Significant Workplace Relations Issues

6 August 2018

EXECUTIVE SUMMARY

- ***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'.***

- ***On 10 August, a case management hearing will take place before Justice O'Callaghan of the Federal Court in the Mondelēz v AMWU case. The case relates to the meaning of the expression "10 days of paid/personal carer's leave" in section 96 of the Fair Work Act.***

- ***The Minister for Small and Family Business, the Workplace and Deregulation, the Hon Craig Laundy MP, has announced that the Government intends to implement an entitlement to five days of unpaid domestic violence leave through amendments to the Fair Work Act. The legislation is expected to be introduced into Parliament in August.***

- ***All modern awards have been varied to include the Fair Work Commission's model Family and Domestic Violence Leave Clause, with effect from the first pay period that starts on or after 1 August. The clause gives employees an entitlement to up to five days per annum of unpaid domestic violence leave.***

- ***On 20 July, Ai Group made a submission to a Senate Committee that is inquiring into the provisions of the Modern Slavery Bill 2018 (Cth). 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).***

- ***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.***

- ***Three important Government workplace relations Bills are before Parliament. The Bills have not yet been called on for debate this year. Parliament resumes on 13 August, after the winter break.***

- ***In a speech to the recent ACTU Congress, Opposition Leader Bill Shorten announced a new Labor Party policy on labour hire.***

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

- ***On 30 July, Ai Group made a submission to a Queensland Parliamentary Committee inquiry into 'wage theft'.***

- ***In late July, Ai Group made a submission to a Senate Committee Inquiry into the Exploitation of General and Specialist Cleaners Working for Retail Chains for Contracting or Subcontracting Cleaning Companies.***

- ***On 20 July, Ai Group filed a submission in response to the Productivity Commission's draft report on Superannuation: Assessing Efficiency and Competitiveness.***

- ***On 15 July, Sandra Parker commenced a five-year term as the Fair Work Ombudsman, replacing Natalie James whose five-year term has expired.***

- ***At the recent ACTU Congress, Michele O'Neil was elected to the position of President of the ACTU.***

- ***On 20 July, an application was filed in the Federal Court of Australia 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).***

- ***On 2 August, the Full Court of the Federal Court issued a personal payment order against CFMMEU official Joe Myles. This is the first personal payment order issued since the High Court decided earlier this year that the Federal Court has the power to make these orders.***

- ***During the FWC's 4 Yearly Review of Modern Awards, there has been a hard-fought contest between Ai Group and the unions concerning whether or not the standard award clause which gives an employer the right to deduct money from wages due on termination for notice not given by an employee, can remain in awards. Following several rounds of submissions over the past 12 months and a hearing, a Full Bench of the FWC has decided upon a new model clause.***

- ***The Victorian Government has introduced a Bill into Parliament that would amend the Owner Drivers and Forestry Contractors Act 2005 (Vic). The amendments would provide additional protections for owner drivers and forestry contractors and implement financial penalties for non-compliance with various provisions of the Act.***

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

- ***The decision of a Full Bench of the FWC in CFMEU v CBI Constructors [2018] FWCFB 2732 has led to a potentially significant number of enterprise agreement applications that have not yet been approved becoming invalid.***

- ***A Full Bench of the FWC has decided that casual service is not to be taken into account when calculating redundancy entitlements under the redundancy clause in an enterprise agreement applicable to Unilever.***

- ***On 5 July, the Department of Jobs and Small Business released its report on Trends in Federal Enterprise Bargaining for the March 2018 quarter.***

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

Additional fact sheets and other materials will shortly be released to emphasise the shared interests of businesses and workers in the following areas, amongst others:

- Labour hire
- Productivity
- Competitiveness
- Work health and safety
- Diversity and inclusion
- Skills
- Skilled Migration
- Company profits
- Compliance with the law

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.

