Significant Workplace Relations Issues

26 September 2018

EXECUTIVE SUMMARY

- ***On 16 August, the Full Court of the Federal Court handed down a very problematic decision in the WorkPac v Skene case. Ai Group is working hard to achieve legislative changes to address the problems caused by the decision.***

- ***Early next year, the Full Federal Court will hear an application by Mondelēz International for a declaration relating to the meaning of the expression "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.***

- ***A Bill has been introduced in the House of Representatives by the Minister for Jobs, Industrial Relations and Women, the Hon Kelly O'Dwyer MP, to implement five days of unpaid family and domestic violence leave for all employees covered by the Fair Work Act. The Bill follows the inclusion of a clause in all modern awards providing for five days of unpaid family and domestic violence leave from 1 August 2018.***

- ***The Australian Government and Ai Group are making a concerted effort to secure the passage of the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 through Parliament. The Bill 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.***

- ***The Fair Work Amendment (Repeal of 4 Yearly Reviews of Modern Awards and Other Measures) Bill 2017 and Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017 are still before Parliament but have not yet been called on for debate this year.***

- ***On 28 August, the Hon Kelly O'Dwyer MP was sworn-in as the Minister for Jobs, Industrial Relations and Women. The portfolio has been restored to Cabinet. Ai Group wrote to the Minister on 27 August outlining several important priorities and met with the Minister on 30 August.***

- ***The federal Labor Party has announced a series of proposals aimed at achieving greater gender equality and pay equity. Whilst supporting the objective of achieving greater gender equality, Ai Group has expressed concern about some of the proposals.***

- ***Ai Group has developed a package of fact sheets, podcasts, research papers and other materials that emphasise the shared interests of businesses and workers. Additional materials are being developed and will be progressively released over the next few months.***

- ***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 the right to bargain at the industry level, the right to take industry-wide industrial action, the abolition of protected action ballots, more generous leave entitlements, more restrictions on businesses, and wider powers for the FWC. The ACTU is campaigning under the slogan 'Change the Rules'.***

- ***Following last year's main decision in the FWC's Casual and Part-time Employment Case, on 9 August a Full Bench of the Fair Work Commission (FWC) handed down a decision determining various outstanding issues, including the terms of the Commission's model casual conversion clause.***

- ***On 25 September, a Full Bench of the FWC handed down a decision determining the terms of the model award clause arising from the FWC's Family Friendly Work Arrangements Case.***

- ***On 24 August, a Senate Committee recommended that the Commonwealth Parliament pass the Federal Government's Modern Slavery Bill 2018 (Cth) following a Senate Committee Inquiry. On 20 July, Ai Group made a submission to the Senate Committee.***

- ***The NSW Parliament has passed the Modern Slavery Act 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 Act has not yet been proclaimed and the commencement date is currently unknown.***

- ***On 19 September, a Senate Committee dominated by Labor and Greens' Senators handed down their report following an inquiry into the future of work and workers.***

- ***The Victorian Government has announced an inquiry into the "On-Demand" Workforce to be conducted by former Fair Work Ombudsman Natalie James.***

- ***On 6 September, an opinion piece entitled "Time to end the unfair attacks on the labour hire industry" by Ai Group Chief Executive, Innes Willox, was published in the Australian Financial Review.***

- ***On 7 September, Ai Group lodged a submission with the Victorian Government in response to its Labour Hire Licensing Regulations – Exposure Draft.***

- ***The South Australian Government has announcement its intention to repeal the Labour Hire Licensing Act 2017 (SA).***

- ***On 31 August and 6 September, Deputy President Dean of the FWC handed down two important decisions relating to the pattern bargaining provisions of the Fair Work Act.***

- ***In a 7 September decision, Deputy President Asbury of the FWC distinguished between "outsourcing" and supplementary labour in the context of an alleged transfer of business.***

- ***On 12 September, the Sex Discrimination Commissioner, Kate Jenkins, released the results of the Australian Human Rights Commission's fourth national survey on sexual harassment in Australian workplaces.***

- ***In November, the Full Federal Court will hear an application for judicial review of the decisions of the FWC which approved 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 16 August, Ai Group appeared at a public hearing relating to a Queensland Parliamentary Committee inquiry into 'wage theft'.***

- ***A wider range of employers will be required to contribute to the Coal Mines Insurance (CMI) workers' compensation scheme as a result of changes to the Coal Industry Act 2001 (NSW).***

- ***The Victorian Government has announced that the commencement date for the Long Service Leave Act 2018 (Vic) will now be 1 November 2018, rather than 1 October as previously announced.***

- ***The Government Procurement (Secure Local Jobs) Amendment Bill 2018 has been introduced into the ACT Parliament. If passed, the Bill would underpin a Secure Local Jobs Code, applying to ACT Government funded projects valued at $200,000 or more. The Code subjects contractors to a range of additional requirements from the time an entity responds to an approach to market for work funded by the ACT Government.***

FEDERAL COURT WORKPAC V SKENE DECISION – ADVICE FOR EMPLOYERS

On 16 August, the Full Court of the Federal Court handed down a very problematic decision in the *WorkPac v Skene* case. Ai Group is working hard to achieve legislative changes to address the problems caused by the decision.

The Federal Court's decision creates significant uncertainty for businesses and has already led to some employees who have been engaged and paid as casual employees, making claims for annual leave and other entitlements under the National Employment Standards in the *Fair Work Act*.

The case concerned a casual worker (Paul Skene) who was employed by labour hire company WorkPac between 2010 and 2012 to work in coal mines operated by Anglo Coal and Rio Tinto. Throughout his employment, Mr Skene was paid in accordance with an enterprise agreement reached between WorkPac and its employees. The enterprise agreement included all-in rates of pay, with a higher all-in rate payable to casual employees. During the period that he worked at Rio Tinto's Clermont Coal Mine as a "fly in, fly out" worker, Mr Skene was given 12 month rosters at the start of each year setting out the hours that he would work. After the termination of his employment, Mr Skene made a claim for annual leave in accordance with the National Employment Standards in the *Fair Work Act* for the two year period that he worked for WorkPac.

The Full Court of the Federal Court (Justices Tracey, Bromberg and Rangiah) upheld Mr Skene's claim. The Court decided that:

- Division 6 (Annual Leave) of Part 2-2 of the *Fair Work Act* states that the Division applies *"to employees, other than casual employees"*, but the term "casual employees" is not defined in the Act.

- Just because an employee meets the definition of a casual employee under an award or enterprise agreement, does not necessarily mean that the employee will be a "casual employee" for the purposes of the National Employment Standards in the *Fair Work Act*.

- The term "casual employee" has no precise meaning and whether any particular employee is a casual employee depends upon an objective characterisation of the nature of the particular employment as a matter of fact and law having regard to all the circumstances. In this regard, there are a number of indicators of casual employment.

- A "casual employee" has no firm advance commitment from the employer to continuing and indefinite work according to an agreed pattern of work.

- Irregular work patterns, uncertainty, discontinuity, intermittency of work and unpredictability are the usual features of an absence of a firm advance commitment. However, it is possible for a casual employee to ultimately work a regular pattern of work (in the absence of advance commitment and predictability), and for the employee to still be considered a casual.

