Significant Workplace Relations Issues

3 April 2018

EXECUTIVE SUMMARY:

- ***On 13 March, Ai Group filed its submission in this year's Annual Wage Review. The submission argues that a modest wage increase of 1.8 per cent is warranted. This equates to an increase of about $12.50 per week in the National Minimum Wage and about $14.60 per week at the base trade level.***

- ***After last year's decision to reject the ACTU's claim for 10 days of paid domestic violence leave, on 26 March a Full Bench of the Fair Work Commission (FWC) has decided to take a measured approach to the issue of unpaid domestic violence leave. The Commission has decided to implement an award entitlement to up to five days of unpaid leave per year for those who need to deal with the impact of domestic violence.***

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

- ***On 26 March, a Full Bench of the FWC handed down its decision in the Family Friendly Work Arrangements Case. Ai Group played the leading role in representing employers in the case. If the ACTU's claims had been accepted, all awards would have been varied to give employees the right to dictate to their employer what hours and days they work, with the employer having no right to refuse regardless of the circumstances.***

- ***On 5 March, a Full Bench of the FWC handed down its decision in the Public Holidays Case. Ai Group played the leading role in representing employers in the case. The decision protects employers in a number of key industries from big cost increases that would have occurred if the unions' claims had been accepted.***

- ***Three important workplace relations Bills are before Parliament: the Fair Work Amendment (Proper Use of Worker Benefits) Bill 2017, the Fair Work Amendment (Repeal of 4 Yearly Reviews of Modern Awards and Other Measures) Bill 2017 and the Fair Work (Registered Organisations) Amendment (Ensuing Integrity) Bill 2017. The Bills have not yet been called on for debate this year.***

- ***The Labor Party has been floating various workplace relations policy proposals that will be problematic for businesses if implemented. On 15 March, Shadow Employment and Workplace Relations Minister,***

Brendan O'Connor, gave a speech which floated some further proposed changes to the Fair Work Act.

- ***The ACTU is pressing the Labor Party to commit to making sweeping changes to the Fair Work Act if elected to give unions a lot more power, including much wider rights to strike, more generous worker entitlements, and wider powers for the FWC. ACTU Secretary Sally McManus outlined the unions' proposals in a speech to the National Press Club on 21 March.***

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

- ***The State Parliaments in Queensland and South Australia have passed legislation to create a licensing scheme for the supply of labour across all industries. On 13 December, the Victorian Government introduced a Bill into Parliament that would create a similar licensing scheme in Victoria. Ai Group is making strong representations to each of the State Governments in an endeavour to ensure that the legislation and associated regulations are as workable for businesses as possible.***

- ***On 27 March, Ai Group filed a detailed submission opposing the four model annualised salaries clauses that the FWC published for public comment in its 20 February decision in the Annualised Salaries Case.***

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

- ***On 14 March, Ai Group Workplace Lawyers, on behalf of Hair and Beauty Australia (HABA), filed submissions and evidence in the FWC's Hair and Beauty Industry Penalty Rates Case.***

- ***On 22 February, Ai Group filed a submission in the FWC's Reasonable Overtime Case opposing the preliminary view that a Full Bench of the FWC expressed in a 22 December 2017 decision that the reasonable overtime clauses in awards should be replaced with a note referring to s.62 of the Fair Work Act.***

- ***On 27 March, a Full Bench of the FWC overturned the decision of Commissioner Ryan in Sam Technology Engineers v Bernardou. Ai Group intervened in the case in support of the overturning of Ryan C's decision. The central issue in the appeal case was the manner in which car allowances should be treated when determining whether an employee is paid above the 'high income threshold' under the unfair dismissal laws.***

- ***The Construction, Forestry, Mining and Energy Union (CFMEU), the Maritime Union of Australia (MUA) and the Textile, Clothing and Footwear Union of Australia have merged. The merger took effect on 27 March. The new union is called the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU).***

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

- ***On 6 March, Ai Group publicly released its submission to a Senate inquiry into the Future of Work and Workers.***

- ***The Fair Work Ombudsman is developing a Guide for Franchisors to give guidance on what reasonable steps should be taken by franchisors to ensure that franchisees comply with workplace relations laws.***

