Significant Workplace Relations Issues

31 October 2018

EXECUTIVE SUMMARY

- ***Ai Group is working hard to address the problems caused by the decision of the Full Court of the Federal Court in the WorkPac v Skene case. There have been a number of important developments, and there are a number of practical steps that employers can take to reduce the risks associated with the Federal Court's decision.***

- ***Ai Group has written to Labor's Shadow Employment and Workplace Relations Minister Brendan O'Connor expressing strong opposition to the ACTU's industry bargaining claims and urging the Labor Party to reject the claims.***

- ***Ai Group has released a package of further materials as part of its Working Together, the Facts initiative. The materials emphasise the shared interests of businesses and workers in ensuring that businesses are successful.***

- ***There are a number of important Government Bills that are before the Commonwealth Parliament, dealing with workplace relations and related matters.***

- ***The ACTU has held a series of rallies in support of its "Change the Rules" campaign, including rallies in Sydney and Melbourne on 23 October. The ACTU wrote to Ai Group objecting to our advice that: "Employees who fail to attend work to participate in one of the rallies, without the agreement of their employer, would in most circumstances be engaging in unlawful industrial action." However, Ai Group stands by this advice.***

- ***In February 2019, 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.***

- ***In November, the Full Federal Court will hear an application for judicial review of the decisions of the Fair Work Commission (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.***

- ***Ai Group has been successful in its arguments that reasonable overtime clauses should remain in those awards that currently contain these clauses, e.g. the Manufacturing Award. The clauses give employers the right to require that an employee work a reasonable amount of overtime. On 29 October, the FWC determined the terms of a model clause.***

- ***The FWC has issued determinations varying 104 awards to insert re-drafted model clauses dealing with: Individual flexibility arrangements; Consultation about major workplace change; Consultation about changes to rosters or hours of work; Dispute resolution; and Termination of employment. The award variations are operative from 1 November 2018.***

- ***The FWC has issued determinations varying 89 modern awards to incorporate a model term dealing with payment of wages on termination of employment. Amongst other aspects, the model term generally requires that an employer must pay an employee no later than seven days after the day on which the employee's employment terminates. The award variations are operative from 1 November 2018.***

- ***On 31 October, a Full Bench of the FWC heard submissions and evidence from Ai Group and the Australian Manufacturing Workers Union (AMWU) regarding the link between the classification structure and wage rates in the Graphic Arts, Printing and Publishing Award 2010 and the competency standards in the Printing and Graphic Arts Industry Training Package.***

- ***Ai Group has made a submission to the Australian Taxation Office (ATO) expressing opposition to advice that the ATO is giving that superannuation contributions are payable on annual leave loading unless an employee is demonstrable working overtime on a permanent regular basis.***

- ***The Australian Human Rights Commission (AHRC) is conducting a National Inquiry into Sexual Harassment in Australian Workplaces. Ai Group and the AHRC are co-hosting employer consultations for Ai Group Members.***

- ***The FWC has released its annual report for the 2017/18 financial year. The report contains some interesting statistics about enterprise agreement approvals, general protections applications and unfair dismissal applications.***

- ***The Labour Hire Licensing Regulations 2018 (Vic) were made on 23 October 2018. The Regulations clarify some aspects of the coverage of the Victorian labour hire licensing scheme as well as addressing various other issues of detail relating to the scheme. Meanwhile, the Victorian Government has appointed former AMWU Victorian State Secretary, Steve Dargavel, as Labour Hire Licensing Commissioner.***

- ***On 29 October, Ai Group participated in an initial roundtable discussion for the Victorian Inquiry into the On-demand Workforce. The inquiry is being led by Natalie James, the previous Fair Work Ombudsman.***

- ***The Long Service Leave Act 2018 (Vic) has been proclaimed to commence on 1 November 2018.***

- ***The Long Service Benefits Portability Act 2018 has been passed by the Victorian Parliament. The Act will establish portable long service leave schemes in the community services, contract cleaning and security industries, funded by an employer levy of up to 3% of ordinary pay.***