- The payment by the employer and the acceptance by the employee of a casual loading, and the description of the type of employment given by the parties in the contract of employment, are indicators of the intent of the parties to create and continue a casual employment relationship. However, any objective assessment needs to consider whether that intent has been put into practice and maintained.

- Mr Skene was paid an all-in flat rate (initially $50.00 per hour and later $55.00 per hour) under his contract of employment. It was not clear that he was paid a casual loading and his contract of employment did not allocate any part of the all-in rate to a casual loading. The Court held that if Mr Skene had been paid a casual

loading, this could be a "*relevant indicator"* as to whether he was a "casual employee" for the purposes of the *Fair Work Act*, but this would not be determinative.

- WorkPac's enterprise agreement did not define "casual employment". If the enterprise agreement or employment contract had defined or described Mr Skene as a casual employee for the purposes of the annual leave provisions of the *Fair Work Act*, that would have been a relevant factor to be taken into account, but neither the enterprise agreement or the employment contract did this.

- The Court held that Mr Skene's pattern of work was regular and predictable, continuous and not subject to significant fluctuation, in circumstances where there was an expectation that he would be available, on an ongoing basis, to perform the duties required of him in accordance with his roster (set 12 months in advance).

WorkPac has not filed an application for special leave to appeal the decision in the High Court. The deadline for filing an application for special leave passed on 13 September.

In a 13 September media release, Ai Group made the following comments:

"It is vital that Parliament acts quickly to protect businesses, employees and the community from the huge potential cost impacts of the Federal Court's decision in the *WorkPac v Skene* case. It would be very unfair to allow employees who have received a special loading as a casual to now be able to "double-dip" by also claiming annual leave and redundancy entitlements. The significant potential costs involved could drive many businesses, small and large, into insolvency, leaving tax-payers to pick up the tab under the Fair Entitlements Legislation and trigger major job losses."

"There are at least 1.6 million casuals who work on a regular, ongoing basis. The potential cost impacts of the Court's decision on employers for annual leave alone are between $5.7 billion and $8 billion, based on statistics from the ABS and the Household Income and Labour Dynamics in Australia (HILDA) survey."

"The very widespread and longstanding practice across virtually all industries is that an employee engaged as a casual and paid as a casual is a casual. It is very common for casuals to work on a regular and systematic basis for extended periods."

"The Federal Court's decision is inconsistent with the whole notion of "casual conversion clauses" which have been an important part of the award system for 20 years. Casual conversion clauses were inserted into awards because the evidence showed that a large proportion of casuals have no wish to be employed on a permanent basis. They either do not wish to lose their 25 per cent casual loading or they do not wish to lose the flexibility they enjoy, or both."

"Unless Parliament acts quickly, the litigation likely to result from the decision will lead to a big increase in business insolvencies and a big blow-out in the cost of the Fair Entitlements Guarantee scheme due to claims by casuals for annual leave and

redundancy entitlements. It is evident that overseas litigation funders and their lawyers are already planning class actions."

"The uncertainty and risks for businesses created by the Court's decision threatens thousands of jobs, including the jobs of young people who rely heavily on casual employment."

"Parliament needs to amend Part 4-1 of the *Fair Work Act* without delay to prevent an employer being ordered to pay compensation or a pecuniary penalty in circumstances where the compensation would result in "double dipping" by an employee who was engaged as a casual employee and paid as a casual employee at the time when the employment first commenced. Such an amendment is fair to employers and employees and should not be controversial."

"In addition, the *Fair Work Act* needs to be amended to define a "casual employee" as, in effect, an employee engaged as a casual and paid as a casual, regardless of the pattern of work."

"This is the second time that Parliament has needed to act quickly to address problems caused by a Federal Court decision relating to casual employment. In 2001, the *Workplace Relations Act 1996* needed to be, and was, amended urgently to address the adverse impacts of the Federal Court's decision in *Hamzy v Tricon International Restaurants trading as KFC* (2001) 115 FCR 78."

How can employers reduce risks?

To reduce risks of claims by casual employees for annual leave and other entitlements of full-time and part-time employees, employers should:

1. Ensure that new casuals sign a written employment agreement prior to commencing employment, that:

    - Specifies that the person is a casual employee;
    - Specifies that there is no advance commitment of ongoing work or regular work;
    - Specifies the casual loading that is paid (e.g. 25 per cent);
    - Specifies that the casual loading is paid instead of annual leave, personal/carer's leave, notice of termination, redundancy benefits and the other attributes of full-time and part-time employment;
    - Includes an offsetting clause that clarifies:
        - That the total rate of pay is paid to the employee firstly in payment of any award and legislative entitlements; and

- That the balance may vary from pay period to pay period depending upon award or legislative entitlements of the employee in that pay period.

(Note: Ai Group Workplace Lawyers can assist in drafting appropriate offsetting clauses).

2. Ensure that pay records and pay slips identify that the employee is a casual and show the casual loading separately.

3. Consider whether or not the employment contracts of existing casual employees should be reviewed.

4. Consider whether any company policies or enterprise agreements should be reviewed.

Ai Group's workplace relations advisers are available to assist Members to address the issues that arise from the *WorkPac v Skene* decision.

MONDELĒZ V AMWU CASE RE. MEANING OF SECTION 96 OF THE FAIR WORK ACT

Early next year, the Full Federal Court will hear an application by Mondelēz International for a declaration relating to the meaning of the expression *"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.

On 10 August, a case management hearing took place before Justice O'Callaghan of the Federal Court, and a further case management hearing is scheduled for 6 December 2018.

The Minister for Jobs, Industrial Relations and Women, the Hon Kelly O'Dwyer MP, has intervened in the case on behalf of the Commonwealth.

Mondelēz International is being represented by Ai Group Workplace Lawyers, Mr Stuart Wood QC and Mr Dimitri Ternovski of Counsel. Minister O'Dwyer is being represented by the Australian Government Solicitor, Mr Tom Howe QC and Ms Irene Sekler of Counsel. The AMWU is being represented by Mr Ingmar Taylor SC and Ms Lucy Saunders of Counsel.

The *Mondelēz v AMWU* case has important implications for most employers in Australia. 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, Mondelēz International and the Australian Government contends.

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

FAIR WORK AMENDMENT (FAMILY AND DOMESTIC VIOLENCE LEAVE) BILL 2018

A Bill has been introduced in the House of Representatives by the Minister for Jobs, Industrial Relations and Women, the Hon Kelly O'Dwyer MP, to implement five days of unpaid family and domestic violence leave for all employees covered by the *Fair Work Act*.

The Bill follows the insertion of a clause in all modern awards providing for five days of unpaid family and domestic violence leave from 1 August 2018. The definitions and entitlements in the Bill are very similar to those in the award clause.

The five day per annum unpaid leave entitlement:

- Applies to all employees, including casuals and part-time employees;
- Is available in full at the commencement of each 12 month period, rather than accruing through the year; and
- Does not accumulate from year to year.