MONDELĒZ V AMWU CASE RE. MEANING OF A "10 DAYS OF PAID PERSONAL/CARER'S LEAVE" IN THE FAIR WORK ACT

On 10 August, a case management hearing will take place before Justice O'Callaghan of the Federal Court in the *Mondelēz v AMWU* case. The case relates to the meaning of the expression *"10 days of paid/personal carer's leave"* in section 96 of the *Fair Work Act*.

In the proceedings, Mondelēz International is seeking a declaration from the Federal Court relating to the meaning of the above expression. The relevant employees of Mondelēz work 12-hour shifts at the company's Claremont plant in Tasmania.

The case has implications for most employers in Australia. An application has been made for the case to be dealt with by the Full Court of the Federal Court. The Minister for Small and Family Business, the Workplace and Deregulation, the Hon Craig Laundy MP, has intervened in the case on behalf of the Commonwealth.

Ai Group Workplace Lawyers has briefed Stuart Wood QC and Mr Dimitri Ternovski of Counsel. Minister Laundy is being represented by the Australian Government Solicitor, Mr Tom Howe QC and Ms Irene Sekler of Counsel. The AMWU is being represented by Ms Lucy Saunders of Counsel.

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

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

This important case follows a number of unfavourable decisions of relevance to the meaning of the phrase *"10 days of paid personal/carer's leave"* under section 96 of the *Fair Work Act*, in circumstances where an employee works more than 7.6 ordinary hours per day/shift as part of their roster pattern. The decisions of a Full Bench of the FWC in *RACV v ASU* [2015] FWCFB 2881 and of the Federal Court in *CFMEU v Glendell Mining* [2017] FCAFC 35 and *CFMEU v Anglo Coal* [2016] FCA 689 all support an interpretation that a '*day'* means the ordinary hours that the employee is required to work in a 24-hour period. Ai Group believes that this interpretation is not aligned with the legislative

intention of the provisions, that it conflicts with widespread industry practice, and would lead to absurd outcomes (e.g. a part-time employee who works one day per week would arguably be entitled to the equivalent of 10 weeks of personal/carer's leave per year).

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

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

BILL TO IMPLEMENT UNPAID DOMESTIC VIOLENCE LEAVE

The Minister for Small and Family Business, the Workplace and Deregulation, the Hon Craig Laundy MP, has announced that the Government intends to implement an entitlement to five days of unpaid domestic violence leave through amendments to the *Fair Work Act*. The legislation is expected to be introduced into Parliament in August.

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

FWC UNPAID DOMESTIC VIOLENCE LEAVE CASE

All modern awards have been varied to include the FWC's model Family and Domestic Violence Leave Clause, with effect from the first pay period that starts on or after 1 August. The clause gives employees an entitlement to up to five days per annum of *unpaid* domestic violence leave.

Ai Group has played a leading role throughout the FWC's *Family and Domestic Violence Leave Case* in representing the interests of employers. In the case, a Full Bench of the FWC rejected the ACTU's claim for 10 days of paid family and domestic violence leave but decided to implement an unpaid 5-day leave entitlement.

The FWC's model clause is set out in the **Attachment**.

The clause applies to all employees to whom the relevant award applies, including casuals and part-time employees.

The clause defines "family and domestic violence" as:

> *"violent, threatening or other abusive behaviour by a family member of an employee that seeks to coerce or control the employee and that causes them harm or to be fearful."*

The 5-day unpaid leave entitlement is available in full at the start of each 12-month period of the employee's employment and does not accumulate from year to year.

An employee may take unpaid leave to deal with family and domestic violence if the employee:

- is experiencing family and domestic violence; and
- needs to do something to deal with the impact of the family and domestic violence and it is impractical for the employee to do this outside their ordinary hours of work.

The clause states that the reasons for which an employee may take family and domestic violence leave include:

- making arrangements for their safety or the safety of a family member (including relocation);
- attending urgent court hearings; or
- accessing police services.

The time that an employee is on unpaid family and domestic violence leave does not count as "service" but does not break the employee's continuity of service.

The employee must give the employer notice of the taking of the leave. The notice must be given to the employer as soon as practicable (which may be a time after the leave has started), and must advise the employer of the period, or expected period, of the leave.