- ***The Government Procurement (Secure Local Jobs) Amendment Act 2018 has been passed in the ACT Legislative Assembly. The Act underpins the introduction of the Secure Local Jobs Code and will apply to businesses tendering for ACT Government construction, cleaning, security and traffic management work from 15 January 2019. At a later date, the Code will apply to other ACT Government funded work, valued at least $200,000.***

CASUAL EMPLOYMENT MATTERS

Ai Group is working hard to address the problems caused by the decision of the Full Court of the Federal Court in the *WorkPac v Skene* case. There have been a number of important developments, and there are a number of practical steps that employers can take to reduce the risks associated with the Federal Court's decision.

In the *WorkPac v Skene* case, the Federal Court held that the term 'casual employee' in the *Fair Work Act* has no precise meaning and whether any employee is a casual for the purposes of the Act depends upon the circumstances. This is unworkable. 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 decision creates significant uncertainty for businesses as it could lead 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*.

Further Federal Court test case

An application for special leave to appeal the above Federal Court decision to the High Court has not been filed by WorkPac. However, WorkPac has initiated another important case about casual employment in the Federal Court.

In the *WorkPac v Rossato* Case, the Court will consider further arguments about the meaning of the expression "casual employee" in the *Fair Work Act* and also arguments about the ability for an employer to set-off any casual loading paid against other entitlements that may be owed. The case was listed for an initial case management hearing in the Federal Court on 18 October. This case is separate to the *WorkPac v Skene* case referred to above.

In an 18 October media release, Ai Group welcomed the Australian Government's decision to intervene in the *WorkPac v Rossato* case. This case will provide an opportunity for all of the relevant issues to be considered by the Court including matters that were not fully explored in the *WorkPac v Skene* case.

Ai Group actions to protect Members' from costly claims

Ai Group is working hard to convince the Australian Government to introduce legislation into Parliament to prevent casual employees who have been paid a casual loading from pursuing 'double-dipping' claims, and to gain sufficient Parliamentary support for the legislation to be passed. We will keep Members informed of developments in this regard.

In addition to various submissions and direct representations to Government, Opposition and Crossbench Parliamentarians, Ai Group has issued a number of media releases that highlight the importance of legislative amendments, and the potential impact of the Court's *WorkPac v Skene* decision on businesses of all sizes. For example:

- A 13 September media release identified that at least 1.6 million of the 2.6 million casuals in Australia work on a regular, ongoing basis and that the potential cost impacts of the Court's decision on employers for annual leave alone are between $5.7 billion and $8 billion.

- A 4 October media release explained that the decision has a big impact on small and medium enterprises because over 50 per cent of casuals work for businesses with less than 20 employees and over 80 per cent work for businesses with less than 100 employees.

In a further development, Ai Group has written to the Australian Competition and Consumer Commission (**ACCC**) requesting that the ACCC investigate whether Canberra based law firm Adero is engaging in misleading or deceptive conduct in breach of the *Competition and Consumer Act 2010* given the information that Adero has been circulating to casual workers. Adero is pursuing a class action against a major mining company and a number of labour hire firms that provided casual labour, in pursuit of millions of dollars of back-pay.

What steps can employers take to 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 consider:

1. Ensuring 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. Ensuring that pay records and pay slips identify that the employee is a casual and show the casual loading separately.

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

4. Whether any company policies or enterprise agreements should be reviewed.

Ai GROUP'S OPPOSITION TO THE ACTU'S INDUSTRY BARGAINING CLAIMS

Ai Group has written to Labor's Shadow Employment and Workplace Relations Minister Brendan O'Connor expressing strong opposition to the ACTU's industry bargaining claims and urging the Labor Party to reject the claims.

The points that are made in Ai Group's letter are set out below.

Industry bargaining is inconsistent with Australia's modern award system

There is no country in the world that has both an award system and an industry bargaining system. In fact, Australia is the only country in the world that has a system of industry and occupational awards to set minimum standards of wages and conditions.