Employees would be able to take unpaid family and domestic violence leave if:

- They are experiencing family or domestic violence;
- They need to take some action to deal with the violence; and
- It is impractical to take that action outside of working hours.

"Family and domestic violence" is defined in the Bill as violent, threatening or other abusive behaviour by a close relative of an employee that seeks to coerce or control the employee and causes the employee harm or to be fearful.

The Bill has been referred to the Senate Education and Employment Legislation Committee with the Committee's Report due by 12 October 2018. Ai Group has lodged a detailed submission.

Ai Group made the following media comments in response to the Bill:

"The Government's Family and Domestic Violence Leave Bill is a sensible legislative change that would extend the 5-day unpaid domestic violence leave entitlement which the Fair Work Commission (**FWC**) recently incorporated into awards, to all employees.

The Bill contains provisions which are closely aligned with those in the FWC's model award clause. This is important to avoid confusion and uncertainty".

"No doubt the unions will argue that the Bill should reflect the 10-day paid leave entitlement that they pursued in the FWC case, but this entitlement was rejected by the independent Commission. In the case, the unions were unable to provide any credible argument for where they came up with their claim for 10 days of paid leave. The evidence in the case was that employees who are experiencing domestic violence and take leave, on average take 2-3 days of leave.

"Domestic violence is a community problem and the whole community has a role to play in addressing it. Many businesses are implementing policies to assist employees impacted by domestic violence.

"Employers have different capacities to provide support to employees who are experiencing domestic violence. The Bill strikes an appropriate balance, as does the model award clause developed by the FWC."

ENSURING INTEGRITY BILL

The Australian Government and Ai Group are making a concerted effort to secure the passage of the *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017* through Parliament. The Bill 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.

On 11 September, Ai Group wrote to Crossbench Parliamentarians urging them to support the Bill. The letter included the following relevant comments:

"Registered organisations enjoy many rights and privileges under industrial laws. Along with these rights and privileges comes the responsibility for registered organisations to comply with the law. Many (but not all) rights and privileges of unions and employer organisations under industrial laws are derived from a union or employer organisation's status as a registered organisation under the Registered Organisations Act."

"Where a registered organisation repeatedly breaches industrial laws, it is appropriate that the organisation is exposed to the potential loss of the rights and privileges that it enjoys under the industrial laws. Otherwise there is little incentive to comply with the laws, particularly if the registered organisation has sufficient revenue to readily pay fines that are imposed by Courts for unlawful conduct. The main mechanism for removing the rights and privileges of a registered organisation under industrial laws (either for a period of time or permanently) is the suspension or cancellation of registration under the Registered Organisations Act."

"Giving the Federal Court the powers contained within Schedule 2 of the Bill, would give the Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**) a strong incentive to stop its law-breaking and abandon its approach of treating fines as just another cost of doing business.

"The CFMMEU's repeated law-breaking is unacceptable and cannot be allowed to continue. Numerous respected judges have expressed dismay at the blatant disregard that the CFMMEU has for the rule of law. For example:

- On 14 August 2018, the Full Federal Court handed down a decision upholding an earlier decision of the Federal Circuit Court to impose maximum penalties on the CFMEU for unlawful conduct. In the earlier Federal Circuit Court decision, Judge Vasta described the CFMEU as *"the most recidivist corporate offender in Australian history".* The decision cited around 120 previous occasions over the past 10 years that the courts had sanctioned the CFMEU for contraventions of industrial laws.

- In a separate decision handed down on 14 August 2018, Justice Tracey of the Federal Court stated:

> "The contravening conduct has continued unabated to a point where there is an irresistible inference that the CFMEU has determined that its officials will not comply with the requirements of the FW Act with which it disagrees. If this results in civil penalties being imposed they will be paid and treated as the cost of the union pursuing its industrial ends. The union simply regards itself as free to disobey the law."

"The CFMEU has been fined more than $16 million over the past decade or so for unlawful conduct, but the fines have had no noticeable impact on the unions' financial strength or its unlawful conduct."

"The CFMEU's unlawful conduct has been very well-documented, including in:

- The December 2015 *Final Report of the Royal Commission into Trade Union Governance and Corruption*; and

- The 2016/17 *Annual Report of the Australian Building and Construction Commission*."

"In a civilised society no-one and no organisation can be allowed to act as though they are above the law. To allow the CFMMEU to continue its law-breaking would seriously undermine the critical role of the Commonwealth Parliament. It is important that Parliament acts to protect the integrity of Parliament and the Courts by passing the Bill."

"Each registered organisation is readily able to implement the necessary systems to ensure that its organisation, officers and staff comply with the law. Therefore, each registered organisation is able to readily remove the risk of having its registration suspended or cancelled. All that is required is that the organisation comply with the law."

OTHER GOVERNMENT FAIR WORK BILLS BEFORE PARLIAMENT

The *Fair Work Amendment (Repeal of 4 Yearly Reviews of Modern Awards and Other Measures) Bill 2017* and *Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017* are still before Parliament but 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.

Ai Group has made detailed submissions to Senate Committee inquiries into each Bill, expressing strong support for the Bills.

NEW MINISTER RESPONSIBLE FOR WORKPLACE RELATIONS

On 28 August, the Hon Kelly O'Dwyer MP was sworn-in as the Minister for Jobs, Industrial Relations and Women. The portfolio has been restored to Cabinet. Ai Group wrote to the Minister on 27 August outlining several important priorities and met with the Minister on 30 August.

Minister O'Dwyer was a lawyer at Freehills between 2001-04 and then an adviser to Federal Treasurer Peter Costello up to 2007. She then worked for the National Australia Bank before being elected to Parliament in 2009.

ALP GENDER EQUALITY POLICIES

The federal Labor Party has announced a series of proposals aimed at achieving greater gender equality and pay equity. Whilst supporting the objective of achieving greater gender equality, Ai Group has expressed concern about some of the proposals.

Pay equity proposals

Labor has proposed that businesses with 1,000 or more employees should be required to publish their gender pay gap figures. Labor has also proposed amending the *Fair Work Act* to prohibit employees being required to maintain salary confidentiality.

In response to Labor's announcements, Ai Group made the following media comments:

“Industry is committed to achieving gender equality and reducing the current gender pay gap.”

“The *Workplace Gender Equality Act 2012* already contains comprehensive gender equality and equal remuneration reporting requirements for larger businesses. Most of the information that businesses are required to report to the Workplace Gender Equality Agency is publicly available. The current Act strikes the right balance.”

“The existing reporting system and the benchmarking and other initiatives of the Workplace Gender Equality Agency are making a difference. Businesses are widely implementing initiatives to increase gender equality and equal remuneration. A heavy handed legislative response could lead to a negative reaction amongst employers when, at present, so much positive work is being done in a cooperative manner.”

“Workplace flexibility is essential if gender equality is to be achieved. Therefore, it is critical that rigidities are identified and removed in Australia’s workplace relations system. This includes ensuring that access to part-time and casual work remains widely available.”

“The pay of individual employees is often confidential. A great deal of workplace disharmony would most likely result if this was no longer the case.”

