australia in an important case about the meaning of the expression '10 days of paid personal/carer's leave' in section 96 of the FW Act. On behalf of Mondelez, Ai Group is arguing that 12 hour shift workers are entitled to 76 hours of personal/carer's leave, not 120 hours.***

- ***The State Parliaments in Queensland and South Australia have passed legislation to create a licensing scheme for the supply of labour across all industries. The Victorian Government has introduced a Bill into Parliament that would create a similar licensing scheme in Victoria.***

- ***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 has decided to take a measured approach to the issue of unpaid domestic violence leave. The Commission has 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. The FWC has issued a draft award clause for public comment. Ai Group will make a submission on the draft award clause by the 1 June 2018 deadline.

- ***Immediately following the FWC's Unpaid Domestic Violence Leave Decision, the Minister for Small and Family Business, the Workplace and Deregulation, Craig Laundy MP, announced that the Government intends to implement an entitlement to five days of unpaid domestic violence leave through amendments to the Fair Work Act.***

- ***In accordance with its decision in the Family Friendly Work Arrangements Case, the FWC has released a model clause aimed at facilitating discussion between employers and employees about flexible work arrangements. Ai Group will make a submission on the draft clause by the 1 June 2018 deadline.***

- ***On 27 March and 16 April, Ai Group filed detailed submissions opposing the four model award annualised salaries clauses that the FWC published for public comment in its 20 February decision in the Annualised Salaries Case. All four of the clauses would have major adverse effects on workplace flexibility in industries covered by awards that contain annualised salary clauses.***

- ***Between 10 and 14 April, a Full Bench of the FWC heard evidence and submissions in the District Allowances Case. Ai Group is opposing claims by various unions for new district allowances to be included in numerous awards.***

- ***The Construction, Forestry, Mining and Energy Union (CFMEU), the Maritime Union of Australia (MUA) and the Textile, Clothing and Footwear Union of Australia have merged. The new union is called the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU).***

- ***Jaguar Consulting have been commissioned by the Federal Government to conduct a review into the Building and Construction Industry (Improving Productivity) Act 2015 and the Australian Building and Construction Commission (ABCC).***

- ***The Parliamentary Joint Committee on Corporations and Financial Services is conducting an inquiry into the Operation and Effectiveness of the Franchising Code of Conduct and the Oil Code of Conduct. Ai Group has made a detailed submission to the inquiry which argues that franchisors need to have the right to terminate contracts with franchisees that are blatantly committing serious breaches of workplace relations laws and instruments.***

- ***Ai Group is opposing the Victorian Government's Long Service Benefits Portability Bill 2018 which 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.***

- ***Ai Group is strongly opposing changes to the coverage of the Victorian construction industry portable long service leave scheme that CoINVEST, the administrator of the scheme, has sought the Victorian Government's approval for.***

- ***The Long Service Leave Act 2018 has been passed by the Victorian Parliament. The Act replaces the Long Service Leave Act 1992 (Vic). The legislation will come into effect following Royal Assent.***

- ***On 30 April and 1 May 2018, Ai Group's 2018 Annual PIR (Policy-Influence-Reform) Conference was held at the Hyatt Hotel in Canberra. The PIR Conference is Ai Group's premier workplace relations event each year. The Conference was well-supported by Ai Group Members, with over 150 attendees.***

- ***On 4 May 2018, the Department of Employment released its report on Trends in Federal Enterprise Bargaining for the December 2017 quarter.***

LABOR PARTY WORKPLACE RELATIONS PROPOSALS

The Labor Party has been floating various workplace relations policy proposals that will be very problematic for businesses if implemented.

Workplace relations policy proposals that have been recently mentioned by Labor include:

- Termination of any enterprise agreements that were made under the WorkChoices legislation between 2006 and 2009, that are still in operation.

- Restricting the ability for employers to apply to terminate expired enterprise agreements.

- Restricting the ability for employers to reach an enterprise agreement with a small group of employees and later apply that agreement to a large number of employees.

- Expanding the capacity for the Fair Work Commission (**FWC**) to arbitrate enterprise bargaining disputes and to impose an outcome.

- Restricting lock-out rights of employers.
- Expanding the multi-employer bargaining provisions of the *Fair Work Act 2009* (**FW Act**), particularly to give low paid workers and those with little industrial power the ability to obtain an enterprise agreement.
- Restricting the engagement of casual employees, through defining casual employment in a narrow manner in the National Employment Standards. Employees who do not meet the definition would be entitled to annual leave, personal/carer's leave and other entitlements of permanent employees.
- Giving casual employees who have been employed for six months the right to convert to full-time or part-time employment.
- Giving all employees an entitlement to 10 days of paid domestic violence leave per year through the National Employment Standards.
- Legislating to overturn the FWC's *Penalty Rates Decision* and to prevent the FWC making any changes to awards that would reduce the take home pay of any employees.
- Expanding the equal remuneration provisions of the Act, including no longer requiring a male comparator.
- Regulating labour hire arrangements.
- Regulating work arrangements for "gig workers".
- Setting a floor for the National Minimum Wage of 60% of median earnings, or changing the criteria in the FW Act to require the FWC to give more weight to the needs of low paid workers and consequently less weight to economic factors and the interests of employers.
- Abolishing the Australian Building and Construction Commission (**ABCC**).
- Reviving the powers of the Road Safety Remuneration Tribunal, as a separate tribunal or as a division of the FWC.
- Abolishing the Registered Organisations Commission, with the powers to regulate unions and employer associations split between the FWC and ASIC.
- Increasing penalties for employers who breach workplace relations laws and awards.

Ai Group has expressed strong opposition to the above proposals and is regularly arguing against them in the public debate.

The FW Act increased union power and employee entitlements in numerous areas. It also reduced employer flexibility in numerous areas. Not surprisingly, at the time of its implementation, Ai Group was critical of the legislation. Examples of increases to union power and worker entitlements that resulted from the introduction of the FW Act include:

1. An expansion in the coverage of the unfair dismissal laws and a reduction in various employer rights under the laws.

2. The abolition of Australian Workplace Agreements.

3. An expansion in the legislated minimum standards, now known as the National Employment Standards.

4. An expansion in union rights of entry.

5. An expansion in the industrial action rights of unions and employees.

6. A reduction in the lockout rights of employers.

7. The replacement of the previous voluntary bargaining system with a system where employers are forced to bargain if a majority of their employees want a collective agreement. The new system has given unions a lot of powers that they did not previously have, for example, access to bargaining orders and scope orders, and the deeming of unions to be bargaining representatives for their members.