An employee must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken for a purpose covered by the clause. The clause states that, depending on the circumstances, evidence may include a document issued by the police service, a court or a family violence support service, or a statutory declaration.

Employers must take steps to ensure that information concerning any notice an employee has given, or evidence an employee has provided is treated confidentially, as far as it is reasonably practicable to do so.

COMMONWEALTH MODERN SLAVERY BILL

On 20 July, Ai Group made a submission to a Senate Committee that is inquiring into the provisions of the *Modern Slavery Bill 2018* (Cth). 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).

The Bill would require businesses to publish annual public statements on what steps they have taken, and will take, to address modern slavery in their supply chains and operations.

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

Ai Group's submission to the Senate inquiry makes 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, regardless of size. 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 served by practical support to industry about the steps businesses 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 for 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.

The Senate Committee is required to report to the Commonwealth Parliament by 24 August.

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.

Under the legislation, businesses which have an annual turnover of $50 million in a financial year will be required to submit 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.

No regulations for the legislation have yet been made. The Act has not yet been proclaimed and the commencement date is currently unknown.

GOVERNMENT FAIR WORK BILLS BEFORE PARLIAMENT

Three important Government workplace relations Bills are before Parliament. The Bills have not yet been called on for debate this year. Parliament resumes on 13 August, after the winter break.

The *Fair Work Amendment (Repeal of 4 Yearly Reviews of Modern Awards and Other Measures) Bill 2017* would amend the *Fair Work Act* to abolish 4 yearly Reviews of Awards and give the FWC more discretion to overlook minor procedural non-compliance

in the enterprise agreement-making process, provided that the employees are unlikely to have been disadvantaged.

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

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

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

FEDERAL ALP LABOUR HIRE POLICY

In a speech to the recent ACTU Congress, Opposition Leader Bill Shorten announced a new Labor Party policy on labour hire.

If Labor wins Government at the next Federal Election, Labor intends to legislate to:

- Ensure that labour hire workers are entitled to the same wages and conditions as the employees of the host employer who they are working alongside; and

- Create a national labour hire licensing scheme.

In a media release, Ai Group's Chief Executive Innes Willox, made the following comments about Labor's policy:

"Industry is concerned about the announcements made by the Federal Opposition regarding regulation of the labour hire industry. The labour hire industry provides vital flexibility to businesses and to employees, and this flexibility needs to be preserved."

"Like every other business, labour hire companies must pay no less than what is legally required under the *Fair Work Act* and awards. Beyond the legal minimum, labour hire companies need to retain the ability to reach agreement with their employees on wage structures and working conditions that meet the needs of their businesses and their employees. The labour hire industry should not be forced through legislation to apply the wage rates and conditions of employment of their clients' businesses. Many labour hire companies offer best-practice employment arrangements."

"With regard to labour hire licensing, an appropriate national labour hire licensing scheme would be better than having separate licensing schemes in each State and Territory. However, there is no sign that the Queensland, South Australian and Victorian Parliaments intend to repeal the legislation they have passed creating labour hire licensing schemes in these States. Overlaying a national licensing scheme on top of the

State schemes that are already in place would be a recipe for uncertainty and over-regulation."

"Taking away vital flexibility for labour hire businesses and their clients would reduce the competitiveness of Australian firms and potentially have an adverse impact on employment. The labour hire industry employs hundreds of thousands of employees, many of whom prefer the flexibility that labour hire employment provides."

"Labor has announced that it intends to consult with industry groups when working through the details of its policy. Ai Group will participate constructively in this consultation process."

LABOUR HIRE LICENSING LEGISLATION IN VICTORIA, QUEENSLAND AND SOUTH AUSTRALIA

There have been a number of important developments relating to the labour hire licensing legislation in Victoria, Queensland and South Australia.

The Victorian Labour Hire Licensing Act

The Victorian *Labour Hire Licensing Act 2018* was passed by the Victorian Parliament on 20 June 2018.