- ***The Parliamentary Joint Committee on Corporations and Financial Services is conducting an inquiry into the Operation and Effectiveness of the Franchising Code of Conduct and the Oil Code of Conduct.***

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

- ***On 29 March, the Victorian Government introduced the Long Service Benefits Portability Bill 2018 into Parliament. The Bill would establish portable long service leave schemes for the security, contract cleaning and community services industries, funded by a payroll levy of up to 3% of ordinary pay, including shift penalties but not overtime.***

- ***The Victorian Long Service Leave Bill 2017 which, if passed by the Victorian Parliament, will replace the Long Service Leave Act 1992***

(Vic), was not dealt with in the March session of Parliament. The Bill is likely be passed when Parliament resumes in May.

- ***On 30 April and 1 May 2018, Ai Group's 2018 Annual PIR (Policy-Influence-Reform) Conference will be held at the Hyatt Hotel in Canberra. The PIR Conference is Ai Group's premier workplace relations event each year.***

ANNUAL WAGE REVIEW

On 13 March, Ai Group filed its submission in this year's Annual Wage Review. The submission argues that a modest wage increase of 1.8 per cent is warranted. This equates to an increase of about $12.50 per week in the National Minimum Wage and about $14.60 per week at the base trade level.

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

Despite some improvements in GDP and employment growth, national disposable income growth remains weak, and unemployment and underemployment rates continue to indicate considerable spare capacity. Businesses are under pressure. Steep energy price rises are proving difficult to pass on to customers and are squeezing margins across a wide range of industries. Also, productivity growth has been exceedingly weak over the past decade and over the current productivity growth cycle. Currently, background inflation in Australia is weak and this means that a smaller minimum wage increase will generate real wage increases for workers, including those in low-wage jobs.

Ai Group's submission points out that global competitiveness is a key risk for Australian businesses. Australia already has one of the highest national minimum wage rates in the world, and most Australian workers are entitled to award wage rates that are higher than the National Minimum Wage.

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

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

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

FWC UNPAID DOMESTIC VIOLENCE LEAVE DECISION

After last year's decision to reject the ACTU's claim for 10 days of *paid* domestic violence leave, on 26 March a Full Bench of the FWC has decided to take a measured approach to the issue of *unpaid* domestic violence leave. The Commission has decided to implement an award entitlement to up to five days of *unpaid* leave per year for those who need to deal with the impact of domestic violence.

An employee will only be able to take the leave if it is necessary for them to do something to deal with the impact of the domestic violence, and it is impractical for them to do it outside of working hours.

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

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

The FWC intends to issue a draft award clause for public comment. Ai Group will consider the draft clause and express its views on the clause to the Commission.

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

GOVERNMENT ANNOUNCEMENT ON LEGISLATION TO IMPLEMENT UNPAID DOMESTIC VIOLENCE LEAVE

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

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

FWC FAMILY FRIENDLY WORK ARRANGEMENTS DECISION

On 26 March, a Full Bench of the FWC handed down its decision in the *Family Friendly Work Arrangements Case*. Ai Group played the leading role in representing employers in the case. If the ACTU's claims had been accepted, all awards would have been varied to give employees the right to dictate to their employer what hours and days they work, with the employer having no right to refuse regardless of the circumstances.

The Commission has drafted a model clause aimed at facilitating discussion between employers and employees about flexible work arrangements rather than imposing outcomes upon employers, and has called for submissions on the model clause.

Ai Group will study the decision and the draft clause and will express its views to the Commission by the 1 May 2018 deadline.

UNION PUBLIC HOLIDAY CLAIMS REJECTED

On 5 March, a Full Bench of the FWC handed down its decision in the *Public Holidays Case*. Ai Group played the leading role in representing employers in the case. The decision protects employers in a number of key industries from big cost increases that would have occurred if the unions' claims had been accepted.

The Shop, Distributive and Allied Employees Association was seeking an award right for full-time employees and certain part-time employees to have an alternative paid day off or an extra day's pay for each public holiday that falls on a day on which they would not have ordinarily worked. This claim, which would have cost the retail and fast food industries many millions of dollars a year, has been rejected by the Full Bench.