Proposed abolition of the $450 superannuation guarantee threshold

Labor has proposed the abolition of the $450 monthly earnings threshold that applies to the superannuation guarantee, aimed at boosting the superannuation of women.

In response to the announcement, Ai Group made the following public comments:

"Analysis of the Federal Opposition's proposed change to the Superannuation Guarantee shows that it will add much more to employer costs than it will add to the retirement incomes of women.”

"Improving retirement incomes for women is of course an important goal. However, the Opposition's proposal to remove the $450 per month income threshold below which employers are not required to make super contributions on behalf of their employees will add significantly to the costs of employment and it will not work in a cost-effective way to address gender disparities in retirement incomes.”

"If implemented, the removal of this long-standing threshold will add significantly to the direct costs of employment and to business compliance costs. In addition, the extra Superannuation Guarantee payments will give rise to higher payroll tax liabilities. These additional costs will reduce the capacity of businesses to employ and invest and will reduce the contributions of business to the economy.”

"On the other side of the equation, a large proportion of the extra costs borne by businesses as a result of removing this threshold would not convert into higher retirement incomes for women. Instead:

- A large proportion – we estimate it at more than one-third – would be paid into the superannuation accounts of males;

- Of the remaining additional contributions, 15% would be paid in tax to the Commonwealth Government and another proportion would be deducted as fees by superannuation funds;

- Further, for many women the benefits of a higher superannuation balance on retirement will be significantly diluted by the age pension assets and income tests. For these women additional superannuation balances will be partly offset by lower age pension entitlements.

"It is important to note that the $450 per month Superannuation Guarantee threshold was put in place in 1992 in part to address compliance cost concerns. If the threshold had been indexed, today it would cut in at $850 per month. Instead, its erosion in real terms has exposed business to greater compliance costs than were envisaged when the Superannuation Guarantee was originally legislated. The Opposition's proposal would remove this protection altogether.

"While removing the $450 threshold is clearly not a cost-effective way to raise retirement incomes for women, Ai Group would welcome an opportunity to consult with the Opposition as it further develops its policy agenda both in this area and in others."

Ai GROUP'S 'WORKING TOGETHER – THE FACTS' INITIATIVE

Ai Group has developed a package of fact sheets, podcasts, research papers and other materials that emphasise the shared interests of businesses and workers. Additional materials are being developed and will be progressively released over the next few months.

The materials are available on the *Working Together – The Facts* section of Ai Group's website.

The materials that are currently available include:

- *Working Together, The Facts* – Casual Employment

- *Working Together, The Facts* – Part-time Employment

- *Working Together, The Facts* – Self-Employment

- Casual work and part-time work in Australia in 2018 – Research Paper

- Recent wages growth in Australia – trends and causes – Research Paper

- Podcasts on casual employment, part-time employment and self-employment

The fact sheets and research papers do not refer to unions or any political parties. The materials are simply designed to set out the facts.

Members are being encouraged to consider using the materials in relevant discussions in their workplaces. For example, if faced with a bargaining claim to restrict casual employment, the fact sheet on this topic may be of use to ensure that employees are aware of the relevant ABS statistics and other facts (e.g. that the level of casual employment in Australia is the same today as it was 20 years ago – 20% of the workforce).

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 the right to bargain at the industry level, the right to take industry-wide industrial action, the abolition of protected action ballots, more generous leave entitlements, more restrictions on businesses, and wider powers for the FWC. The ACTU is campaigning under the slogan 'Change the Rules'.

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.

FWC CASUAL AND PART-TIME EMPLOYMENT CASE – DETERMINATION OF OUTSTANDING ISSUES

Following last year's main decision in the FWC's *Casual and Part-time Employment Case*, on 9 August a Full Bench of the FWC handed down a decision determining various outstanding issues, including the terms of the Commission's model casual conversion clause.

Ai Group played the leading role in representing employers in the case, which continued for over three years. Most of the unions' claims in the case, which would have wreaked havoc on Australia's labour market, were rejected. An employer's right of reasonable refusal of a casual employee's request to convert to permanent employment has been preserved in the award clause.

In its latest decision, the FWC has made some modifications to the draft model casual conversion clause that was published in last year's main decision in the case.

The latest decision settles the following key elements of the model clause:

- A casual employee will be eligible to convert if, in the preceding 12 months, they worked a pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to perform as a full-time or part-time employee under the provisions of the award.

- The 12 month qualification period for a casual to be eligible to request conversion is a rolling period, so that eligibility remains whenever a casual has, in the preceding 12 months, worked the required pattern of hours.

- A casual employee's request to convert can only be refused by an employer on reasonable grounds and after there has been consultation with the employee.

- For any ground of refusal to be reasonable, it must be based on facts which are known or reasonably foreseeable.

- An employer must provide casual employees (covered by an award that contains the model clause) with a copy of the clause within the first 12 months of the employee's first engagement to perform work. For casual employees already employed on 1 October 2018, the employer must provide the employees with a copy of the clause by 1 January 2019.

The FWC's model casual conversion clause is set out in **Attachment A.**

The 84 awards that do not currently include a casual conversion clause will be varied from **1 October 2018** to insert the model casual conversion clause (in some cases with modifications to address award-specific issues). The 28 awards that already contain a casual conversion clause (e.g. the *Manufacturing and Associated Industries and Occupations Award 2010*) will not be varied to replace the existing provisions with the model provision.

Other elements of the FWC's latest decision include:

- Operative from 1 October 2018, 28 awards that do not currently contain a minimum engagement period for casuals will be varied to include the following provision:

  > "A casual employee must be engaged and paid for at least 2 consecutive hours of work on each occasion they are required to attend work."

- Operative from 1 October 2018, the *Manufacturing and Associated Industries and Occupations Award 2010* and the *Food, Beverage and Tobacco Manufacturing Award 2010* will be varied to place a three hour 'floor' under the facilitative provision which enables an employer and a casual to agree on a shorter minimum engagement period than four hours, and under the facilitative provision that enables an employer and part-time employee to agree to a day or shift of less than four hours.

- The Full Bench has expressed a preliminary view on new overtime provisions for casuals covered by the *Horticulture Award 2010*. A draft determination has been issued and parties have been given until 20 September to make any further submissions on the proposed new provisions.

FWC FAMILY FRIENDLY WORK ARRANGEMENTS CASE

On 25 September, a Full Bench of the FWC handed down a decision determining the terms of the model award clause arising from the FWC's *Family Friendly Work Arrangements Case.*

The model clause is set out in **Attachment B**. At this stage no awards have been varied to insert the clause.

The clause:

- applies where an employee has made a request for flexible working arrangements under s.65 of the *Fair Work Act*;
- sets out a process that the employer must follow before responding to an employee's request;
- sets out the issues that an employer must address in its notice to the employee in circumstances where the employer refuses an employee's request for flexible work arrangements;
- provides that disputes about employee requests for flexible work arrangements can be dealt with through the dispute resolution clause in the relevant award (NB. the FWC does not have the power to arbitrate a dispute without the employer's consent).

Ai Group has played a leading role in representing employers throughout the *Family Friendly Work Arrangements 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.