Australia's modern award system provides a very comprehensive set of legally enforceable wage rates and conditions of employment at the industry level. Awards are constantly updated by the Fair Work Commission (**FWC**) and the *Fair Work Act* requires that awards remain fair and relevant.

The New Zealand Labour Government recently announced a system of "Fair Pay Agreements" covering industries and/or occupations. Fair Pay Agreements are being promoted in New Zealand as being similar to Australia's modern awards, and necessary because of the absence of awards. For example, the President of the New Zealand Council of Trade Unions wrote an opinion piece recently defending the proposed Fair Pay Agreements. In it he said: (emphasis added)

> "The difference between then and now, and between Australia and New Zealand, is sector bargaining. This used to be called awards here. In Australia, sector bargaining is called modern awards; in other parts of the world it takes the shape of industry agreements or tripartite national bargaining. What it is in all of these places is a system to deliver minimum standards.[1]

[1] Richard Wagstaff, President, New Zealand Council of Trade Unions, *"Fair pay agreements will be good*

In Australia, we already have instruments that set industry-wide minimum standards and they are called modern awards. The ACTU's proposed industry-bargaining system directly conflicts with Australia's modern award system.

The unions are proposing that industry agreements override awards, but what would be the point of an industry award that doesn't apply to anyone?

Industry agreements impede innovation and best practice employee relations

Industry agreements are negotiated at the industry level. They involve the imposition of unsuitable one-size-fits-all conditions on thousands of businesses and hundreds of thousands of workers who were not involved in the negotiations.

Industry agreements:

- Stifle flexibility, productivity, innovation and competitiveness;
- Impede best practice employee relations;
- Reduce the capacity for employees to reach agreement with their employer regarding their own employment conditions – including leave arrangements, participation in bonus schemes, flexible working hours and other mutually acceptable arrangements;
- Assume that all businesses and their employees operate in the same fashion, have the same objectives, adopt common approaches to working arrangements and are content with uniformity;
- Assume that unions and industry groups understand better than either the employer or the employees what the business model of the enterprise is and what the wishes and desires of the employees are;
- Assume that employees are not capable of negotiating satisfactorily on their own behalf.

Industry agreements reduce entitlements down to the lowest common denominator. Industry agreements cover the least productive as well as the most productive enterprises operating in an industry. They cover the most profitable and the least profitable. High performing enterprises can, and often do, negotiate agreements with higher remuneration than struggling enterprises. With industry bargaining, there is little incentive for employers to pay higher wage increases than what is provided for in the industry agreement.

for business, as well as workers" The Dominion Post (NZ), 8 June 2018.

The loss of flexibility would be very damaging for the economy

Enterprise bargaining enables wages and conditions to be set at a level that reflects the needs and characteristics of particular enterprises, on a foundation of minimum standards in awards and the NES. This practical and sensible approach recognises that a struggling business in a rural or regional area does not have the same capacity to provide over-award pay and conditions, as a profitable business in a capital city.

Businesses which are forced through industry bargaining to pay more than they can afford will go out of business, resulting in job losses and more Government expenditure under the Fair Entitlement Guarantee.

A key reason why Australia survived the GFC much better than most other countries was due to our flexible labour market. If this flexibility is lost, the next economic shock will create much greater hardship in the community.

Industry-wide industrial action would be very damaging for the Australian community

The ACTU is proposing that unions be given the right to organise industrial action at the industry level as part of its proposed industry bargaining system. If such a system was ever implemented, it would not be long before the Australian economy was crippled by strikes across the construction, maritime, mining, manufacturing, transport and other industries. These strikes would inflict widespread hardship on businesses, workers and the broader community.

In the 1970s when industry-wide strikes were common, Australian industry operated behind high tariff walls. These days, Australia has a very open economy and this is a major reason for Australia's long run of economic success. This success would be brought to a grinding halt by the damage that industry-wide strikes would inflict upon our international reputation.