The Australian Manufacturing Workers Union (AMWU) was seeking to create an award entitlement for employees to receive public holiday penalty rates (typically double time and a half) for work on 25 December and on any substituted Christmas Day public holiday where 25 December falls on the weekend. The AMWU's claim has also been rejected by the Full Bench.

A similar Health Services Union claim has not yet been determined and will be the subject of further proceedings.

Ai Group's main submission in the case is available on Ai Group's website.

FAIR WORK BILLS BEFORE PARLIAMENT

Three important workplace relations Bills are before Parliament: the *Fair Work Amendment (Proper Use of Worker Benefits) Bill 2017*, the *Fair Work Amendment (Repeal of 4 Yearly Reviews of Modern Awards and Other Measures) Bill 2017*, and the *Fair Work (Registered Organisations) Amendment (Ensuing Integrity) Bill 2017*. The Bills have not yet been called on for debate this year.

The Ensuring Integrity Bill is unlikely to pass given opposition from some Crossbench Senators. At this stage it is unclear whether the other two Bills will be passed and, if so, the timing of this. Parliament next sits in May for the Budget session.

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 categories of ‘prescribed offence’ which lead to automatic disqualification of a person from acting as an official of a registered organisation, and allow the Federal Court to issue orders prohibiting officials of registered organisations from holding office in certain circumstances, including where they have contravened particular laws.

- Allow the Federal Court to cancel the registration of an organisation on a range of grounds, and allow applications to be made to the Federal Court for other orders, including suspending the rights and privileges of an organisation.

LABOR PARTY'S WORKPLACE RELATIONS POLICY PROPOSALS

The Labor Party has been floating various workplace relations policy proposals that will be problematic for businesses if implemented. On 15 March, Shadow Employment and Workplace Relations Minister, Brendan O'Connor, gave a speech which floated some further proposed changes to the *Fair Work Act*.

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

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

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

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

- Expanding the capacity for the FWC to arbitrate enterprise bargaining disputes and to impose an outcome.

- Expanding the multi-employer bargaining provisions of the *Fair Work Act*, particularly to give low paid workers and those with little industrial power the ability to obtain an enterprise agreement.

- Restricting the engagement of casual employees, through defining casual employment in a narrow manner in the National Employment Standards. Employees who do not meet the definition would be entitled to annual leave, personal/carer's leave and other entitlements of permanent employees.

- Giving all employees an entitlement to 10 days of paid domestic violence leave per year through the National Employment Standards.

- Expanding the equal remuneration provisions of the Act.

- Setting a floor for the National Minimum Wage of 60% of median earnings, or changing the criteria in the *Fair Work Act* to require the FWC to give more weight to the needs of low paid workers and consequently less weight to economic factors and the interests of employers.

- Regulating work arrangements for "gig workers".

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

ACTU 'CHANGE THE RULES' CAMPAIGN

The ACTU is pressing the Labor Party to commit to making sweeping changes to the *Fair Work Act* if elected to give unions a lot more power, including much wider rights to strike, more generous worker entitlements, and wider powers for the FWC. ACTU Secretary Sally McManus outlined the unions' proposals in a speech to the National Press Club on 21 March.

In its media comments, Ai Group described Sally McManus' speech as a re-hash of flawed arguments, misrepresented statistics and discredited policy proposals that the unions have been peddling for some time.

The ACTU is campaigning under the slogan *'Change the Rules'.* Ai Group is strongly opposing the campaign and pointing out the numerous fallacies in the materials that the unions are distributing. Some relevant facts are set out in the following table.

	ACTU Assertion	**The Facts**
1	That casual employment is increasing in Australia	ABS statistics show that casual employment has been stable in Australia for the past 20 years at about 20% of the workforce.
2	That labour hire is increasing in Australia	ABS statistics show that approximately 1% of all employed persons across Australia are labour hire employees. This remains a very small proportion of the workforce.
3	That independent contracting is increasing in Australia	ABS statistics show that self-employed independent contractors make up about 8.5% of employed people. This proportion has decreased from 9.1% in 2014. By far, the biggest group of independent contractors are engaged in the construction industry (e.g. plumbers and electricians).