COMMONWEALTH MODERN SLAVERY BILL

On 24 August, a Senate Committee recommended that the Commonwealth Parliament pass the Federal Government's *Modern Slavery Bill 2018* (Cth) following a Senate Committee Inquiry. On 20 July, Ai Group made a submission to the Senate Committee.

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). Businesses would be 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.

Many submissions to the Senate Committee inquiry criticised the Bill for not containing penalties for non-compliance, unlike the NSW Modern Slavery Act (see next item below). On the issue of penalties, the Committee recommended (including Government and Labor Senators) that:

- A statutory three year review into the legislation consider whether a mandatory penalty regime should be introduced, drawing on the evidence and data gathered through the first three years of the Act's operation;
- The Government develop a list of those entities that are required to report and publish compliance standards in order to test the proposition that 'reputational

risk' is a sufficient motivator for reporting entities to comply with the requirements of the Act.

The Committee recommended that the Bill be amended to include, in one location, reference to Australia's existing modern slavery offences (as outlined in Divisions 270 and 271 of the *Criminal Code Act 1995*) and to offences relating to fighting modern slavery such as offences relating to sexual and labour exploitation under the *Migration Act 1958.* This will assist in informing businesses what modern slavery is.

The Committee also recommended that an independent statutory officer be appointed to support the operation of the Modern Slavery Act.

Ai Group's submission to the Senate inquiry made the following points about the Bill:

- Ai Group supports effective and targeted measures to eradicate modern slavery crimes. Any measures imposed on business to combat modern slavery need to be realistic, workable and sustainable.

- Many large businesses already have policies, contract management systems and risk controls that reduce instances and risks of criminal conduct in their operations.

- Ai Group is pleased that the Bill includes a non-punitive reporting regime similar to the legislation in place in the UK, rather than a punitive regime.

- The reporting requirement in the Bill will have varying impacts on different industries and different businesses. Industries such as manufacturing and construction are highly fragmented with significant integration into global supply chains across multiple business units and products. It is important that businesses operating in these industries are not disproportionately penalised by the Bill.

- The reporting entity threshold in the Bill (i.e. consolidated revenue of $100 million per annum) is appropriate. Larger businesses have greater capacity and resources than smaller organisations to invest in the identification and elimination of modern slavery risks.

- The elimination of modern slavery is best addressed by giving practical support to businesses about the steps that they can take, relevant to their particular operations and supply chains.

- It is essential that the federal Bill be amended to explicitly exclude the operation of the NSW *Modern Slavery Act 2018* for businesses that participate in the reporting requirements under the federal Bill, including those that elect to opt-in.

- Should the Bill proceed, it is essential that businesses be given adequate time to adjust and prepare for the new reporting laws. Ai Group proposes that industry be given at least 12 months from the date when the legislation comes into operation before any obligations under the legislation apply.

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 Modern Slavery Act\. 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.

NSW MODERN SLAVERY ACT

The NSW Parliament has passed the *Modern Slavery Act 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 Act has not yet been proclaimed and the commencement date is currently unknown.

Under the legislation, businesses which have an annual turnover of $50 million in a financial year will be required to prepare and make public an annual modern slavery statement. A $1.1 million maximum financial penalty can be imposed on an organisation that fails to provide a modern slavery statement.

SENATE COMMITTEE REPORT ON THE FUTURE OF WORK AND WORKERS

On 19 September, a Senate Committee dominated by Labor and Greens' Senators handed down their report following an inquiry into the future of work and workers.

The Committee Majority made a series of recommendations, including:

- Broadening the definition of an "employee" to capture gig workers;
- Strengthening sham contracting laws;
- Reviewing the definition of "casual" work;
- Strengthening employer obligations to consult with workers and trade unions when introducing technological and other changes;
- Introducing a national labour hire licensing scheme;
- Requiring that labour hire workers be paid at least the same wages and conditions as the directly engaged employees working alongside them;
- Implement measures aimed at reducing the exploitation of interns;
- Introduction of new measures allowing greater flexibility to workers to manage family, caring and other responsibilities,
- Consideration to be given to the implementing of portable leave schemes;
- Improving superannuation entitlements for contractors and casuals; and

- Abolishing the $450 minimum threshold for Superannuation Guarantee payments.

Ai Group made a detailed submission to the inquiry which argued that:

- The public policy debate about the future of work must not become a vehicle for imposing restrictions on Australia's labour market.

- Australia's workplace relations laws already provide extensive protections for Australian workers, including those working in the 'gig economy'. Further protections are not necessary or desirable.

- Rather than imposing restrictions on 'digital disruptors', Australia's workplace relations laws need to be amended to better enable established businesses to compete effectively with 'digital disruptors'.

- The important legal distinction between an 'employee' and an 'independent contractor' must not be disturbed. Doing so would have widespread negative implications for hundreds of thousands of independent contractors and their clients.

- Portable leave schemes are typically funded by a hefty levy on businesses that would operate as a tax on employment and consequently inhibit employment growth and competitiveness.

VICTORIAN INQUIRY INTO THE "ON DEMAND" WORKFORCE

The Victorian Government has announced an inquiry into the "On-Demand" Workforce to be conducted by former Fair Work Ombudsman Natalie James.

The inquiry will investigate the status of people working with online platforms in Victoria, and whether gig economy contracting arrangements are being used to avoid workplace laws and other statutory obligations. The inquiry will consider workplace relations, accident compensation, superannuation and work health and safety matters.

Ai Group intends to make a detailed submission to the inquiry.

OPINION PIECE: UNFAIR ATTACKS ON THE LABOUR HIRE INDUSTRY

On 6 September, the following opinion piece by Ai Group Chief Executive, Innes Willox, was published in the Australian Financial Review.

Time to end the unfair attacks on the labour hire industry

"Why the current economically reckless war on labour hire? It makes no sense. The labour hire industry employs hundreds of thousands of Australians (about 2 per cent of the workforce), and hundreds of thousands more obtain their jobs with other businesses through a labour hire firm.

Over the past few years, one constant has been the ongoing attempts by Labor and the unions to portray the labour hire industry as full of shonky operators who underpay their staff. Of course, there is a small number of employers and employees who do the wrong thing in every industry. However, there is no evidence that the incidence of wrongdoing in the labour hire industry is greater than any other industry or to anything like the extent its detractors would like you to believe.

The *Fair Work Act* and awards apply to labour hire businesses and employees, just like everyone else. Last year, penalties for breaches of awards and workplace laws increased by up to 20 times.

The key aspect of labour hire is that the workers are employed by a labour hire company and are placed with other businesses. Businesses use labour hire to address seasonal demand, to cover unplanned absences, and to access staff with particular skills.

Many employees prefer the flexibility that labour hire employment offers them. They enjoy significant flexibility over their hours and work locations. They enjoy a lot of variety and rapidly gain new skills and experiences.

Labour hire businesses typically provide work health and safety training and direct management support to their employees. Many provide best-practice employment conditions. Hundreds of thousands of employees choose to work in the labour hire industry.

Labor State Governments in Queensland, South Australia and Victoria recently introduced labour hire licensing legislation. The legislation is imposing a major regulatory burden and increased costs on labour hire businesses.