8. An expansion in the allowable matters for awards, with a consequent expansion in the rights of unions and employees.

9. An expansion in the permitted matters for enterprise agreements and a reduction in the unlawful terms, with a consequent expansion in the rights of unions and employees.

10. An expansion in the powers of the FWC to deal with disputes and impose outcomes on businesses, with consequent expanded rights for unions and employees.

11. The introduction of the General Protections which have given unions and employees a lot more rights, and taken away many employer discretions.

12. The imposition of many new transfer of business restrictions, with a consequent expansion in the rights of unions and employees.

After the Act was introduced in 2009, a series of amendments were made by the Labor Government in 2012 and 2013 that tipped the balance even further in favour of unions and workers, including expanded union right of entry laws, the imposition of more restrictions on transfer of business, and increased entitlements under the National Employment Standards.

THE ACTU'S "CHANGE THE RULES" CAMPAIGN

The ACTU is pressing the Labor Party to commit to making sweeping changes to the FW Act if elected to give unions a lot more power, including much wider rights to strike, more generous worker entitlements, 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 rally in Melbourne on 9 May was attended by tens of thousands of unionists and caused significant disruption to commuters and businesses. The rally led to the closure of the Port of Melbourne when waterside workers walked off the job.

The proposals that are being pushed by the ACTU are similar to the proposals that have been floated by Labor (see above), albeit more extreme in various areas. A few examples are discussed below.

Giving unions the ability to bargain across industries and supply chains

The ACTU wants the unions to have the ability to bargain across whole industries and supply chains, including the right to take industry-wide industrial action.

If the ACTU got its way, unions would be able to make unreasonable claims and potentially cripple whole industries and supply chains until employers capitulated. Australia could see a return to an environment like that in 1970s when industrial action was rife and Australia had a reputation internationally as an unreliable supplier of goods and services.

The right to strike at the industry or supply chain levels has never been part of the Australian system, and it must never become part of it. Since 1993 when enterprise bargaining was first introduced by the Keating Labor Government, the federal workplace relations legislation has recognised the importance of bargaining taking place at the enterprise level and of the economic problems that flow from centralised outcomes.

No mention appears to have been made, so far, about protected action ballots, but it is hard to see how protected action ballots could operate at the industry level. Protected action ballots are a critical component of Australia's bargaining system. They protect the right of employees to freely decide whether they wish to take industrial action during enterprise bargaining, and they guard against coercion from union officials and co-workers.

Restricting the ability of employers to apply to the FWC to terminate expired enterprise agreements

Both the ACTU and Labor have floated proposals to restrict the ability of employers to terminate expired enterprise agreements.

According to the FWC's annual reports, there were exactly 400 applications to terminate an expired enterprise agreement in the last financial year and 403 in the previous financial year. These figures include applications made by employers to terminate agreements, as well as applications made by unions and employees. All of the decisions are readily available on the FWC's website. The FWC's own analysis of the decisions highlights that less than three per cent of the applications were opposed. This tiny three per cent figure includes applications made by unions that were opposed by the employer and applications made by an employer that were opposed by a union.

The ACTU's proposal is blatantly one-sided because it is proposing that only employers should lose the right to apply to terminate an expired enterprise agreement, with unions and employees retaining the right to apply for termination.

Defining casual employment in the FW Act based upon an employee's pattern of work

The ACTU wants the FW Act changed to define casual employment in a very narrow way based on an employee's pattern of work. Under its proposal, people who work regular hours could not be employed on a casual basis. The ACTU is arguing that *"it is essential to limit casual employment to very exceptional circumstances that are of a temporary nature"*.

Currently there is no definition of casual employment in the Act, but the standard definition of casual employment in awards is *"an employee engaged as a casual and paid as a casual".* This sensible and clear definition has been the same for decades. It provides clarity and certainty for all parties. If a person is engaged as a casual and paid the 25 per cent casual loading, then the person is a casual.

The ACTU's proposal for a definition of casual employment based on an employee's pattern of work would be recipe for huge risks and uncertainty for employers, and widespread job losses for employees. Any employer with a casual employee would be exposed to back-pay claims for annual leave, personal/carer's leave and so on if the employee has worked regular hours.

These days casuals often work regular hours for lengthy periods and this is often the preference of the employee. This is the reason why the FW Act gives casuals who have worked regularly for a particular period the right to take unpaid parental leave and to request flexible work arrangements, as well as the right to make an unfair dismissal claim. Also, State long service leave laws give casuals who have worked regularly for a lengthy period a right to long service leave.

Under standard award clauses, casual employees have the right to request to convert to permanent employment after 6 or 12 months of regular employment. An employer can only refuse an employee's conversion request on reasonable business grounds. Casual conversion clauses were devised by the Commission in recognition of the fact that a large number of employees prefer to work casually and have no desire to convert to permanent employment. Only a very small proportion of employees who are offered the opportunity by their employer to convert, choose to do so. They either don't want to lose the flexibility that casual employment offers or they don't want to lose the 25 per cent casual loading, or both.

The ACTU's arguments in support of a narrow definition of casual employment, as well as their arguments to remove an employer's right of reasonable refusal, were recently rejected by a Full Bench of the FWC in the major *Casual Employment Case*. In this case, which continued for over two years, the Commission decided that the ACTU's claims would impose unreasonable restrictions on businesses and would potentially lead to widespread job losses.

The ACTU is not letting the facts get in the way of its arguments, including facts about the composition of the Australian workforce. In the public debate, Ai Group intends to keep reinforcing the following key facts about Australia's workforce:

	ACTU Assertion	**The Facts**
1	That casual employment is increasing in Australia	ABS statistics show that casual employment has been stable in Australia for the past 20 years at about 20% of the workforce.
2	That labour hire is increasing in Australia	ABS statistics show that approximately 1% of all employed persons across Australia are labour hire employees. This remains a very small proportion of the workforce.
3	That independent contracting is increasing in Australia	ABS statistics show that self-employed independent contractors make up about 8.5% of employed people. This proportion has decreased from 9.1% in 2014. By far, the biggest group of independent contractors are engaged in the construction industry (e.g. plumbers and electricians).
4	That a large proportion of workers are "gig economy" workers	The number of people who work for Uber, Airtasker, Foodora and other "gig economy" businesses is a tiny fraction of the workforce – much less than 1%.

FAIR WORK BILLS BEFORE PARLIAMENT

Three important 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 FW Act to **a**bolish 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.

ANNUAL WAGE REVIEW

Ai Group will appear before the Expert Panel of the FWC on 16 May in the final consultations for this year's Annual Wage Review. Ai Group has filed a main submission, a reply submission and a post-Budget submission in the Review. The submissions contain a detailed economic analysis and argue that a modest wage increase of 1.8 per cent is warranted. This equates to an increase of about $12.50 per week in the National Minimum Wage and about $14.60 per week at the base trade level.