Industry-wide industrial action has never been lawful in Australia. Since 1993, there has been a right to take industrial action in pursuit of an *enterprise* agreement, but there has never been a right to take industry-wide industrial action. The industry-wide strikes that plagued the Australian economy in the 1970s were unlawful.

The negotiation process for industry agreements

The ACTU proposes that industry agreements be negotiated at the industry level by unions and presumably some employer representatives. These days unions represent only 9% of employees in the private sector, and there are typically a number of employer groups with members in each industry.

No union or group of employers has a legitimate mandate to negotiate a "one-size-fits all" outcome to be imposed on thousands of employers and hundreds of thousands of employees. In the award system, unions and employer groups do reach agreement from time to time, but those agreements on award variations have no effect unless the FWC

is convinced of the merits of the outcome and the outcome is consistent with the modern awards objective in the *Fair Work Act*.

Industry bargaining inhibits the development of mature workplace relations at the enterprise level because the responsibility for negotiating wages and conditions are devolved to unions and industry groups.

Unions would use industry agreements to deliver lucrative financial rewards to them

These days many unions derive millions of dollars a year from products and services that employers are forced to purchase through enterprise agreements, including pattern agreements in the construction and electrical contracting industries. For example, employers are often forced to purchase grossly over-priced and sub-standard income protection insurance products from insurance companies that pay huge commissions to unions.

Also, unions receive millions of dollars every year from the distribution of so called "surpluses" from some construction industry and electrical contracting industry redundancy funds. Employers have contributed to these funds for the benefit of their own employees – not for the benefit of union head offices.

Undoubtedly, the unions would use industry agreements in the same inappropriate way to enrich themselves. Given the very large number of employers that the unions want to have covered by industry agreements, the potential financial rewards to the unions from these inappropriate sources are enormous.

Australia's recent slow wage growth is not due to a lack of union power

The unions argue that giving them more power to force businesses to pay large wage increases would be good for the economy and employment. This argument is self-serving and plainly wrong. As highlighted in a recent Ai Group economics research paper, the three key reasons for Australia's recent slow wages growth are: weak productivity growth, spare labour capacity, and weak inflation.

Over recent months wage outcomes have begun to improve as skill shortages emerge. Giving unions the power to inflict widespread damage on the Australian community would not increase incomes; rather it would destroy jobs, economic growth and living standards.

International obligations

The ACTU is arguing that the absence of a right to bargain at the industry level is inconsistent with various International Labour Organization (**ILO**) conventions to which Australia is a signatory. This is not true. The ACTU's arguments are based on their own extreme interpretations of those conventions.

Since the *Fair Work Act* was implemented, Labor and Coalition Federal Governments have prepared detailed reports to the ILO setting out why the Act is consistent with Australia's international obligations.

Some senior union leaders see no problem with breaking existing laws, so giving them a lot more power would be reckless

A number of senior union leaders have recently expressed the view that they see no problem in breaking laws that they do not agree with. This attitude strikes at the heart of Australia's democracy and the rule of law. Laws are made by Parliament which consists of the elected representatives of the community. Everyone has the right to propose changes to laws and to vote for political parties that they support. However, no-one has the right to break laws. Given the attitude of these senior union leaders, it would be reckless to give them even more power.

The vital role of protected action ballots

Protected action ballots are inherently democratic. They play a vital role in ensuring that employees genuinely support industrial action during enterprise bargaining and do not feel intimidated by union officials or co-workers into withdrawing their labour.

Strikes typically inflict hardship on workers as well as on businesses. Industrial action should only be taken as a last resort during enterprise bargaining, and protected action ballots play a critical role in this regard.

The importance of Australia's pattern bargaining laws

The pattern bargaining provisions in *Fair Work Act* are similar to the provisions that were in the previous *Workplace Relations Act 1996*. The provisions were implemented in response to Ai Group's submissions over several years that industrial action in pursuit of pattern bargaining needs to be outlawed.