In addition, Federal Labor has announced a policy to implement a national licensing scheme. An appropriate national scheme would be better than having separate schemes in each State and Territory, but there is no sign that the State Parliaments intend to repeal the legislation they have passed.

Federal Labor has also announced a policy to give labour hire employees the same entitlements as the employees in the workplaces in which they work. Labour hire businesses should not be forced through legislation to apply the wage rates and employment conditions of other businesses. The proposal is unfair and unworkable. For example, if a business implements an employee share scheme for its employees, how can a labour hire supplier to that business be expected to offer its employees shares in another company? Also, if a retailer offers its employees discounted groceries, how is a labour hire provider supposed to do the same? Further, if an airline offers its employees access to heavily discounted airfares, it is unfair and unworkable to expect a labour hire supplier to do the same.

Labour hire businesses need to be able to make their own decisions, in conjunction with their own employees, on what salaries and employment conditions are appropriate, so long as the relevant awards and workplace laws are complied with.

Some of the largest labour hire companies operating in Australia are multi-national firms. The current war on labour hire sends completely the wrong message to overseas head offices – that Australia is not a good place to invest.

The problems are not limited to union campaigns and ill-conceived policy proposals. The recent decision of the Full Federal Court in the *WorkPac v Skene* case flies in the face of widespread industry practice and threatens the flexibility that is so important to industry.

Paul Skene was employed by labour hire company WorkPac as a casual. He worked on a regular roster for a two-year period. The Court decided that Skene was not a "casual employee" under the Fair Work Act and awarded him annual leave. According to the Court, the fact that an employee is engaged as a casual, paid a casual loading and meets the definition of a casual in an award is not determinative of whether the employee is a "casual employee" for the purposes of the Act.

The Court's interpretation is unworkable. It creates huge cost risks for all industries – not just the labour hire industry. The Australian Government needs to move quickly to insert a definition of "casual employee" in the Act clarifying that if a person is engaged and paid as a casual, they are a casual.

Given that the demand for labour hire can be uncertain, most employees in the labour hire industry are engaged as casuals. It is a myth that the level of casual employment has been increasing – it has been about 20% of the workforce for the past 20 years. It is also a myth that labour hire employment as a proportion of the workforce has been increasing. The growth of the industry has flattened over recent years.

Taking away the flexibility that labour hire businesses and their clients need would reduce productivity, competitiveness and employment. It would also be unfair on hundreds of thousands of labour hire employees.

It is time to stop the unfair attacks on Australia's labour hire industry. The industry needs to be given the recognition that it deserves, as one that provides substantial benefits to businesses, employees and the broader community."

VICTORIAN LABOUR HIRE LICENSING REGULATIONS

On 7 September, Ai Group lodged a submission with the Victorian Government in response to its *Labour Hire Licensing Regulations – Exposure Draft.*

The submission argues that the Draft Regulations do not provide the necessary and intended exclusions from the licensing scheme. The limited exclusions in the Draft Regulations, combined with extremely broad definitions in the *Labour Hire Licensing Act 2018* of a "provider" of labour hire service and of a "worker", would create significant confusion and uncertainty for individual businesses, supply chains, sub-contracting arrangements and the broader Victorian industry.

Ai Group's submission also expresses opposition to the Victorian Government's unnecessary limiting of the Act's mutual recognition provision to natural persons and

argues that the licence fees should be reduced to bring them in line with the licence fees in Queensland and South Australia.

The Victorian *Labour Hire Licensing Act 2018* was passed by the Victorian Parliament on 20 June 2018. On 27 June, certain provisions of the Victorian Act came into effect. These provisions only relate to the establishing of the Victorian Labour Hire Licensing Authority and other related provisions. The Victorian Government has announced that the licensing requirements under the Act are not expected to begin before early 2019, and that the commencement date will be announced well in advance.

SOUTH AUSTRALIAN GOVERNMENT ANNOUNCES ITS INTENTION TO REPEAL THE LABOUR HIRE LICENSING ACT

The South Australian Government has announcement its intention to repeal the *Labour Hire Licensing Act 2017* (SA).

Ai Group has welcomed the announcement, but it remains to be seen whether there is sufficient support in the South Australian Parliament for the Act to be repealed.

IMPORTANT PATTERN BARGAINING DECISIONS

On 31 August and 6 September, Deputy President Dean of the FWC handed down two important decisions relating to the pattern bargaining provisions of the *Fair Work Act*.

In *WGC Crane Group v CFMMEU* [2018] FWC 5101, Dean DP held that the CFMMEU was pattern bargaining and that, therefore, the industrial action was not protected. A stop order was issued. A very similar decision was issued by Dean DP in *Boom Logistics v CFMMEU* [2018] FWC 5634.

In both decisions, the FWC held that the industrial action taken in pursuit of a CFMMEU template agreement for the mobile crane sector constituted pattern bargaining under the *Fair Work Act* and therefore industrial action was prohibited.

In *WGC Crane Group v CFMMEU*, DP Dean made the following findings of relevance to the pattern bargaining provisions of the Act:

> **"[55]** In this regard, I consider (and where relevant find) that the following principles are applicable:
>
> (a) *Involves seeking common terms'* does not mean that <u>all</u> of the terms must be common – it means what it says, that is that the course of conduct involves seeking common terms.
>
> (b) Section 412(1) needs to be given a sensible interpretation, so as to have a practical operation. This section is simply the gateway requirement – the union will not be pattern bargaining if they are genuinely trying to reach agreement. Accordingly, it should not be given an unduly restrictive interpretation.
>
> (c) Section 412(3)(a) – ie whether the bargaining representative is demonstrating a preparedness to bargain for the agreement taking into account the individual circumstances of that employer, including in relation

to the nominal expiry date of the agreement - would have no work to do if agreements had to be identical before section 412(2) and (3) could be engaged. By definition, the bargaining representative would not be seeking identical agreements if they were showing a preparedness to agree to changes for one employer.

(d) Accepting that 'common' means 'same' or 'identical', it does not mean all the terms in the agreement must be the same or identical. It simply means, as section 412(1)(b) says, that common terms are involved.

- - -

(j) In the case before me, the vast majority of the conditions in the proposed agreements are identical. This includes the wage rates which are proposed to take effect from 1 October 2018 and 1 March 2019.The rates are exactly the same, down to the last cent.

(k) This 'sameness' is evidenced by the document filed by WGC which showed a clause by clause comparison of the proposed Boom and WGC agreements. An examination of the comparison document shows that the changes between the WGC and Boom agreements are minimal. The proposed agreements comprise some 40 clauses and a number of annexures. Obviously, the name of the employer is different in each agreement. In terms of some of the differences, clause 11.2 - Protective Clothing provides a difference in the value of the footwear to be supplied by the employer. In clause 18 - Travel, there is a change in the applicability of the travel allowance related to geographical factors. The Parental Leave clause (clause 25) removes an operative date in 2017 in one agreement (ie no longer relevant). There are minor differences with respect to call back and the timing of breaks within the shift work clause. There is a minor difference with respect to overtime. Some allowances located in the appendices vary – these are mainly related to the location of work or travel performed. None of these matters in my view are matters of substance. The substantive provisions of the proposed agreements are the same."