4	That a large proportion of workers are “gig economy” workers	The number of people who work for Uber, Airtasker, Foodora and other “gig economy” businesses is a tiny fraction of the workforce – much less than 1%.
5	That the definition of casual employment has changed in recent years and a new definition is needed.	The standard definition of casual employment in awards is *“an employee engaged as a casual and paid as a casual”.* This sensible and clear definition has been the same for decades. The ACTU wants to introduce a new definition based on the work patterns of an employee, which would be uncertain and unworkable. The ACTU’s arguments for a new definition were recently rejected by a Full Bench of the FWC.
6	That casual employees should have the right to convert to permanent employment after 6 months, with an employer having no right to refuse	Under standard award clauses, casual employees have the right to seek to convert to permanent employment after 6 or 12 months of regular employment. An employer can only refuse on reasonable business grounds. The ACTU’s claim to remove an employer’s right of reasonable refusal was recently rejected by a Full Bench of the FWC as this would impose unreasonable restrictions on businesses and potentially lead to widespread job losses.
7	That unions should have the right to bargain, including taking industrial action, across entire industries and supply chains,	This proposal would be extremely damaging for businesses and the economy.
8	That employees should have the right to take up to 10 days of paid domestic violence leave per year	This claim has recently been rejected by the FWC. Paid leave for employees who experience domestic violence needs to be dealt with at the enterprise level because different employers have different capacities to provide assistance.
9	That workers should have the right to pursue unfair dismissal claims for labour hire workers against host employers	The employer of a labour hire worker is the relevant labour hire company. Businesses that use labour hire should not be exposed to unfair dismissal claims from labour hire workers.
10	That the *Fair Work Act* is unfair upon workers and unions	The *Fair Work Act* was introduced by the Labor Government in 2009 markedly increased worker entitlements and union

		power. Since its introduction it has been amended on several occasions by the Labor and Coalition Governments to increase worker entitlements and to impose much higher penalties on employers. Since the Act was introduced, there have been no significant amendments to address issues of concern for businesses, despite a major Productivity Commission inquiry recommending a series of important changes to support productivity improvements.

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

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

The case relates to an application to approve an enterprise agreement. Ai Group has applied to the President of the FWC under s.615A(2)(a) of the Act for the matter to be referred to a Full Bench of the Commission.

On 26 March, the Minister for Small and Family Business, the Workplace and Deregulation, Craig Laundy, also applied to the FWC for the matter to be referred to a Full Bench and stated that, if the matter is referred, the Federal Government intends to make submissions in the case.

The President of the Commission has delegated the decision on whether to refer the case to a Full Bench to Vice President Hatcher. Following a Mention on 29 March, Vice President Hatcher has reserved his decision on this issue.

LABOUR HIRE LICENSING LEGISLATION IN QUEENSLAND, SOUTH AUSTRALIA AND VICTORIA

The State Parliaments in Queensland and South Australia have passed legislation to create a licensing scheme for the supply of labour across all industries. On 13 December, the Victorian Government introduced a Bill into Parliament that would create a similar licensing scheme in Victoria. Ai Group is making strong representations to each of the State Governments in an endeavour to ensure that the legislation and associated regulations are as workable for businesses as possible.

The range of businesses that will be covered by the legislation in each State is still unclear because the regulations that will clarify the coverage of the schemes are still being developed. Ai Group is working hard to achieve workable coverage definitions to avoid disruption to numerous contracting arrangements and other business-to-business services that are not legitimately 'labour hire'.

The Queensland *Labour Hire Licensing Act 2017* commences on 16 April 2018. Labour hire providers will have 60 days from this date to lodge an application for a licence.

The South Australian *Labour Hire Licensing Act 2017* commenced on 1 March 2018. Businesses that provide labour hire services have until 1 September 2018 to apply for a licence.

The Victorian licensing scheme will not commence until the Bill that is before Parliament has been passed and the operative date proclaimed. The Bill was not dealt with in the March session of Parliament. Parliament resumes in May.