While similar in many respects to the labour hire licensing Acts in Queensland and South Australia, the Victorian Act contains some key differences. Ai Group was successful in influencing some important amendments that should reduce the impact on businesses, as outlined below.

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.

A business is considered a provider of labour hire services under the Victorian legislation if, in the course of conducting the business, it supplies one or more individuals to another person (a *host)* to perform work in and as part of a business or undertaking of the host.

The Victorian Government has announced that it will introduce Regulations excluding particular business arrangements from the requirement to hold a licence. Late last year, the Victorian Government released a consultation paper which identified a number of business arrangements that could potentially be excluded from the requirement to hold a licence. Following strong representations from Ai Group about the problematic and broad coverage of the licensing scheme, the Victorian Government made a statement in Parliament during the debate on the legislation expressing its intention to exclude many of the business arrangements identified in the consultation paper. This statement was influential in convincing key Crossbench Parliamentarians to support the legislation.

Following further representations from Ai Group, a late amendment to the Victorian Act was passed which provides for mutual recognition of labour hire licences held in another State or Territory. The provision is designed to alleviate the regulatory burden on businesses required to hold a licence under the Victorian scheme, if they can demonstrate that they hold a licence under a labour hire licensing scheme in another State, such as Queensland or South Australia.

The Victorian legislation includes penalties of up to $507,424 for companies and $126,856 for individuals. The penalties apply to those who provide "labour hire services" without a licence and to those who use an unlicensed labour hire provider. The penalties also apply to persons who enter into an arrangement to avoid obligations under the legislation.

The Queensland Labour Hire Licensing Act – Latest Developments

On 16 June 2018, the Queensland *Labour Hire Licensing Act 2017* became enforceable against businesses that are labour hire service providers and businesses that use labour hire service providers.

Labour hire service providers under the Queensland Act had until 15 June 2018 to lodge their licence application to enable them to continue operations while their licence application was determined by Labour Hire Licensing Queensland.

Labour hire service providers that did not submit their licence application by 15 June 2018 must now be licensed to provide labour hire services. These businesses may still lodge a licence application but must not provide labour hire services until such time as a licence is granted by Labour Hire Licensing Queensland.

Businesses using labour hire service providers must now only use providers that are licensed or providers that have an application pending if the application was lodged by 15 June 2018 as shown on the Labour Hire Licensing Queensland Pending Applications List. Businesses can view an online register of the providers who have been granted a licence.

The South Australian Labour Hire Licensing Act – Latest Developments

The South Australian *Labour Hire Licensing Act 2017* commenced on 1 March 2018.

Under the South Australian Act, labour hire service providers originally had until 1 September 2018 to lodge an application. However, following concerns raised by stakeholders, including Ai Group, the South Australian Government has announced that the licensing requirements will not be enforced until 1 February 2019 and that "*businesses may wish to postpone seeking a licence until further information is available."*

INQUIRY INTO THE EXPLOITATION OF CLEANERS WORKING FOR RETAIL CHAINS

In late July, Ai Group made a submission to a Senate Committee Inquiry into the Exploitation of General and Specialist Cleaners Working for Retail Chains for Contracting or Subcontracting Cleaning Companies.

Ai Group's submission, which addresses the terms of reference for the Inquiry, argues that:

- There are very comprehensive protections in place to protect workers from exploitation, underpayments and workplace injury and that changes are not needed to workplace relations or Work Health and Safety laws to increase protection for workers;

- "Wage theft" is an overly emotive term widely used by unions to describe underpayments;

- The current low rate of wage growth is due to spare labour capacity, weak productivity growth and weak inflation, and not due to inadequate union power or worker rights;

- The Fair Work Ombudsman (FWO) and the Australian Taxation Office (ATO) are very well-resourced and effective regulators with all of the necessary powers;

- Strong laws are in place to address "phoenixing";

- Legitimate subcontracting arrangements should not be interfered with;

- The accessorial liability provisions in s.550 of the *Fair Work Act* provide an effective and adequate means of holding persons responsible if they are knowingly involved in breaches of the Act or industrial instruments. The FWO very frequently pursues actions under s.550, most of which are successful

- Making major businesses in a supply chain responsible for the liabilities of their suppliers would:

    - Discourage multinational firms from investing in Australia and consequently reduce employment;

    - Reduce the responsibility upon suppliers for ensuring that they meet their own liabilities; and

    - Impose very substantial auditing, training and other costs upon major businesses, with these costs leading to the businesses needing to charge higher prices for their products and services which would increase the cost of living for consumers.