The pattern bargaining provisions in the *Fair Work Act* are based on a few key propositions.

Firstly, before industrial action can be taken by employees in an enterprise, the Act requires that the employees have made a genuine attempt to reach agreement with their employer. Where a common claim is being pursued across more than one enterprise and the employees are not prepared to accept a different outcome at any of the workplaces, the employees are not genuinely trying to reach an agreement with any of the employers.

Secondly, industrial action is only lawful in pursuit of an *enterprise* agreement. Pattern bargaining is a device invented by unions to misuse the enterprise bargaining process to pursue industry bargaining.

Thirdly, template agreements are not outlawed. The pattern bargaining laws only ban industrial action in pursuit of template outcomes.

The pattern bargaining laws are important and need to be maintained.

Australia's enterprise bargaining system is not broken; it just needs to be refreshed with a few modest changes

Australia's enterprise bargaining system was implemented by the Hawke/Keating Labor Government, and the key merits of the system have not altered over time. The prime responsibility for determining wages and conditions needs to remain with employers and their employees at the enterprise level, on a foundation of minimum standards in awards and the NES.

Enterprise bargaining has been a major contributor to Australia's strong economic performance and growth in living standards over more than a quarter of a century.

The key reasons for the recent decline in enterprise agreement making in Australia are obvious. The enterprise agreement process has become a minefield due to the poor drafting of a few provisions of the *Fair Work Act*, and due to the excessively technical approach of the FWC when assessing enterprise agreements at the approval stage. These problems can be readily addressed through a few relatively minor changes to the *Fair Work Act*.

The changes needed include:

1. Amending the Better Off Overall Test (**BOOT**) to require it to be applied to the employees at each classification level, and not to every single employee who is covered and may potentially be covered by the enterprise agreement. This approach is consistent with the explanation in the Explanatory Memorandum to the *Fair Work Bill 2008* of how the BOOT was intended to operate.

2. Giving the FWC more discretion to overlook minor procedural and technical issues when enterprise agreements are being assessed, provided that the employees are not disadvantaged.

3. Inserting criteria into the *Fair Work Act* to ensure that the Commission gives more weight to the importance of respecting the outcome negotiated between an employer and its employees, unless there is some clear disadvantage to the employees.

The *Fair Work Amendment (Repeal of 4 Yearly Reviews of Modern Awards and Other Measures) Bill 2017* would address point 2 above.

With some modest changes, enterprise bargaining can be readily refreshed, and continue to provide important benefits to employers and employees for another quarter of a century and beyond.

The unions' industry bargaining proposals would be beneficial only for unions – not the rest of the community.

Ai GROUP'S "WORKING TOGETHER, THE FACTS" INITIATIVE

Ai Group has released a package of further materials as part of its *Working Together, the Facts* initiative. The materials emphasise the shared interests of businesses and workers in ensuring that businesses are successful. The materials are available on the *Working Together, The Facts* section of Ai Group's website.

The new fact sheets that have been released are:

- *Working Together, The Facts – Productivity;*
- *Working Together, The Facts – Company Profits;*
- *Working Together, The Facts – Diversity and Inclusion;*
- *Working Together, The Facts – Migration;*
- *Working Together, The Facts – Labour Hire*.

The above new fact sheets accompany the following earlier fact sheets and research papers:

- *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;
- *Where do casuals work in 2018?* – Economic Fact Sheet.

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 may wish to use the materials in relevant workplace discussions. 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).

GOVERNMENT BILLS THAT ARE BEFORE PARLIAMENT

There are a number of important Government Bills that are before the Commonwealth Parliament, dealing with workplace relations and related matters:

- The *Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018* would amend the National Employment Standards in the *Fair Work Act* to implement five days of unpaid family and domestic violence leave.

- 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.

- 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 *Modern Slavery Bill 2018* would establish a modern slavery reporting requirement for businesses with an annual consolidated revenue of $100 million or more. 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.