FWC DISTINGUISHES BETWEEN OUTSOURCING AND LABOUR HIRE

In a 7 September decision, Deputy President Asbury of the FWC distinguished between "outsourcing" and supplementary labour in the context of an alleged transfer of business.

The employee who was the subject of Asbury DP's decision in *Abbott v Acciona* [2018] FWC 5609 was employed by a labour hire company and placed on a construction project which was being undertaken by a joint venture which included Acciona as one of the joint venture partners. The employee worked for the labour hire company until 29 September 2017, and then was employed by Acciona from 3 October 2017.

The employee argued that there was a transfer of business between the labour hire company and Acciona and hence he was entitled to have his period of service with the labour hire company recognised.

DP Asbury held that there was no "outsourcing" or "insourcing" involved for the purposes of s.311 of the *Fair Work Act* – merely the provision of supplementary labour. She stated that the ordinary definition of "outsourcing" was to "contract work outside a company

rather than employ more in-house staff". She made a distinction "between an employer engaging supplementary labour through a labour hire company and outsourcing work".

DP Asbury held that for the purposes of s.311 of the Act, there needs to be an "arrangement" between the entity outsourcing the work and the entity which will perform the work. That is, there needs to be something more than an employee ceasing to perform particular work for one employer and commencing to perform the same or substantially the same work for another employer.

NATIONAL SURVEY AND INQUIRY INTO SEXUAL HARASSMENT

On 12 September, the Sex Discrimination Commissioner, Kate Jenkins, released the results of the Australian Human Rights Commission's fourth national survey on sexual harassment in Australian workplaces.

The survey found that:

- In the last 12 months, 23% of women and 16% of men had experienced some form of workplace sexual harassment.

- People aged 18 – 29 were more likely than those in other age groups to have experienced workplace sexual harassment in the past five years.

- Harassers were most often a co-worker employed at the same level as the victim and in the majority of cases, had sexually harassed others in the same workplace in a similar manner.

- The most common form of workplace sexual harassment experienced was *offensive, sexually suggestive comments or jokes.*

- More than half of workplace sexual harassment occurred at the victim's workstation or where they work and one-quarter of incidents occurring in a social area for employees.

- The rates of workplace sexual harassment were particularly high in the information, media and telecommunications industries (87%), followed by arts and recreation services (49%), electricity, gas and waste services (42%) and retail trade (42%).

- Fewer than one in five people (17%) made a formal report or complaint in relation to workplace sexual harassment.

- The most common reasons for not reporting workplace sexual harassment were that people would think it was an over-reaction and it was easier to keep quiet.

The survey results will inform the Australian Human Rights Commission's National Inquiry into Sexual Harassment in Australian Workplaces. Ai Group's Chief Executive, Innes Willox, has been appointed as a Member of the Reference Panel for the Inquiry.

APPEAL AGAINST THE MERGER OF THE CFMEU, MUA AND TCFUA

In November, the Full Federal Court will hear an application for judicial review of the decisions of the FWC which approved 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.

The Federal Court application is being pursued by the Australian Mines and Metals Association. Mr Stuart Wood QC is representing AMMA in the proceedings.

INQUIRY INTO 'WAGE THEFT' IN QUEENSLAND

On 16 August, Ai Group appeared at a public hearing relating to a Queensland Parliamentary Committee inquiry into 'wage theft'.

Ai Group's submission to the inquiry argues that:

- The characterisation of underpayments as 'theft' is misleading, inappropriate, and has the potential to unfairly brand every failure to correctly calculate an employee's pay as criminal.

- The existing regulatory system provides an appropriate framework for oversight and enforcement of penalties directed against the small minority of employers who deliberately underpay their staff.

- The current regulatory system governing workplace relations in Australia is federally based. State and Territory legislation designed to circumvent the Commonwealth system is unwelcome and would add to an already overly complex system.

- Criminalisation of underpayments is inappropriate. Many instances of incorrect payment are a result of misunderstanding or error. Employers should not be at risk of being labelled a 'thief' for such mistakes. Exposure to criminal penalties, including imprisonment, for underpayments would discourage investment and employment in Queensland.

The Committee is due to report its findings to the Queensland Parliament by 16 November 2018.

CHANGES TO NSW COAL MINES WORKERS' COMPENSATION ARRANGEMENTS

A wider range of employers will be required to contribute to the Coal Mines Insurance (CMI) workers' compensation scheme as a result of changes to the *Coal Industry Act 2001* (NSW).

The Act requires that approved workers' compensation insurance be taken out by an "employer in the coal industry". The *Coal Industry Amendment Act 2018* amended the *Coal Industry Act* to define "an employer in the coal industry" to mean an "employer whose employees work in or about a coal mine". The amendments will potentially require many employers that have never previously considered themselves to be an employer in the coal industry to take out a policy with CMI.

Though the legislation came into effect on 1 July 2018, a transition period operates until 30 September during which employers required to take out a policy with CMI will only need to possess a Certificate of Currency from a workers' compensation insurer. From 1 October 2018, such employers must obtain a Certificate of Currency from CMI.

NEW VICTORIAN LONG SERVICE LEAVE LAWS

The Victorian Government has announced that the commencement date for the *Long Service Leave Act 2018 (Vic)* will now be 1 November 2018, rather than 1 October as previously announced.

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 arrangements will apply. These provisions broaden the circumstances where the new employer needs to recognise transferring employees' service with the old employer.
- Penalties for breaches of the long service leave legislation will be increased.
- Departmental staff will have new inspection and enforcement powers.

AUSTRALIAN CAPITAL TERRITORY – SECURE LOCAL JOBS CODE

The *Government Procurement (Secure Local Jobs) Amendment Bill 2018* has been introduced into the ACT Parliament. If passed, the Bill would underpin a Secure Local Jobs Code, applying to ACT Government funded projects valued at $200,000 or more.

The Code subjects contractors to a range of additional requirements from the time an entity responds to an approach to market for work funded by the ACT Government.

Amongst other requirements, the Code provides that:

- All contractors and subcontractors engaged on ACT Government work must hold a valid Code Certificate at the time a response is submitted to any Approach to Market for Territory Funded Work

- Details of all proposed subcontractors are to be provided to the Government prior to their engagement on Territory Funded Work. Contractors must ensure that all subcontractors are Code Certified and must ensure, so far as is reasonably practicable, that subcontractors comply with the Code and take remedial action to rectify non-conformances.

- All contractors and subcontractors must provide the Government with a contact person, workforce locations and working hours for the purpose of assisting lawful right of entry under Part 3-4 of the *Fair Work Act 2009* (Cth) and Part 7 of the *Work Health and Safety Act 2011* (ACT). Contractors must update the Government within 14 days of a change to the information. The information will be kept in a register which may be accessed for the purposes of exercising a lawful right of entry.

- In order to become and remain a Code Certified Entity, a contractor must comply with their industrial relations, work health and safety and tax obligations and must notify the Territory within 7 days of any ruling made against either itself or one of its subcontractors on Territory Funded Building Work.