- The very longstanding redundancy pay exclusion for 'the ordinary and customary turnover of labour' is an important part of the redundancy pay scheme under the *Fair Work Act* and needs to be maintained.

INQUIRY INTO 'WAGE THEFT' IN QUEENSLAND

On 30 July, Ai Group made a submission to a Queensland Parliamentary Committee inquiry into 'wage theft'.

Ai Group's submission 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.

PRODUCTIVITY COMMISSION INQUIRY INTO SUPERANNUATION

On 20 July, Ai Group filed a submission in response to the Productivity Commission's draft report *Superannuation: Assessing Efficiency and Competitiveness.*

Ai Group's submission:

- Firmly supports the objective of improving retirement incomes for superannuation fund members;

- Agrees with the Commission's identification of unintended multiple accounts and entrenched fund underperformance as two structural flaws in present arrangements which, if addressed, could be expected to substantially boost fund members' retirement incomes;

- Supports most of the recommendations in the draft report and expresses the view that, if adopted and subject to minor qualifications, they will help improve fund governance; lift average performance levels; assist in improving fund member outcomes; and enhance the regulation of institutional superannuation funds;

- Cautions that some of the Commission's recommendations would reduce competition, variety and innovation among funds and would undermine the viability of a significant number of high-performing smaller funds many of which offer industry-specific advantages; and

- Expresses support for an approach of short-listing high performing default funds, but, rather than there being only one shortlist of up to 10 funds across the entire economy, high-performing products that are suitable for the industry the employee is entering be included in the shortlist.

NEW FAIR WORK OMBUDSMAN

On 15 July, Sandra Parker commenced a five-year term as the Fair Work Ombudsman, replacing Natalie James whose five-year term has expired.

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

NEW ACTU PRESIDENT

At the recent ACTU Congress, Michele O'Neil was elected to the position of President of the ACTU.

Ms O'Neil was previously the National Secretary of the Textile Clothing and Footwear Union (TCFUA). Ai Group has been dealing with Ms O'Neil for many years in her various senior roles at the TCFUA.

APPEAL AGAINST THE MERGER OF THE CFMEU, MUA AND TCFUA

On 20 July, an application was filed in the Federal Court of Australia 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 was filed by the Australian Mines and Metals Association. At this stage, no hearing date has been set.

FEDERAL COURT ISSUES FIRST PERSONAL PAYMENT ORDER

On 2 August, the Full Court of the Federal Court issued a personal payment order against CFMMEU official Joe Myles. This is the first personal payment order issued since the High Court decided earlier this year that the Federal Court has the power to make these orders.

The order requires that Mr Myles personally pay a fine of $19,500 that was imposed due to his actions in unlawfully blocking a concrete pour on the Regional Rail Link Project in 2013.

NOTICE OF TERMINATION BY EMPLOYEE CLAUSES IN AWARDS

During the FWC's 4 Yearly Review of Modern Awards, there has been a hard-fought contest between Ai Group and the unions concerning whether or not the standard award clause which gives an employer the right to deduct money from wages due on termination for notice not given by an employee, can remain in awards. Following several rounds of submissions over the past 12 months and a hearing, a Full Bench of the FWC has decided upon a new model clause.

The model clause:

- 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);
- 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.

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

VICTORIAN OWNER DRIVERS AND FORESTRY CONTRACTORS AMENDMENT BILL 2018

The Victorian Government has introduced a Bill into Parliament that would amend the *Owner Drivers and Forestry Contractors Act 2005* (Vic). The amendments would provide additional protections for owner drivers and forestry contractors and implement financial penalties for non-compliance with various provisions of the Act.