Ai Group's submissions argue that the FWC needs to take a cautious approach when determining the quantum of this year's minimum wage increase. An excessive increase would reduce the job security of low paid workers and reduce employment opportunities for the unemployed and underemployed.

The 3.3 per cent minimum wage increase awarded by the FWC last year was exceptionally high and out of step with economic factors.

In its submission to the Annual Wage Review, the ACTU has proposed a $50 per week or 7.2 per cent increase in the national minimum wage and award rates. In its media comments, Ai Group described the ACTU's proposal, which is nearly four times the current rate of inflation, as job-destroying. The ACTU's claim would push our national minimum wage to without doubt the highest in the world.

The FWC's decision in the Annual Wage Review is likely to be handed down in early June with the increase operative from 1 July.

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

Ai Group is currently representing Mondelez Australia in an important case about the meaning of the expression *'10 days of paid personal/carer's leave'* in section 96 of the FW Act. On behalf of Mondelez, Ai Group is arguing that 12 hour shift workers are entitled to 76 hours of personal/carer's leave under s.96 of the Act, not 120 hours.

The case arose in the context of an application to approve an enterprise agreement that was being dealt with by Commissioner Cirkovic. On behalf of Mondelez, Ai Group applied to the President of the FWC under s.615A(2)(a) of the FW Act for the matter to be referred to a Full Bench of the Commission. On 26 March 2018, the Minister for Small and Family Business, the Workplace and Deregulation, Craig Laundy MP, also applied to the FWC under s.615A of the Act for the matter to be referred to a Full Bench and stated that, if the matter was referred, the Federal Government intends to make submissions in the case. In respect of the two applications under s.615A, the President of the FWC delegated his power to make a decision to Vice President Hatcher. On 13 April, Vice President Hatcher handed down a decision declining the applications by Mondelez and the Minister for the matter to be referred to a Full Bench. The matter was referred back to Commissioner Cirkovic and the enterprise agreement was approved.

A series of unfavourable decisions have been handed down on what constitutes a *"day"* for the purposes of the expression *"10 days of paid personal/carer's leave"* under s.96 of the FW 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* and the Federal Court in *CFMEU v Glendell Mining* and in *CFMEU v Anglo Coal* all support an interpretation that a "*day"* means the ordinary hours that the employee is required to work in a 24 hour period. Under this interpretation:

- An employee working a roster pattern of 8 ordinary hours per day / shift would accrue 80 hours a year of personal/carer's leave per year;

- An employee working a roster pattern of 10 ordinary hours per day / shift would accrue 100 hours of personal/carer's leave per year; and

- An employee working a roster pattern of 12 ordinary hours per day / shift would accrue 120 hours of personal/carer's leave per year.

Ai Group believes that the above interpretation is not aligned with the legislative intention of the provisions, that it conflicts with widespread industry practice, and leads to absurd outcomes (e.g. a part-time employee working one day per week would 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 experience problems with this issue. If a dispute about this matter is arbitrated by the FWC under the terms of the dispute settling procedure in an enterprise agreement (as was the case in the *RACV* matter) judicial review of the decision in the Federal Court is unlikely to be available.

LABOUR HIRE LICENSING LEGISLATION IN QUEENSLAND, SOUTH AUSTRALIA AND VICTORIA

The State Parliaments in Queensland and South Australia have passed legislation to create a licensing scheme for the supply of labour across all industries. The Victorian Government has introduced a Bill into Parliament that would create a similar licensing scheme in Victoria.

The Queensland licensing scheme

The Queensland *Labour Hire Licensing Act 2017* commenced on 16 April 2018. Labour hire providers have until 15 June 2018 to lodge an application for a licence.

The Queensland licensing legislation has broad coverage, beyond arrangement that are commonly understood as being "labour hire". A business is covered if it meets the relevant definitions as a provider of labour hire services, or as a user of labour supplied by a provider of labour hire services. Subject to some limited exclusions, a business is considered a provider of labour hire services if, in the course of carrying on the business, it supplies to another person or business, a worker to do work. The scheme adopts a broad definition of *"worker"* that is not confined to employees. The definition extends to contractors placed with another person to do work.

On 6 April 2018, the Queensland Government released the *Labour Hire Licensing Regulations 2018 (Qld)* that exclude certain workers from the licensing scheme. A Member Advice has been circulated to all Ai Group Members detailing the exclusions.

The Queensland legislation includes penalties of up to $378,450 for companies. The maximum penalty for individuals is $130,439 or imprisonment for up to three years. The penalties apply to those who provide "labour hire services" without a licence and to those who use an unlicensed labour hire provider. The penalties also apply to persons who enter into an arrangement to avoid obligations under the legislation or the licensing scheme.

The South Australian licensing scheme

The South Australian *Labour Hire Licensing Act 2017* commenced on 1 March 2018. Labour hire providers have until 1 September 2018 to lodge an application for a licence.

Subject to some limited exclusions, a business is considered a provider of labour hire services under the South Australian legislation if, in the course of carrying on the business, it supplies to another person or business, a worker to do work in and as part of the commercial undertaking of the other person or business. The South Australian licensing scheme adopts a broad definition of *"worker"* that is not confined to employees. The definition extends to contractors placed with another person to do work.

A list of examples of businesses that are considered to be providers of labour hire services under the South Australian licensing scheme, is available on the South Australian Government's labour hire licensing website. This is not an exhaustive list and Members will need to give careful consideration to whether or not they are providers of labour hire services under the legislation. A Member Advice has been circulated to all Ai Group Members detailing the exclusions.

The South Australian legislation includes penalties of up to $400,000 for companies. The maximum penalty for individuals is $140,000 or imprisonment for up to three years. The penalties apply to those who provide "labour hire services" without a licence and to those who use an unlicensed labour hire provider. The penalties also apply to persons who enter into an arrangement to avoid obligations under the legislation or the licensing scheme.

The Victorian Labour Hire Licensing Bill

The Victorian *Labour Hire Licensing Bill 2017* is currently before the Victorian Parliament. If the Bill is passed by Parliament, the legislation will introduce a labour hire licensing scheme with many similar features to the Queensland and South Australian schemes.

The Victorian Bill contains similar coverage provisions to the South Australian licensing legislation.

Given that the Bill is still before Parliament, regulations have not yet been made providing for exclusions from the legislation. Late last year the Victorian Government released a consultation paper which identifies a number of business arrangements that could potentially be excluded from the requirement to hold a licence. However, at this stage, there is no certainty regarding the extent of any exclusions.