- If a Code Certified Entity has more than one employee who is a member of an Eligible Union, that entity must facilitate the conduct of an election amongst those employees for a union workplace delegate. Obligations are placed on the Code Certified Entity to institute practices and procedures to facilitate the workplace delegate's role.

- Code Certified Entities may be required to provide all employees who are eligible to join the union with application forms for membership and to facilitate meetings with the elected workplace delegate.

- Code Certified Entities must ensure new employees receive induction training tailored to their duties and workplace from an appropriately skilled and experienced person. A draft of the model terms and conditions to be inserted into contracts for Territory Funded Work provides that a Territory Contact Officer may require a union workplace delegate to attend staff induction sessions.

- Where Code Certified Entities employ members of an Eligible Union, they must make such arrangements as are necessary to allow bargaining representatives from the relevant union to participate in enterprise agreement negotiations.

Contractors may be able to seek exemption from obligations under the Code which conflict with Commonwealth laws.

Much like the existing Certification scheme already applicable to ACT Government building work, an Audit Report will need to be procured from an Approved Auditor in order to become Code Certified. The Standard period of a Code Certificate will be 18 months, with a maximum period of 30 months. Ordinarily, the costs associated with the conduct of an audit will be met by the entity seeking Code Certification.

Ai Group has made a submission to the ACT Government expressing opposition to many aspects of the Bill.

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.

ATTACHMENT A

MODEL AWARD CLAUSE – RIGHT TO REQUEST CASUAL CONVERSION

XX Right to request casual conversion

(a) A person engaged by a particular employer as a regular casual employee may request that their employment be converted to full-time or part-time employment.

(b) A regular casual employee is a casual employee who has in the preceding period of 12 months worked a pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to perform as a full-time employee or part-time employee under the provisions of this award.

(c) A regular casual employee who has worked equivalent full-time hours over the preceding period of 12 months' casual employment may request to have their employment converted to full-time employment.

(d) A regular casual employee who has worked less than equivalent full-time hours over the preceding period of 12 months' casual employment may request to have their employment converted to part-time employment consistent with the pattern of hours previously worked.

(e) Any request under this subclause must be in writing and provided to the employer.

(f) Where a regular casual employee seeks to convert to full-time or part-time employment, the employer may agree to or refuse the request, but the request may only be refused on reasonable grounds and after there has been consultation with the employee.

(g) Reasonable grounds for refusal include that:

(i) it would require a significant adjustment to the casual employee's hours of work in order for the employee to be engaged as a full-time or part-time employee in accordance with the provisions of this award – that is, the casual employee is not truly a regular casual employee as defined in paragraph (b);

(ii) it is known or reasonably foreseeable that the regular casual employee's position will cease to exist within the next 12 months;

(iii) it is known or reasonably foreseeable that the hours of work which the regular casual employee is required to perform will be significantly reduced in the next 12 months; or

(iv) it is known or reasonably foreseeable that there will be a significant change in the days and/or times at which the employee's hours of work are required to be performed in the next 12 months which cannot be accommodated within the days and/or hours during which the employee is available to work.

(h) For any ground of refusal to be reasonable, it must be based on facts which are known or reasonably foreseeable.

(i) Where the employer refuses a regular casual employee's request to convert, the employer must provide the casual employee with the employer's reasons for refusal in writing within 21 days of the request being made. If the employee does not accept the employer's refusal, this will constitute a dispute that will be dealt with under the dispute resolution procedure in clause X. Under that procedure, the employee or the employer may refer the matter to the Fair Work Commission if the dispute cannot be resolved at the workplace level.

(j) Where it is agreed that a casual employee will have their employment converted to full-time or part-time employment as provided for in this clause, the employer and employee must discuss and record in writing:

(i) the form of employment to which the employee will convert – that is, full-time or part-time employment; and

(ii) if it is agreed that the employee will become a part-time employee, the matters referred to in clause X.

(k) The conversion will take effect from the start of the next pay cycle following such agreement being reached unless otherwise agreed.

(l) Once a casual employee has converted to full-time or part-time employment, the employee may only revert to casual employment with the written agreement of the employer.

(m) A casual employee must not be engaged and re-engaged (which includes a refusal to re-engage), or have their hours reduced or varied, in order to avoid any right or obligation under this clause.

(n) Nothing in this clause obliges a regular casual employee to convert to full-time or part-time employment, nor permits an employer to require a regular casual employee to so convert.

(o) Nothing in this clause requires an employer to increase the hours of a regular casual employee seeking conversion to full-time or part-time employment.

(p) An employer must provide a casual employee, whether a regular casual employee or not, with a copy of the provisions of this subclause within the first 12 months of the employee's first engagement to perform work. In respect of casual employees already employed as at 1 October 2018, an employer must provide such employees with a copy of the provisions of this subclause by 1 January 2019.

(q) A casual employee's right to request to convert is not affected if the employer fails to comply with the notice requirements in clause XX(p).

ATTACHMENT B

MODEL AWARD CLAUSE – REQUESTS FOR FLEXIBLE WORK ARRANGEMENTS

X Requests for flexible working arrangements

Employee may request change in working arrangements

X.1 This clause X applies where an employee has made a request for a change in working arrangements under s.65 of the Act.

NOTE: 1. Section 65 of the Act provides for certain employees to request a change in their working arrangements because of their circumstances, as set out in s.65(1A).

2. An employer may only refuse a s.65 request for a change in working arrangements on 'reasonable business grounds' (see s.65(5) and (5A)).

3. Clause X is an addition to s.65.

Responding to the request

X.2 Before responding to a request made under s.65, the employer must discuss the request with the employee and genuinely try to reach agreement on a change in working arrangements that will reasonably accommodate the employee's circumstances having regard to:

(a) the needs of the employee arising from their circumstances;

(b) the consequences for the employee if changes in working arrangements are not made; and

(c) any reasonable business grounds for refusing the request.

What the written response must include if the employer refuses the request

NOTE: 1. The employer must give the employee a written response to an employee's s.65 request within 21 days, stating whether the employer grants or refuses the request (s.65(4)).

2. If the employer refuses the request, the written response must include details of the reasons for the refusal (s.65(6)).

X.3 Clause X.3 applies if the employer refuses the request and has not reached an agreement with the employee under clause X.2.

(a) The written response under clause X.2 must include details of the reasons for the refusal, including the business ground or grounds for the refusal and how the ground or grounds apply.

(b) If the employer and employee could not agree on a change in working arrangements under clause X.2, the written response under clause X.2 must:

(i) state whether or not there are any changes in working arrangements that the employer can offer the employee so as to better accommodate the employee's circumstances; and

(ii) if the employer can offer the employee such changes in working arrangements, set out those changes in working arrangements.

X.4 If the employer and the employee reached an agreement under clause X.2 on a change in working arrangements under clause X.2 that differs from that initially requested by the employee, the employer must provide the employee with a written response to their request setting out the agreed change(s) in working arrangements.

Dispute resolution

X.5 Disputes about whether the employer has discussed the request with the employee and responded to the request in the way required by clause X, can be dealt with under clause Y—Consultation and Dispute Resolution.