The *Owner Drivers and Forestry Contractors Act 2005* regulates owner drivers and harvesting and haulage contractors working in the forestry industry. The Act imposes obligations in respect of contractual arrangements. It also provides dispute resolution mechanisms, and mandates the provision of certain information to contractors, such as information booklets, guideline rates and cost schedules.

The introduction of the Bill follows the completion of a review into the legislation

Key changes that would be introduced through the Bill include:

- Amending the definition of "freight broker" under the legislation to cover third party contracting platforms such as Uber Freight.

- Requiring hirers and freight brokers to provide the rates and costs schedule annually if a contractor is engaged under more than one contact during a 12-month period.

- Requiring hirers to provide tip truck contactors working in connection with the building and construction industry with the information booklet and rates and costs schedule, regardless of the period of time for which they are engaged.

- Clarifying that hirers can meet their obligation to provide contractors with relevant mandated information through electronic means.

- Requiring that invoices be paid within 30 days of receipt unless there is a dispute, subject to the parties agreeing to alternative fair arrangements.

- Clarifying that contractors have the option of being covered by the same terms and conditions as an existing regulated contract that has been jointly negotiated.

- Specifying that the Small Business Commissioner can arrange arbitration where the parties to a dispute agree, and that the Commercial Arbitration Act does not apply to such arbitration.

- Introducing penalties for failure to provide the information booklet, rate and cost schedule, written contract, and either the appropriate notice of termination of a contractor's engagement or the specified minimum payment in lieu thereof.

- Providing for an enforcement and compliance framework that includes a system of infringement notices and court-imposed penalties for non-compliance with certain provisions of the Act.

- Empowering authorised officers to require hirers to produce documents relevant to an investigation, and to enter premises with consent.

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

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

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

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

FWC CFMEU v CBI DECISION – NEW 'ACCESS PERIOD' REQUIREMENTS

The decision of a Full Bench of the FWC in *CFMEU v CBI Constructors* [2018] FWCFB 2732 has led to a potentially significant number of enterprise agreement applications that have not yet been approved becoming invalid.

In the decision, the Full Bench has adopted the following interpretation of the 'access period' requirements in s.180 of the *Fair Work Act*.

- The 'access period' must be seven clear calendar days;
- The employees must be notified of the time and place at which the vote will occur, and the voting method that will be used, before the start of the 'access period' (i.e. the calendar day before the 'access' period starts or earlier);
- The vote must not commence until the day after the end of the 'access period'.

This decision is just one of many that have changed the way that the FWC is assessing enterprise agreements at the approval stage. The approval process has become a 'minefield'. A relatively large number of applications are being found to be invalid by the Commission.

Of those applications that are not rejected by the FWC or withdrawn by the employer at the suggestion of the FWC, employers are being required to give undertakings in around 75 per cent of cases.

Members are urged to contact Ai Group for advice early in the bargaining process.

UNILEVER v AMWU CASE – INCLUSION OF CASUAL SERVICE WHEN CALCULATING REDUNDANCY ENTITLEMENTS

A Full Bench of the FWC has decided that casual service is not to be taken into account when calculating redundancy entitlements under the redundancy clause in an enterprise agreement applicable to Unilever.

The decision is a welcome development. In its decision, the Full Bench made the following comments about the earlier split decision of a Full Bench of the Commission in *AMWU v Donau* [2016] FWCFB 3075 which led to a great deal of concern amongst employers when handed down in 2016:

> "**[28]** There was argument before us about the significance of a decision of the Full Bench in *Australian Manufacturing Workers' Union v Donau Pty Ltd*, in which a majority found that a period of 'contiguous' casual service counted in the calculation of severance pay under the enterprise agreement in question. That decision turned on its own facts. It should not be understood as establishing any principle about the application of s.22 of the Act to casual employment, or the approach to calculating service in enterprise agreements…."