FWC UNPAID DOMESTIC VIOLENCE LEAVE DECISION

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 has decided to take a measured approach to the issue of *unpaid* domestic violence leave. The Commission has 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. The FWC has issued a draft award clause for public comment. Ai Group will make a submission on the draft award clause by the 1 June 2018 deadline.

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.

Ai Group's has played a leading role throughout the FWC's *Domestic Violence Leave Case* in representing the interests of employers.

In its media comments, Ai Group said that domestic violence is totally unacceptable and that employers typically take a compassionate approach when employees who experience domestic violence need to take some leave. While different employers have different capacities to provide assistance to employees experiencing domestic violence, most employers are not likely to experience problems with what the Commission has decided.

The Commission intends to review the operation of the unpaid domestic violence leave entitlements in June 2021 and, at that time, also consider whether any paid domestic leave entitlements should be provided and/or access granted to personal/carer's leave entitlements.

GOVERNMENT ANNOUNCEMENT ON LEGISLATION TO IMPLEMENT UNPAID DOMESTIC VIOLENCE LEAVE

Immediately following the FWC's Unpaid Domestic Violence Leave Decision, the Minister for Small and Family Business, the Workplace and Deregulation, Craig Laundy MP, announced that the Government intends to implement an entitlement to five days of unpaid domestic violence leave through amendments to the FW Act.

This will have the effect of extending the unpaid leave entitlement determined by the FWC for award-covered employees to those employees who are not covered by an award. The legislation has not yet been drafted.

FWC FAMILY FRIENDLY WORK ARRANGEMENTS DECISION

In accordance with its decision in the *Family Friendly Work Arrangements Case*, the FWC has released a model clause aimed at facilitating discussion between employers and employees about flexible work arrangements. Ai Group will make a submission on the draft clause by the 1 June 2018 deadline.

Ai Group played the 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.

FWC ANNUALISED SALARIES CASE

On 27 March and 16 April, Ai Group filed detailed submissions opposing the four model award annualised salaries clauses that the FWC published for public comment in its 20 February decision in the *Annualised Salaries Case*. All four of the clauses would have major adverse effects on workplace flexibility in industries covered by awards that contain annualised salary clauses.

A further hearing before the Full Bench is scheduled for 8 June.

FWC DISTRICT ALLOWANCES CASE

Between 10 and 14 April, a Full Bench of the FWC heard evidence and submissions in the *District Allowances Case*. Ai Group is opposing claims by various unions for new district allowances to be included in numerous awards.

Ai Group filed a further submission in the case on 26 April. The Full Bench has reserved its decision.

CFMEU, MUA AND TCFUA MERGER

The Construction, Forestry, Mining and Energy Union (CFMEU), the Maritime Union of Australia (MUA) and the Textile, Clothing and Footwear Union of Australia have merged. The new union is called the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU).

In effect the CFMEU's coverage rules have been expanded and the MUA and TCFUA have been deregistered.

The merger took effect on 27 March. On 9 April, a Full Bench of the FWC heard an appeal against the decision of Deputy President Gostencnik to approve the merger. At the time of writing, the decision of the Full Bench was still reserved.

On 16 March, Vice President Hatcher rejected an application to stay Deputy President Gostencnik's decision until after the appeal and this enabled the merger to proceed on 27 March.

REVIEW INTO THE BUILDING AND CONSTRUCTION INDUSTRY (IMPROVING PRODUCTIVITY) ACT 2015 AND THE ABCC

Jaguar Consulting has been commissioned by the Federal Government to conduct a review into the ABCC Act and the ABCC.

Ai Group made a submission to the Review in April 2018, and also filed a supplementary submission responding to a number of follow-up questions asked by Jaguar Consulting.

SENATE INQUIRY INTO FRANCHISING

The Parliamentary Joint Committee on Corporations and Financial Services is conducting an inquiry into the Operation and Effectiveness of the Franchising Code of Conduct and the Oil Code of Conduct. Ai Group has made a detailed submission to the inquiry which argues that franchisors need to have the right to terminate contracts with franchisees that are blatantly committing serious breaches of workplace relations laws and instruments.

The Committee is required to report to Parliament by 30 September.

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

Ai Group is opposing the Victorian Government's *Long Service Benefits Portability Bill 2018* which 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.

On 14 May 2018, Ai Group sent letters to the Government, Opposition and key Crossbenchers expressing Ai Group's opposition to the legislation and highlighting numerous problems with the Bill (**Annexure A**).

Ai GROUP OPPOSITION TO COINVEST'S PROPOSED EXPANSION IN COVERAGE

Ai Group is strongly opposing changes to the coverage of the Victorian construction industry portable long service leave scheme that CoINVEST, the administrator of the scheme, has sought the Victorian Government's approval for.

CoINVEST has written to the Victorian Government seeking approval for a series of coverage changes that would have the effect of expanding the coverage of the scheme, and the obligation upon employers to pay a 2.7% payroll levy, to include certain electrical manufacturing work and other areas. Ai Group has written to the Victorian Industrial Relations Minister, Natalie Hutchins MP, urging the Government to block the changes, and has met with the Minister on a number of occasions about this issue.

A majority of members of the CoINVEST Board have expressed in-principle support for the coverage changes but the changes cannot proceed without the agreement of the Victorian Government.

VICTORIAN LONG SERVICE LEAVE ACT 2018

The *Long Service Leave Act 2018* has been passed by the Victorian Parliament. The Act replaces the *Long Service Leave Act 1992* (Vic). The legislation will come into effect following Royal Assent.

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 service (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.
- Paid parental leave and up to 12 months of unpaid parental leave will count as service.
- 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 staff will have new inspection and enforcement powers.

Ai GROUP'S 2018 ANNUAL PIR (POLICY-INFLUENCE-REFORM) CONFERENCE

On 30 April and 1 May 2018, Ai Group's 2018 Annual PIR (Policy-Influence-Reform) Conference was held at the Hyatt Hotel in Canberra. The PIR Conference is Ai Group's premier workplace relations event each year. The Conference was well-supported by Ai Group Members, with over 150 attendees.

Speakers at this year's conference included: Workplace Relations Minister Craig Laundy MP, Shadow Assistant Minister for Workplace Relations Lisa Chesters MP, FWC Vice President Joe Catanzariti, Fair Work Ombudsman Natalie James, ABC Commissioner Stephen McBurney, AWU National Secretary Daniel Walton, and many others.

There was a lot of discussion at the Conference about Labor and the ACTU's proposed changes to the FW Act, and significant concern was expressed about the proposed changes. Diversity and Inclusion were also key topics at the Conference with panel sessions on Indigenous employment initiatives, and enterprise initiatives to attract more women into STEM fields.