All three schemes will require businesses that meet the relevant definition of a provider of labour hire services (which differs in each of the three pieces of legislation) to hold a licence. Businesses that use labour hire services will be required to only use a licensed provider.

The legislation includes very harsh penalties for breaches by suppliers of labour and users of labour supplied by other businesses.

- The Queensland legislation includes penalties of up to $365,700 for companies. The maximum penalty for individuals is $126,045 or imprisonment for up to three years.

- The South Australian legislation includes penalties of up to $400,000 for companies. The maximum penalty for individuals is $140,000 or imprisonment for up to three years.

- The Victorian Bill includes penalties of up to $507,424 for companies. The maximum penalty for individuals is $126,856 or imprisonment for up to two years.

Ai Group has made numerous detailed submissions to the Queensland, South Australian and Victorian Governments over recent months.

Ai GROUP'S SUBMISSION IN FWC ANNUALISED SALARIES CASE

On 27 March, Ai Group filed a detailed submission opposing the four model annualised salaries clauses that the FWC published for public comment in its 20 February decision in the *Annualised Salaries Case*.

Ai Group's submission argues that:

- Some aspects of the conclusions reached by the FWC in its February 2018 decision will have a very significant adverse impact upon the flexibility contained within the award system, to the detriment of employers and employees. The conclusions were made in the context of Commission proceedings that centred around the annualised salary clauses in a limited number of awards and with (limited) evidence that related only to a few of those awards. Accordingly, the Commission should review the conclusions in the light of further submissions and hearings in the proceedings.

- The inclusion in annualised salary clauses of a requirement to record the starting and finishing time of all additional hours worked, coupled with an annual reconciliation requirement, is unworkable.

- Annualised salary arrangements often apply to employees in higher classifications under an award and in some awards overtime, shift and/or weekend penalties do not apply to employees in higher classifications. If penalties do not apply to employees in higher classifications under an award, it is not appropriate for penalties to be taken into account when considering whether an employee in a higher classification is disadvantaged compared to the award.

- In assessing any disadvantage for the purposes of an annualised salary clause, it is not appropriate to include additional hours that an employee is not required by the employer to work.

- Most existing annualised salary clauses in awards reflect the outcome of lengthy negotiations between industrial parties and/or Commission proceedings, and should not be disturbed.

- Flexible workplace relations arrangements are fundamental to the improved productivity that is so important to Australia's national competitiveness and our capacity to continue to improve Australian living standards. Annualised salary arrangements in awards provide vital flexibility to employers and employees.

- The safeguards included in each of the four model clauses are excessive and would negate most of the benefits of annualised salary clauses for employers and employees.

- If the safeguards in an annualised salary clause in an award are too onerous, a large number of employers will undoubtedly choose not to offer annualised salary arrangements to their employees, and this will disadvantage the large number of employees who value these arrangements.

- Any amendments to award annualised salary clauses must not disturb employment arrangements under which an annual salary is paid in accordance with common law “set off” arrangements.

FWC DISTRICT ALLOWANCES CASE

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

HAIR AND BEAUTY INDUSTRY PENALTY RATES CASE

On 14 March, Ai Group Workplace Lawyers, on behalf of Hair and Beauty Australia (HABA), filed submissions and evidence in the FWC's *Hair and Beauty Industry Penalty Rates Case*.

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

HABA’s submission argues that:

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

HABA is seeking a reduction in Sunday penalty rates from double time to time and one half, and in public holiday rates from double time and one half to double time and one quarter.

Ai Group Workplace Lawyers will represent HABA at hearings before a Full Bench of the FWC which will take place later this year.

FWC REASONABLE OVERTIME CASE

On 22 February, Ai Group filed a submission in the FWC's *Reasonable Overtime Case* opposing the preliminary view that a Full Bench of the FWC expressed in a 22 December 2017 decision that the reasonable overtime clauses in awards should be replaced with a note referring to s.62 of the *Fair Work Act*.