Ai Group has participated in Parliamentary inquiries into each of the above Bills and has made detailed submissions on each Bill.

ACTU RALLIES

The ACTU has held a series of rallies in support of its “Change the Rules” campaign, including rallies in Sydney and Melbourne on 23 October. The ACTU wrote to Ai Group objecting to our advice that: *“Employees who fail to attend work to participate in one of the rallies, without the agreement of their employer, would in most circumstances be engaging in unlawful industrial action.”* However, Ai Group stands by this advice.

In reply correspondence to the ACTU, Ai Group highlighted numerous decisions of the FWC and its predecessors in which unauthorised attendance by employees at union rallies was treated as being unlawful and where, on occasions, stop orders were issued preventing employees stopping work to attend.

Ai Group's letter also referred to the decision of the Federal Court in *CEPU v Commissioner Laing of the Australian Industrial Relations Commission and another* [1998] FCA 1410. This case related to a CEPU claim that a stop order issued by the Commission preventing a group of employees stopping work to participate in protests against changes to industrial legislation was invalid on the basis of the implied constitutional limitation on freedom of communication about political matters. Justice French rejected the CEPU's claim.

Consistent with the above authorities, on 17 October, Deputy President Beaumont of the FWC issued a stop order under s.418 of the *Fair Work Act* preventing employees of Alcoa from attending the ACTU's "Change the Rules" rally in Perth on 18 October. The detailed reasons for the decision were published on 26 October.

The ACTU's letter to Ai Group accused Ai Group of breaching s.345 of the *Fair Work Act* which prohibits a person knowingly or recklessly making a false or misleading representation about the workplace rights of another person. However, it is evident from the numerous authorities referred to in Ai Group's letter to the ACTU that Ai Group has not breached s.345 in the advice given to our Members. In fact, the ACTU's claim that employees have a lawful right to stop work to attend union rallies would appear to constitute a false and misleading representation about the workplace rights of employees in breach of s.345 of the Act.

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

In February 2019, 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.

Ai Group Workplace Lawyers is representing Mondelēz in the proceedings and have briefed Mr Stuart Wood QC and Mr Dimitri Ternovki of Counsel. The Minister for Jobs, Industrial Relations and Women, the Hon Kelly O'Dwyer MP, has intervened in the case on behalf of the Commonwealth.

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.

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.

FWC 4 YEARLY REVIEW OF AWARDS – REASONABLE OVERTIME DECISION

Ai Group has been successful in its arguments that reasonable overtime clauses should remain in those awards that contain these clauses, e.g. the Manufacturing Award. The clauses give employers the right to require that an employee work a reasonable amount of overtime. On 29 October, the FWC determined the terms of a model clause.

At this stage no awards have been varied to reflect the model clause.

FWC 4 YEARLY REVIEW OF AWARDS – PLAIN LANGUAGE RE-DRAFTING OF STANDARD CLAUSES

The FWC has issued determinations varying 104 awards to insert re-drafted model clauses dealing with: Individual flexibility arrangements; Consultation about major workplace change; Consultation about changes to rosters or hours of work; Dispute resolution; and Termination of employment. The award variations are operative from 1 November 2018.

The most significant change relates to the standard clause which gives an employer the right to deduct money from wages due on termination for notice not given by an employee. Over the past 12 months, there has been a hard-fought contest between Ai Group and the unions concerning whether or not the standard award clause can remain in awards. Following several rounds of submissions over the past 12 months and a hearing, a Full Bench of the FWC decided upon a new model clause which:

- Requires an employee to give notice of between 1 week and 4 weeks, depending upon the employee's length of service;
- Clarifies that the clause does not apply to the employees identified in s.123(1) and 123(3) of the *Fair Work Act* (e.g. casuals, fixed term employees, etc);
- Enables an employer to deduct from wages due to an employee (who is at least 18 years of age), an amount that is no more than one week's wages; and
- Specifies that any deduction from wages must not be unreasonable in the circumstances.