WAGE OUTCOMES UNDER ENTERPRISE AGREEMENTS

On 4 May 2018, the Department of Employment released its report on *Trends in Federal Enterprise Bargaining* for the December 2017 quarter. Average annualised wage increases (**AAWI**) for enterprise agreements approved in the December 2017 quarter are summarised in the following table.

Industry Sector or Type of Agreement	AAWI (%) for agreements approved in December 2017	Change from September 2017(%)
All sectors	2.5	Up 0.3
Private sector	2.6	Up 0.2
Public sector	2.3	Up 0.3
Manufacturing	2.5	Up 0.1
Metals manufacturing	2.2	Down 0.3
Non-metals manufacturing	2.7	Up 0.3
Construction	4.7	Up 1.6
Transport, postal & warehousing	2.4	Up 0.4
Mining	1.8	Down 0.1
Information media and telecommunications	2.1	Up 0.2
Retail	2.3	Up 1.2
Single enterprise non-greenfields	2.5	Up 0.3

Single enterprise greenfields	2.5	Same
Union/s covered	2.5	Up 0.4
No Union/s covered	2.4	Down 0.1

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.

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ANNEXURE A

14 May 2018

The Hon Robert Clark MP
Shadow Minister for Industrial Relations
24 Rutland Road
Box Hill, Victoria, 3128

Dear Mr Clark

Re. Long Service Benefits Portability Bill 2018

We are writing to set out our concerns about the *Long Service Benefits Portability Bill 2018* (**Bill**). These concerns include our opposition to portable leave schemes being established for the community services, contract cleaning and security industries, as well as our concerns about particular provisions in the Bill.

Ai Group has amongst its membership many large organisations in the community services, contract cleaning and security industries.

Ai Group's opposition to the Bill

Ai Group opposes any extension in the portability of long service leave entitlements beyond the building and construction industry in Victoria where portable entitlements already exist, for the reasons set out in our submission to the Parliament of Victoria's Economic, Education, Jobs and Skills Committee inquiry into the portability of long service leave entitled in Victoria.

None of the Members of the Committee that conducted the inquiry recommended the establishment of portable long service leave schemes for the community services, contract cleaning or security industries. Only three of the seven Members of the Committee which conducted the inquiry (i.e. a minority of Members) supported the recommendation that a feasibility study be conducted into the introduction of portable long service leave in the contract cleaning and security industries (see the last seven pages of the Committee's Final Report).

Portable long service leave schemes are much costlier for industry than traditional long service leave schemes as demonstrated by the costings in Ai Group's submission to the Committee's inquiry. The levy which would be imposed on employers would operate like a tax on employment, with adverse effects on employment growth.

In addition, there would be substantial additional costs imposed on employers due to the regulatory burden of being required to comply with the portable long service leave schemes as well as the long service leave provisions in other legislation and in industrial instruments. The Bill is not able to prevent employers being required to

comply with other long service leave provisions which are binding upon them (e.g. the long service leave provisions in the National Employment Standards in the *Fair Work Act 2009*).

If passed, the Bill would make Victoria less competitive against interstate and overseas firms. It would deter investment in Victoria and reduce employment.

Concerns about particular provisions in the Bill

The following comments relate to particular provisions of the Bill. None of these comments should be taken as indicating any support by Ai Group for the Bill. Ai Group opposes the Bill for the reasons identified above.

Coverage definitions

It is vital that the coverage provisions in the Bill are as precise as possible. If a business believes that it is not covered by a portable long service leave scheme but is held to be covered years down the track, hundreds of thousands of dollars may be owing for the levy, which could force the business into insolvency with the employees losing their jobs.

Over the past 15 years, Ai Group's members have been involved in a large number of coverage disputes with CoINVEST – the administrator of the Victorian construction industry portable long service leave scheme – because the definitions of *"construction work"* and *"construction industry"* are not sufficiently precise. The coverage provisions in the Bill are even less precise than the problematic coverage provisions in the construction industry portable long service leave scheme.

Coverage definitions – community services sector (Clause 3 and Schedule 1)

"Community service work" is defined in Schedule 1 of the Bill in an extremely broad manner which would undoubtedly lead to a large number of businesses being inadvertently covered with all of the consequent costs and risks involved.

There are countless examples of businesses outside of the community services sector that could be captured by the definition, including (to name just a few):

- Manufacturers of products that may be used by people with a disability;
- Electricians, plumbers, carpenters, gardeners, etc, who carry out repairs and maintenance on places of accommodation for people with a disability or who are vulnerable, disadvantaged or in crisis;
- IT companies that design and/or sell software or hardware to assist people with a disability;
- Construction businesses that build places of accommodation for people with a disability or who are vulnerable, disadvantaged or in crisis;
- Banks and financial institutions that lend money to people with a disability or who are vulnerable, disadvantaged or in crisis;

- Hotels where people with a disability or who are vulnerable, disadvantaged or in crisis may choose to stay on a holiday;
- Private colleges and schools where people with a disability or who are vulnerable, disadvantaged or in crisis may attend; and
- Businesses that participate in community fundraising initiatives, such as the Cancer Council's *Australia's Biggest Morning Tea* and International Women's Day fundraising events, which support people with a disability or who are vulnerable, disadvantaged or in crisis.

Unlike the portable long service leave schemes that operate in the construction and coal mining industries, the proposed portable long service leave scheme does not exclude managers, professionals and head office staff. As drafted the Bill would apparently require the levy to be calculated and paid on the salaries of all staff of businesses that carry out any "community services work", including the salaries of CEOs. This approach will substantially increase the levy that employers will be required to pay to fund the schemes and exacerbate the adverse impacts on business viability and employment.

The obvious effect of the Bill will be to strongly discourage businesses outside of what is commonly regarded as the community services sector from developing and/or selling goods and services to people with a disability or who are vulnerable, disadvantaged or in crisis, and from participating in community fundraising initiatives. Such an outcome is obviously not in the interests of disadvantaged people and obviously not in the community's interests.

The definition of "community service work" in the Bill is completely unworkable.

If, despite Ai Group's opposition, the Bill has sufficient support to be passed by Parliament, more workable coverage definitions are set out in **Attachment A**.

Coverage definitions – contract cleaning industry (Clause 3 and Schedule 2)

The "contract cleaning industry" and "cleaning work" are defined in Schedule 2 of the Bill in a very expansive manner which would undoubtedly lead to a large number of businesses being inadvertently covered with all of the consequent costs and risks involved.

If, despite Ai Group's opposition, the Bill has sufficient support to be passed by Parliament, more workable coverage definitions are set out in **Attachment B**.