Ai Group's submission argues that:

- Section 62 of the *Fair Work Act* does not provide an express right to an employer to require employees to work overtime. It only provides an express right for an employee to refuse an employer's request or direction to work additional hours if the additional hours are 'unreasonable'. It is important that both parties have express rights.

- Award provisions which provide an express right for employers to require employees to work overtime have been common in federal awards for over 70 years and can be traced back to a 1947 decision of the Commonwealth Court of Conciliation and Arbitration.

- The removal of the employer right in subclause 40.2(a) of the Manufacturing Award, and the equivalent clauses in other awards, would remove a very important right that is widely relied upon by employers.

FWC *SAM TECHNOLOGY ENGINEERS V BERNARDOU* CASE RE. CAR ALLOWANCES AND THE "HIGH INCOME THRESHOLD"

On 27 March, a Full Bench of the FWC overturned the decision of Commissioner Ryan in *Sam Technology Engineers v Bernardou*. Ai Group intervened in the case in support of the overturning of Ryan C's decision. The central issue in the appeal case was the manner in which car allowances should be treated when determining whether an employee is paid above the 'high income threshold' under the unfair dismissal laws.

In granting leave to Ai Group Member, Sam Technologies, to appeal the decision, the Full Bench highlighted inconsistency in various decisions of individual Members of the FWC in the treatment of car allowances.

The Full Bench decided that:

- If a car allowance is paid to an employee in circumstances in which there is no requirement or expectation that the employee will have to use his or her car for work purposes, then the whole of the car allowance is, in reality, part of the employee's wages and is therefore included in their "earnings".

- If a car allowance is paid to an employee at the time of their dismissal in circumstances in which there is a requirement or expectation that the employee will have to use his or her car for work purposes, then it will be necessary to determine and calculate the private benefit, if any, derived by the employee from the car allowance.

With regard to the second dot point above, in its decision the Full Bench has set out a formula for calculating the private benefit that an employee derives from the car allowance. The formula takes into account the annual distance travelled by the car, the annual distance travelled for business purposes, and the cost per kilometre for the relevant car type (as obtained from the RACV, NRMA or the like).

CFMEU, MUA AND TCFUA MERGER

The Construction, Forestry, Mining and Energy Union (CFMEU), the Maritime Union of Australia (MUA) and the Textile, Clothing and Footwear Union of Australia have merged. The merger took effect on 27 March. The new union is called the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU).

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

On 9 April, a Full Bench of the FWC will hear an appeal against the decision of Deputy President Gostencnik to approve the merger. On 16 March, Vice President Hatcher rejected an application to stay Deputy President Gostencnik's decision until after the appeal and this enabled the merger to proceed on 27 March.

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

Jaguar Consulting has been commissioned by the Federal Government to conduct a review into the *Building and Construction Industry (Improving Productivity) Act 2015* and the Australian Building and Construction Commission (**ABCC**). Ai Group is preparing a submission, which must be lodged by 6 April.

FUTURE OF WORK INQUIRY

On 6 March, Ai Group publicly released its submission to a Senate inquiry into the Future of Work and Workers.

The Senate Committee that is conducting the inquiry is dominated by Labor and Greens' Senators, and the unions and various academics are pushing for a series of very problematic changes to Australia's workplace relations laws.

Ai Group's submission raises the following issues and arguments:

- The nature of work is changing in the Australian and global economies as new technologies and new ways of working evolve. Over the years ahead, the current wave of digitalisation technologies is likely to prove to be no different to previous technological transitions. While it will generate some disruption, if accompanied with appropriate investments in the development of workforce skills and management capabilities and if the process of adaptation is not constrained by excessive regulation, it will bring far greater rewards, considerable opportunities and benefits to the broader community in the longer term, in the form of higher standards of living, more challenging jobs, higher incomes and greater productivity.

- The public policy debate about the future of work must not become a vehicle for imposing restrictions on Australia's labour market. It is vital that Australia retains a flexible labour market. Some parties are using arguments about the future of work to press for sweeping restrictions on the labour market, that would have a negative impact on virtually all industries. Australia's workplace relations laws already provide extensive protections for Australian workers, including those working in the 'gig economy'. Further protections are not necessary or desirable.