WAGE OUTCOMES UNDER ENTERPRISE AGREEMENTS

On 5 July, the Department of Employment released its report on *Trends in Federal Enterprise Bargaining* for the March 2018 quarter. Average annualised wage increases **(AAWI)** for enterprise agreements approved in the March 2018 quarter are summarised in the following table.

Industry Sector or Type of Agreement	**AAWI (%) for agreements approved in March 2018**	**Change from December 2017 (%)**
All sectors	2.7	Up 0.2
Private sector	2.8	Up 0.1
Public sector	2.5	Up 0.2
Manufacturing	2.5	Same
Metals manufacturing	2.4	Up 0.2
Non-metals manufacturing	2.5	Down 0.2
Construction	5.5	Up 0.8
Transport, postal & warehousing	2.2	Down 0.2
Mining	2.5	Up 0.7
Information media and telecommunications	2.2	Up 0.1
Retail	3.0	Up 0.7
Single enterprise non-greenfields	2.7	Up 0.2
Single enterprise greenfields	2.6	Up 0.1
Union/s covered	2.7	Up 0.2
No Union/s covered	2.3	Down 0.1

ATTACHMENT

MODEL CLAUSE – UNPAID FAMILY AND DOMESTIC VIOLENCE LEAVE

X. Leave to deal with Family and Domestic Violence

X.1 This clause applies to all employees, including casuals.

X.2 Definitions

(a) In this clause:

family and domestic violence means violent, threatening or other abusive behaviour by a family member of an employee that seeks to coerce or control the employee and that causes them harm or to be fearful.

family member means:

(i) a spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the employee; or

(ii) a child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the employee; or

(iii) a person related to the employee according to Aboriginal or Torres Strait Islander kinship rules.

(b) A reference to a spouse or de facto partner in the definition of ***family member*** in clause X.2(a) includes a former spouse or de facto partner.

X.3 Entitlement to unpaid leave

An employee is entitled to 5 days' unpaid leave to deal with family and domestic violence, as follows:

(a) the leave is available in full at the start of each 12 month period of the employee's employment; and

(b) the leave does not accumulate from year to year; and

(c) is available in full to part-time and casual employees.

Note:

1. A period of leave to deal with family and domestic violence may be less than a day by agreement between the employee and the employer.

2. The employer and employee may agree that the employee may take more than 5 days' unpaid leave to deal with family and domestic violence.

X.4 Taking unpaid leave

An employee may take unpaid leave to deal with family and domestic violence if the employee:

(a) is experiencing family and domestic violence; and

(b) needs to do something to deal with the impact of the family and domestic violence and it is impractical for the employee to do that thing outside their ordinary hours of work.

Note: The reasons for which an employee may take leave include making arrangements for their safety or the safety of a family member (including relocation), attending urgent court hearings, or accessing police services.

X.5 Service and continuity

The time an employee is on unpaid leave to deal with family and domestic violence does not count as service but does not break the employee's continuity of service.

X.6 Notice and evidence requirements

(a) **Notice**

An employee must give their employer notice of the taking of leave by the employee under clause X. The notice:

(i) must be given to the employer as soon as practicable (which may be a time after the leave has started); and

(ii) must advise the employer of the period, or expected period, of the leave.

(b) **Evidence**

An employee who has given their employer notice of the taking of leave under clause X must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken for the purpose specified in clause X.4.

Note: Depending on the circumstances such evidence may include a document issued by the police service, a court or a family violence support service, or a statutory declaration.

X.7 Confidentiality

(a) Employers must take steps to ensure information concerning any notice an employee has given, or evidence an employee has provided under clause X.6 is treated confidentially, as far as it is reasonably practicable to do so.

(b) Nothing in clause X prevents an employer from disclosing information provided by an employee if the disclosure is required by an Australian law or is necessary to protect the life, health or safety of the employee or another person.

Note: Information concerning an employee's experience of family and domestic violence is sensitive and if mishandled can have adverse consequences for the employee. Employers should consult with such employees regarding the handling of this information.

X.8 Compliance

An employee is not entitled to take leave under clause X unless the employee complies with clause X.

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.