Coverage definitions – security industry (Clause 3 and Schedule 3)

If, despite Ai Group's opposition, the Bill has sufficient support to be passed by Parliament, the coverage provisions need to be tightened to avoid unintended consequences.

Some proposed amendments are set out in **Attachment C**.

Double-dipping and multiple obligations on employers

Common sources of long service leave entitlements of Victorian employees are:

- The Victorian *Long Service Leave Act 2018*;
- The National Employment Standards under the *Fair Work Act 2009*;
- Enterprise agreements and other fair work instruments under the *Fair Work Act 2009*;
- Transitional instruments under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*; and
- The Victorian *Construction Industry Long Service Leave Act 1997*.

The provisions in the Bill that are intended to avoid double-dipping neglect to deal with all of the above common sources of long service leave entitlements. This is a major problem.

The following amendments need to be made to the Bill:

Schedule 1 – Community services

17 No double-dipping

(1) If a registered active worker for the community services sector has an entitlement to long service leave, or the payment of long service benefits, under the *Long Service Leave Act 2018*, the *Fair Work Act 2009*, a fair work instrument or a transitional instrument given continuing effect under the Fair Work Transition Act, the entitlements of the worker and the obligations of the employer and the Authority under this Act are to be determined in accordance with the regulations.

(2) Regulations made for the purposes of subclause (1) must give effect to the following principles—

(a) a worker is not to be entitled to both long service leave under the *Long Service Leave Act 2018*, the *Fair Work Act 2009*, a fair work instrument, a transitional instrument given continuing effect under the Fair Work Transition Act or a corresponding law and payment of a long service benefit under this Act in respect of the same service period;

(b) an employer is not to be required to pay a worker for long service leave under the *Long Service Leave Act 2018*, the *Fair Work Act 2009*, a fair work instrument, a transitional instrument given continuing effect under the Fair Work Transition Act or a corresponding law and to pay a levy under this Act for the worker in respect of the same service period;

(c) the Authority is not to be required to pay a long service benefit to a worker under this Act and to reimburse an employer for long service leave granted to the worker under the *Long Service Leave Act 2018*, the *Fair Work Act 2009*, a fair work instrument, a transitional instrument given continuing effect under the Fair Work Transition Act or a corresponding law in respect of the same service period.

(3) To avoid doubt, the regulations may modify the operation of the other provisions of this Act for the purpose of giving effect to the principles set out in subclause (2).

Schedule 2 – Contract cleaning

24 Benefits under other laws—election

(1) A registered active worker for the contract cleaning industry must elect the law under which long service benefits are to be taken if the worker is eligible both for long service benefits under this Act and long service benefits under one or more of the following—

(a) the **Long Service Leave Act 2018**;

(b) a corresponding law;

(c) a fair work instrument or a ~~fair work~~ transitional instrument given continuing effect under the Fair Work Transition Act;

(d) the *Fair Work Act 2009*.

(2) If so, the worker must nominate to the Authority in writing—

(a) the law or instrument under which the worker elects to take the long service benefits; and

(b) the service period, or part of the service period, for which the election is made.

(3) If the Authority receives a written nomination, the Authority must—

(a) remove from the relevant workers register credit for service equal to the service period, or part of the service period, nominated; and

(b) keep a record of the credit for service removed.

Schedule 3 – Security industry

24 Benefits under other laws—election

(1) A registered active worker for the security industry must elect the law under which long service benefits are to be taken if the worker is eligible both for long service benefits under this Act and long service benefits under one or more of the following—

(a) the **Long Service Leave Act 2018**;

(b) a corresponding law;

(c) a fair work instrument or a ~~fair work~~ transitional instrument given continuing effect under the Fair Work Transition Act;

(d) the *Fair Work Act 2009*.

(2) If so, the worker must nominate to the Authority in writing—

(a) the law or instrument under which the worker elects to take the long service benefits; and

(b) the service period, or part of the service period, for which the election is made.

(3) If the Authority receives a written nomination, the Authority must—

(a) remove from the relevant workers register credit for service equal to the service period, or part of the service period, nominated; and

(b) keep a record of the credit for service removed.

Dispute settling

It is very important that employers who believe that they are not covered by the relevant portable long service scheme, and the obligation to pay the levy, have a cost-effective and timely mechanism to challenge a decision of the Authority that they are covered. This is a major problem with the *Construction Industry Long Service Leave Act 1997*, and it is important that the problem is not duplicated in this Bill.

To address this issue, the following amendments need to be made to clause 56 in the Bill:

56 Review by VCAT

(1) A person whose interests are affected by any of the following decisions may apply to VCAT for review of the decision—

(a) a decision of the registrar to refuse to register a person on the employers register or workers register for a covered industry;

(ab) a decision of the registrar to register a person on the employers register or workers register for a covered industry;

(b) a decision of the registrar to move a person from the active part of the employers register or workers register for a covered industry to the inactive part of that register;

(c) a decision of the registrar to refuse to remove a person from the inactive part of the employers register or workers register for a covered industry to the active part of that register;

(d) a decision of the registrar in relation to the service for which a worker is entitled to be credited;

(e) a refusal by the Authority to pay a long service benefit, or make a payment for or on behalf of long service leave, under this Act;

(f) a refusal by the Authority to pay a person under this Act on behalf of a reciprocal authority;

(g) a refusal by the Authority to reimburse an employer under—

(i) clause 25 of Schedule 2; or

(ii) clause 25 of Schedule 3.

(h) a decision by the Authority that an employer is covered by Schedule 1, Schedule 2 or Schedule 3;

(i) a decision by the Authority that an employer is obligated to pay a levy.

(2) An employer or contract worker for a covered industry may apply to VCAT for review of a decision of the Governing Board determining or changing the rate of levy payable by the employer or contract worker.

57 Time limit for applying for review

An application for review under section 56 must be made within ~~28 days~~ 60 days after the later of—

(a) the day on which the relevant decision is made; or

(b) if, under the **Victorian Civil and Administrative Tribunal Act 1998**, the person requests a statement of reasons for the decision, the day on which the statement of reasons is given to the person or the person is informed under section 46(5) of that Act that a statement of reasons will not be given.

Definition of "ordinary pay"

Other long service leave schemes, including portable long service leave schemes, do not typically include shift allowances, other allowances or weekend penalties in the definition of "ordinary pay". For example, under the Victorian *Long Service Leave Act 2018*, shift loadings, weekend penalties and certain allowances are not *"ordinary pay".*

The definition of *"ordinary pay"* in clause 9 of Schedule 1 of the Bill needs to be amended to make it clear that weekend penalties are not included in the definition. Shift allowances and other allowances are already excluded in this Schedule.