- Critically, rather than imposing restrictions on 'digital disruptors', Australia's workplace relations laws need to be amended to better enable established businesses to compete effectively with 'digital disruptors'. Key changes that are required include redressing problems with the transfer of business laws and the general protections in the *Fair Work Act* that are impeding the restructuring of businesses.

- Some other parties who have made submissions to the Senate Inquiry have argued for a new category of worker to be created under Australian law, i.e. a 'dependent contractor'. This would disturb the important legal distinction between an 'employee' and an 'independent contractor' with widespread negative implications for hundreds of thousands of independent contractors and their clients.

- Some other parties have also expressed support for portable leave schemes for 'gig economy' workers. These submissions need to be rejected. Portable leave schemes are typically funded by a hefty levy on businesses that would operate as a tax on employment and consequently inhibit employment growth and competitiveness.

FWO GUIDE FOR FRANCHISORS

The Fair Work Ombudsman (FWO) is developing a Guide for Franchisors to give guidance on what reasonable steps should be taken by franchisors to ensure that franchisees comply with workplace relations laws.

On 27 March, Ai Group wrote to the FWO proposing various amendments to a draft version of the Guide. The final version of the Guide is expected to be released by the FWO in the near future.

SENATE INQUIRY INTO FRANCHISING

The Parliamentary Joint Committee on Corporations and Financial Services is conducting an inquiry into the Operation and Effectiveness of the Franchising Code of Conduct and the Oil Code of Conduct.

The terms of reference include consideration of the termination provisions of the Codes. In recent submissions to the Federal Government, Ai Group has argued that franchisors need to have the right to terminate contracts with franchisees who are blatantly committing serious breaches of workplace relations laws and instruments.

Ai Group will make a submission to the inquiry. Submissions are due by 4 May and the Committee is required to report to Parliament by 30 September.

Ai GROUP OPPOSITION TO COINVEST'S PROPOSED EXPANSION IN COVERAGE

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

CoINVEST has written to the Victorian Government seeking approval for a series of coverage changes that would have the effect of expanding the coverage of the scheme, and the obligation upon employers to pay a 2.7% payroll levy, to include certain electrical manufacturing work and other areas. Ai Group is urging the Government to block the changes.

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

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

On 29 March, the Victorian Government introduced the *Long Service Benefits Portability Bill 2018* into Parliament. The Bill would establish portable long service leave schemes for the security, contract cleaning and community services industries, funded by a payroll levy of up to 3% of ordinary pay, including shift penalties but not overtime.

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

Ai Group has expressed opposition to the proposed portable long service leave schemes, since the schemes were first announced by the Victorian Government, and we will continue to oppose the legislation given the higher costs that would be imposed on affected businesses. Ai Group will also make a submission on the specific provisions of the Bill.

The legislation is likely to be debated in the May session of the Victorian Parliament.

VICTORIAN LONG SERVICE LEAVE BILL 2017

The *Victorian Long Service Leave Bill 2017* which, if passed by the Victorian Parliament, will replace the *Long Service Leave Act 1992 (Vic),* was not dealt with in the March session of Parliament. The Bill is likely be passed when Parliament resumes in May.

The Bill would implement the following changes:

- There would 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 would 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 would 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 would count as service.

- Where employment ends and the employee is re-employed within 12 weeks, continuous employment would not be broken.
- New continuity of employment arrangements would apply for casual and seasonal workers.
- New transfer of business / employment arrangements would apply.
- Penalties for breaches of the long service leave legislation would be increased.
- Departmental staff would have new inspection and enforcement powers.

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

On 30 April and 1 May 2018, Ai Group's 2018 Annual PIR (Policy-Influence-Reform) Conference will be held at the Hyatt Hotel in Canberra. The PIR Conference is Ai Group's premier workplace relations event each year.

Confirmed speakers for this year's conference include: Minister Craig Laundy, Shadow Minister Brendan O'Connor, FWC Vice President Joe Catanzariti, Fair Work Ombudsman Natalie James, ABC Commissioner Stephen McBurney, AWU National Secretary Daniel Walton, and many others.

Further details are available on Ai Group's website.

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.