FWC 4 YEARLY REVIEW OF AWARDS – PAYMENT OF WAGES ON TERMINATION

The FWC has issued determinations varying 89 modern awards to incorporate a model term dealing with payment of wages on termination of employment. Amongst other aspects, the model term generally requires that an employer must pay an employee no later than seven days after the day on which the employee's employment terminates. The award variations are operative from 1 November 2018.

GRAPHIC ARTS AWARD – COMPETENCY STANDARDS CASE

On 31 October, a Full Bench of the FWC heard submissions and evidence from Ai Group and the Australian Manufacturing Workers Union (AMWU) regarding the link between the classification structure and wage rates in the *Graphic Arts, Printing and Publishing Award 2010* and the competency standards in the Printing and Graphic Arts Industry Training Package.

Ai Group is strongly opposing an AMWU claim to amend Schedule C (Competencies) in the Award which could lead to a raft of costly reclassification claims.

Ai Group is pursuing a counter-claim that would remove the problematic Schedule C from the Award, but leave the formal qualifications in the Industry Training Package linked to the Award through the classification definitions in Schedule B. This would ensure consistency with the approach in nearly all other awards. It would also enable the Training Package to be kept up to date with changes in the industry and the training system, without potentially costly impacts upon wage rates and classifications under the Award.

Ai Group filed detailed submissions and evidence in the case on 15 October 2018. The Full Bench has scheduled a further hearing for 10 December.

ANNUAL LEAVE LOADING AND SUPERANNUATION

Ai Group has made a submission to the Australian Taxation Office (**ATO**) expressing opposition to advice that the ATO is giving that superannuation contributions are payable on annual leave loading unless an employee is demonstrable working overtime on a permanent regular basis.

Ai Group's submission argues that leave loading was inserted into awards in the 1970s to compensate for the loss of opportunity to work overtime and therefore that superannuation contributions should not be payable on leave loading paid to award-covered employees, regardless of whether an individual employee works regular overtime.

The debate with the ATO over the above issue only relates to whether superannuation contributions are payable on leave loading during employment. It is well-established that superannuation contributions are not payable on payments made in lieu of annual leave (including leave loading) on termination of employment.

INQUIRY INTO SEXUAL HARASSMENT IN AUSTRALIAN WORKPLACES

The Australian Human Rights Commission (**AHRC**) is conducting a National Inquiry into Sexual Harassment in Australian Workplaces. Ai Group and the AHRC are co-hosting employer consultations for Ai Group Members as part of the Inquiry.

Ai Group Members who wish to attend employer consultations in Melbourne, Sydney or Newcastle should contact Nicola Street, National Manager – Workplace Relations Policy of Ai Group, on email nicola.street@aigroup.com.au.

Ai Group's Chief Executive, Innes Willox, has been appointed as a Member of the Reference Panel for the Inquiry.

On 12 September 2018, the Sex Discrimination Commissioner, Kate Jenkins, released the results of the AHRC's fourth national survey on sexual harassment in Australian workplaces. The survey found that:

- 1 in 3 people had experienced sexual harassment at work in the past five years;
- In the last 12 months, 23% of women and 16% of men had experienced some form of workplace sexual harassment; and
- People aged 18-29 were more likely than those in other age groups to have experienced workplace sexual harassment in the past five years.

FWC ANNUAL REPORT

The FWC has released its annual report for the 2017/18 financial year. The report contains some interesting statistics about enterprise agreement approvals, general protections applications and unfair dismissal applications.

Enterprise agreement approvals

The number of applications for approval of enterprise agreements has remained relatively steady over the past few years. (There were 5,922 applications in 2014/15 and 5,287 in 2017/18). However, approval rates have reduced significantly (5,481 were approved in 2014/15, compared with 3,803 in 2017/18).

Of those agreements which are approved, the proportion approved with undertakings has increased from 30% in 2014/15 to 68% in 2017/18. Also, the average waiting times for finalisation of applications have increased threefold from an average of 21 days in 2014/15 to an average of 76 days in 2017/18.