The definitions of *"ordinary pay"* in clause 13 of Schedule 2 and clause 13 of Schedule 3 of the Bill need to be amended to exclude shift allowances, other allowances and weekend penalties from the definitions.

Requirement to provide information

It is important that employers are only required to provide information to an inspector that is reasonably required for the inspector to carry out the functions under the Bill. The following amendment should be made to clause 62:

62 Power to require information or documents

(1) For the purpose of monitoring compliance with this Act and the regulations, an authorised officer may by written notice require a person, within a reasonable period specified in the notice—

(a) to give the authorised officer any information that the authorised officer reasonably requires; or

(b) to produce to the authorised officer a document in the custody or control of the person.

(2) A notice under subsection (1) must—

(a) warn the person that a refusal or failure to comply with the notice, without reasonable excuse, is an offence; and

(b) if directed to an individual, inform the person that the person may refuse or fail to produce documents (other than a record or other document that the person is required to keep under this Act) or provide information if producing the document or providing the information would tend to incriminate the person.

Note

See section 68 for offences related to giving information or producing documents.

(3) An authorised officer may inspect, and make copies of or take extracts from, a document produced to the authorised officer under subsection (1).

Limitations on claims for back-pay of the levy

If a business believes that it is not covered by one of the portable long service leave schemes in the Bill but is held to be covered years down the track, hundreds of thousands of dollars may be owing for the levy, which could force the business into insolvency with the employees losing their jobs. Therefore, there needs to be a limit on

claims for back-pay of the levy and penalty interest. A six year limit would be consistent with the limit on underpayment claims under the *Fair Work Act 2009*.

Also, the Authority needs to be given the discretion to waive the requirement to pay penalty interest in appropriate circumstances (e.g. financial hardship of the employer, or the employer's genuine and reasonable belief that it was not covered by Schedule 1, 2 or 3). This discretion exists under other portable long service leave schemes (e.g. the coal industry scheme).

Clause 34 should be amended as follows:

34 Unpaid levy

(1) Interest is payable on an amount of unpaid levy owing to the Authority at the rate fixed from time to time under section 2 of the **Penalty Interest Rates Act 1983** and calculated from the date on which the amount becomes due until the date on which the amount is paid or recovered. The Authority may waive the requirement to pay penalty interest if the Authority decides that this is appropriate in the circumstances, including in circumstances where the employer is experiencing financial hardship or where the employer held a genuine and reasonable belief that it was not covered by Schedule 1, 2 or 3.

(2) The Authority may recover an amount of unpaid levy owing to the Authority, and any interest owing to the Authority under subsection (1), as a debt in a court of competent jurisdiction. A court must not make an order that relates to a period that is more than 6 years before the proceedings concerned commenced.

Service credits

The service crediting arrangements in the Bill are excessively generous which will substantially increase the amount of the levy that employers will need to pay to fund the portable long service leave schemes.

Under the provisions of the Bill, workers are entitled to be credited with one day of service for each day in each service period. A service period continues until a worker does not perform any work in the community services industry in a quarter. This apparently means that an employee who works on only four days of the 365 days in a year (i.e. one day in each quarter) could be entitled to the same long service leave entitlements as an employee who works five days a week each year. (See clauses 5, 6 and 7 in Schedule 1, clauses 6, 7 and 8 in Schedule 2, and clauses 6, 7 and 8 in Schedule 3). This is not logical or fair on employers or employees. It will also substantially increase the levy that employers will be required to pay to fund the schemes and exacerbate the adverse impacts on business viability and employment.

The excessively generous service credit provisions in the Bill contrast with the already very generous provisions in the Victorian construction industry portable long service leave scheme. Under the construction industry scheme, in calculating a period of service any period of employment with an employer for less than five days in a month is disregarded (see CoINVEST Rule 23.10).

Further, there should be no back-dating of service credits for the period prior to the implementation of the portable long service leave schemes. A large number of employees would have already accrued long service leave entitlements under other long service leave schemes for the period leading up to the date of implementation. Back-dating will lead to unnecessary complications for the Authority and businesses, and potential double-dipping.

Entitlement to take leave

We note that the community services sector scheme does not provide employees with an entitlement to take long service leave (see clause 8 in Schedule 1), and hence is not a long service "leave" scheme at all. In contrast, the contract cleaning and security industry schemes give employees an entitlement to take long service leave (clause 11 in Schedule 2 and clause 11 in Schedule 3).

Transitional arrangements

Given the major changes to long service leave entitlements that would occur if the Bill is passed, employers in the community services, contract cleaning and security industry should be given at least six months' notice (and ideally 12 months' notice) of the implementation of the portable long service leave schemes, once the legislation comes into operation.

We would be happy to provide any additional information that you may require about these important matters.

Yours sincerely

Tim Piper
Head – Victoria

ATTACHMENT A

COVERAGE DEFINITIONS – COMMUNITY SERVICES SECTOR

The coverage definitions in the Bill relating to the community services sector are completely unworkable. The following amended definitions would be more workable.

2 What is *community service work*?

(1) Subject to subclause (2), ***community service work*** is work that falls within the coverage of the *Social, Community, Home Care and Disability Services Award 2010* as in force on 1 June 2018 ~~provides—~~

~~(a) training and employment support, or employment placement, for persons with a disability or other persons who are vulnerable, disadvantaged or in crisis; or~~

~~(b) financial support or goods for the assistance of persons with a disability or other persons who are vulnerable, disadvantaged or in crisis; or~~

~~(c) accommodation, or accommodation-related support services, for persons with a disability or other persons who are vulnerable, disadvantaged or in crisis; or~~

~~(d) home care support services for persons with a disability or other persons who are vulnerable, disadvantaged or in crisis; or~~

~~(e) other support services for—~~

~~(i) persons with a disability or their carers; or~~

~~(ii) persons who are vulnerable, disadvantaged or in crisis; or~~

~~(f) community legal services, community education and information services, or community advocacy services; or~~

~~(g) community development services; or~~

~~(h) fundraising assistance for community groups; or~~

~~(i) services providing assistance to particular cultural or linguistically diverse communities; or~~

~~(j) a service, or a service of a class, the provision of which is prescribed to be community service work.~~

(2) ***Community service work*** does not include an activity, or an activity of a class, prescribed not to be community service work.

- - -

4 Who is an *employee*?

(1) Subject to subclause (2), an ***employee*** for the community services sector is an individual employed by an employer for the sector (whether in Victoria or elsewhere) and includes an individual employed on a casual basis.