General protections disputes involving dismissal

There has been a big increase in the number of general protections disputes involving dismissal in the past year (4,117 applications were lodged with the FWC in 2017/18 compared to 3,729 applications in 2016/17).

Unfair dismissal applications

The number of unfair dismissal applications has declined in the past year (from 14,135 in 2016/17 to 13,595 in 2017/18). One reason for this decline may be that ex-employees who wish to challenge their dismissal are increasingly opting to pursue a general protections application rather than an unfair dismissal application.

VICTORIAN LABOUR HIRE LICENSING REGULATIONS AND COMMISSIONER

The *Labour Hire Licensing Regulations 2018* (Vic) were made on 23 October. The Regulations clarify some aspects of the coverage of the Victorian labour hire licensing scheme as well as addressing various other issues of detail relating to the scheme. Meanwhile, the Victorian Government has appointed former AMWU Victorian State Secretary, Steve Dargavel, as Labour Hire Licensing Commissioner.

On 7 September, Ai Group lodged a submission in response to an exposure draft of the Regulations. Disappointingly, the Regulations that have been made fail to provide all of the necessary exclusions from the coverage to avoid disturbing numerous business to business services that are not legitimately regarded as being "labour hire"

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.

VICTORIAN INQUIRY INTO THE "ON-DEMAND" WORKFORCE

On 29 October, Ai Group participated in an initial roundtable discussion for the Victorian Inquiry into the On-demand Workforce. The inquiry is being led by Natalie James, the previous Fair Work Ombudsman.

The inquiry is investigating 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.

Written submissions are due by 6 February 2019. Ai Group will make a detailed submission.

NEW VICTORIAN LONG SERVICE LEAVE LAWS

The *Long Service Leave Act 2018 (Vic)* has been proclaimed to commence on 1 November 2018. The new Act will implement the following changes:

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

VICTORIAN LONG SERVICE BENEFITS PORTABILITY ACT

The *Long Service Benefits Portability Act 2018* has been passed by the Victorian Parliament. The Act will 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 will be based on service in the relevant industry, rather than service with one employer.

Vasuki Paul of Ai Group has been appointed as a Member of the Victorian Government's Portable Long Service Benefits Implementation Working Party. The Working Party is developing regulations for the legislation. Vasuki can be contacted on email vasuki.paul@aigroup.com.au.

The Government has announced that the portable long service leave schemes will commence in mid-2019.

AUSTRALIAN CAPITAL TERRITORY – SECURE LOCAL JOBS CODE

The *Government Procurement (Secure Local Jobs) Amendment Act 2018* has been passed in the ACT Legislative Assembly. The Act underpins the introduction of the Secure Local Jobs Code and will apply to businesses tendering for ACT Government construction, cleaning, security and traffic management work from 15 January 2019. At a later date, the Code will apply to other ACT Government funded work, valued at least $200,000.

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.

- Details of all proposed subcontractors are to be provided to the ACT Government prior to their engagement on ACT Government Funded Work. Contractors must ensure that all subcontractors engaged by the contractor 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 ACT 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* or Part 7 of the *Work Health and Safety Act 2011* (ACT). Contractors must update the Government within 14 days of a change to the above information. The information will be kept in a register which may be accessed for the purpose 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, WHS and tax obligations and must notify the Territory within 7 days of any ruling made against either itself or one of the contractor's subcontractors on ACT Government 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 ACT Government Funded Work provides that a 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.

A spokesperson for the ACT Government has indicated that although the new Code will apply to construction companies tendering for ACT Government building work from 15 January 2019, the Act will not require all companies which already hold an IRE Certificate to be re-certified.

Much like the existing IRE Certification scheme 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 is currently in discussions with the ACT Government regarding potential conflicts between the Code and the *Fair Work Act* and the *Code for the Tendering and Performance of Building Work 2016*.

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.