(2) The following are not employees for the community services sector—

(a) if the employer operates a business in addition to being a licensed children's service under the **Children's Services Act 1996** or an approved provider under the Education and Care Services National Law (Victoria)—an individual employed by the employer unless the individual's role is to care for children or coordinate the care of children for the licensed children's service or approved provider;

(b) if the employer is a community health centre registered under section 48 of the **Health Services Act 1988**—an individual employed by the employer unless the individual's role is to carry out community service work at the community health centre;

(c) if the employer provides services for persons with a disability or for persons who are vulnerable, disadvantaged or in crisis —an individual employed by the employer whose primary role is to provide health services to those persons;

(d) an individual covered by ~~to whom~~ any of the following awards or agreements ~~apply~~ —

(i) the *Aged Care Award 2010*, as ~~amended and~~ in force ~~from time to time~~ on 1 June 2018;

(ii) the *Manufacturing and Associated Industries and Occupations Award 2010* as in force on 1 June 2018;

(iii) the *Professional Employees Award 2010* as in force on 1 June 2018;

(iv) the *Building and Construction General On-site Award 2010* as in force on 1 June 2018;

(v) the *Electrical, Electronic and Communications Contractors Award 2010* as in force on 1 June 2018;

(vi) a prescribed award or agreement;

(e) an individual who is, or is a member of a class, prescribed not to be an employee for the community services sector.

ATTACHMENT B

COVERAGE DEFINITIONS – CONTRACT CLEANING INDUSTRY

The coverage definitions in the Bill relating to the contract cleaning industry are problematic. The following amended definitions would be more workable:

1 What is ~~the~~ *contract cleaning industry* *work*?

(1) Subject to subclause (2), ***contract cleaning industry work*** is work that falls within the coverage of the *Cleaning Services Award 2010* as in force on 1 June 2018.

~~The ***contract cleaning industry*** is—~~

~~(a) in relation to Victoria—the industry in which employers provide cleaning work to other people through the provision of workers' services; and~~

~~(b) in relation to a reciprocating jurisdiction—the contract cleaning industry within the meaning of the corresponding law of that jurisdiction.~~

~~**2 What is *cleaning work*?**~~

~~(1) Subject to this clause, ***cleaning work*** is—~~

~~(a) work that has, as its only or main function, the bringing of premises into, or keeping of premises in, a clean condition; or~~

~~(b) an activity, or an activity of a class, prescribed to be cleaning work.~~

~~(2) ***Cleaning work*** includes the cleaning of a swimming pool and the grounds surrounding the swimming pool.~~

~~(3)~~(2) ***Contract cleaning industry work*** does not include—

(a) the removal of waste from commercial waste receptacles; or

(b) the bringing of grounds surrounding a building or house into, or keeping the grounds in, a clean condition; or

(c) work of a cleaning nature performed on a building or house under construction; or

(d) work of a gardening nature, including the removal or alteration of vegetation; or

(e) an activity, or an activity of a class, prescribed not to be cleaning work.

- - -

43 Who is an *employee*?

(1) Subject to subclause (2), an ***employee*** for the contract cleaning industry is an individual employed by an employer for the industry (whether in Victoria or elsewhere) and includes—

(a) an apprentice and any individual whose employment agreement requires the individual to learn or be taught cleaning work; and

(b) an individual employed on a casual or seasonal basis.

(2) An individual is not an employee for the contract cleaning industry if—

(a) the individual's name is included on the register of workers kept by the trustee in accordance with the trust deed under the **Construction Industry Long Service Leave Act 1997**; or

(b) the individual is, or is a member of a class, prescribed not to be an employee for the contract cleaning industry;

(c) the individual is covered by any of the following awards or agreements —

(ii) the *Manufacturing and Associated Industries and Occupations Award 2010* as in force on 1 June 2018;

(vi) a prescribed award or agreement.

ATTACHMENT C

COVERAGE DEFINITIONS – SECURITY INDUSTRY

The coverage definitions in the Bill relating to the security industry are problematic. The following amended definitions would be more workable:

1 What is the *security industry*?

(1) The ***security industry*** is—

(a) in relation to Victoria—the industry in which security activities are undertaken by persons licensed to undertake them under the **Private Security Act 2004**; and

(b) in relation to a reciprocating jurisdiction—the security industry within the meaning of the corresponding law of that jurisdiction.

(2) In this clause—

security activity has the same meaning as in the **Private Security Act 2004**.

2 What is *security work*?

(1) Subject to subclause (2), ***security work*** is—

(a) work performed in the security industry; or

(b) an activity, or an activity of a class, prescribed to be security work.

(2) ***Security work*** does not include an activity, or an activity of a class, prescribed not to be security work.

Examples

1 The following are examples of activities that would be security work—

(a) protecting, guarding or watching property;

(b) acting as a bodyguard;

(c) acting as a crowd controller;

(d) installing, servicing or repairing security equipment;

(e) providing training in relation to private security.

2 The following are examples of activities that would not be security work—

(a) installing a lock as part of work as a builder;

(b) cutting unrestricted keys;

(c) operating a prison or other correctional facility;

(d) selling self-install security systems.

3 Who is an *employer*?

(1) Subject to this clause, an ***employer*** for the security industry is a person engaged in the industry in Victoria who employs someone else (whether in Victoria or elsewhere) to perform work in the industry.

(2) Also, a person is an ***employer*** for the security industry if—

(a) the person employs or engages someone else (a ***worker***) to perform work in the industry for another person engaged in the industry in Victoria for fee or reward; and

(b) there is no contract to perform the work between the worker and the person for whom the work is performed.

(3) However, the following are not employers for the security industry—

(a) the Commonwealth;

(b) the State;

(c) an entity that has a governing body appointed under an Act of the Commonwealth or the State;

(d) a municipal council or other public statutory body;

(e) a person who is, or is a member of a class, prescribed not to be an employer for the security industry.

4 Who is an *employee*?

(1) Subject to subclause (2), an ***employee*** for the security industry is an individual employed by an employer for the industry (whether in Victoria or elsewhere) and includes—

(a) an apprentice and any individual whose employment agreement requires the individual to learn or be taught security work; and

(b) an individual employed on a casual or seasonal basis.

(2) An individual is not an ***employee*** for the security industry if—

(a) the individual's name is included on the register of workers kept by the trustee in accordance with the trust deed under the **Construction Industry Long Service Leave Act 1997**; or

(b) the individual is, or is a member of a class, prescribed not to be an employee for the security industry.

(c) the individual is covered by any of the following awards or agreements —

(i) the *Manufacturing and Associated Industries and Occupations Award 2010* as in force on 1 June 2018;

(ii) the *Building and Construction General On-site Award 2010* as in force on 1 June 2018;

(iii) a prescribed award or agreement.

(3) In this clause—

trust deed and ***trustee*** have the same meaning as in the **Construction Industry Long Service Leave Act 1997**.