Significant Workplace Relations Issues

19 December 2018

EXECUTIVE SUMMARY

- ***Following the very problematic decision of the Full Court of the Federal Court in the WorkPac v Skene case, the Australian Government has made the Fair Work Amendment (Casual Loading Offset) Regulations 2018 which amend the Fair Work Regulations 2009 to insert a new regulation 2.03A. The new regulation gives employers more protection against 'double dipping' claims by casual employees by expressly allowing an employer to make a claim to offset the cost of any casual loading paid. Over recent months Ai Group has worked hard, on behalf of Members, to convince the Government to introduce a regulation or legislation to protect employers against 'double-dipping' claims.***

- ***The Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018 passed through Parliament in the final sitting week for 2018. The legislation makes some important amendments to the Fair Work Act.***

- ***The Fair Work Amendment (Family and Domestic Violence Leave) Act 2018 passed through Parliament in the final sitting week for 2018. The legislation amends the National Employment Standards (NES) in the Fair Work Act to give all employees up to five days of unpaid family and domestic violence leave per year.***

- ***The Modern Slavery Act 2018 (Cth) was passed by Parliament on 29 November. The Act creates obligations on large businesses with an annual consolidated revenue of at least $100 million to report on modern slavery risks in their operations and supply chains, and actions to address those risks. A commencement date for the Act has not yet been proclaimed.***

- ***Ai Group is strongly opposing a series of workplace relations policy proposals announced by the Federal Labor Party that will be problematic for businesses if implemented.***

- ***On 21 February 2019, the Full Federal Court will hear an application by Mondelēz International for a declaration relating to the meaning of the expression "10 days of paid/personal carer's leave" in section 96 of the Fair Work Act. The relevant employees of Mondelēz work 12-hour shifts at the company's Claremont plant in Tasmania.***

- ***On 14 December, the Full Federal Court rejected an application by the Australian Mines and Metals Association to overturn 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 Australian Human Rights Commission's National Inquiry into Sexual Harassment is underway with the AHRC receiving submissions and conducting its national consultations.***

- ***The Victorian Government has announced that the licensing requirements under the Victorian Labour Hire Licensing Act 2018 will commence in 2019, and that the commencement date will be announced well in advance.***

- ***Ai Group is preparing a detailed submission to the Victorian Inquiry into the On-demand Workforce, which needs to be lodged by 6 February 2019. The inquiry is being led by Natalie James, the previous Fair Work Ombudsman.***

- ***On 16 November 2018, the Department of Employment released its report on Trends in Federal Enterprise Bargaining for the June 2018 quarter.***

CASUAL EMPLOYMENT – NEW REGULATION TO PROTECT EMPLOYERS AGAINST 'DOUBLE DIPPING' CLAIMS

Following the very problematic decision of the Full Court of the Federal Court in the *WorkPac v Skene* case, the Australian Government has made the *Fair Work Amendment (Casual Loading Offset) Regulations 2018* which amend the *Fair Work Regulations 2009* to insert a new regulation 2.03A. The new regulation gives employers more protection against 'double dipping' claims by casual employees by expressly allowing an employer to make a claim to offset the cost of any casual loading paid. Over recent months Ai Group has worked hard, on behalf of Members, to convince the Government to introduce a regulation or legislation to protect employers against 'double-dipping' claims.

The new regulation operates from 18 December 2018 but, importantly, the regulation applies in relation to employment periods that occur before or after 18 December 2018.

In the *WorkPac v Skene* case, the Federal Court held that the term 'casual employee' in the *Fair Work Act* has no precise meaning and whether an employee is a casual for the purposes of the Act depends upon the circumstances. The Federal Court decided that the fact that an employee is engaged as a casual and paid a casual loading does not necessarily mean that the employee is a 'casual employee' for the purposes of the annual leave entitlements under the *Fair Work Act*.

Further Federal Court test case

WorkPac has initiated a further important case about casual employment in the Federal Court. The *WorkPac v Rossato* case is separate to the *WorkPac v Skene* case referred to above.

In the *WorkPac v Rossato* Case, the Court will consider further arguments about the meaning of the expression 'casual employee' in the *Fair Work Act* and also arguments about the ability for an employer to offset any annual leave loading paid against other entitlements that may be owed.

The Australian Government has intervened in the *WorkPac v Rossato* case, which Ai Group has publicly welcomed.

Amendments to the Fair Work Act to give employees casual conversion rights

On 11 December, the Australian Government announced its intention to introduce legislation into Parliament early next year to give casual employees who have worked on a regular basis for 12 months or more, a right to request permanent employment. The employer will have the right to refuse an employee's request on reasonable business grounds.

The legislative amendments have not yet been drafted but are likely to provide similar entitlements to those in the Fair Work Commission's (FWC's) model casual conversion clause that was recently inserted into about 80 awards.

The Government has announced that the amendments will be incorporated into the National Employment Standards (NES) in the *Fair Work Act*. As such, the new provisions would apply to award-covered, enterprise-agreement-covered and award-free employees. Awards, enterprise agreements and contracts of employment would be able to include more generous casual conversion provisions. However, less generous provisions would be of no effect and the provisions in the Act would apply.

AMENDMENTS TO THE FAIR WORK ACT – ENTERPRISE AGREEMENTS AND 4 YEARLY REVIEWS OF AWARDS

The *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018* passed through Parliament in the final sitting week for 2018. The legislation makes some important amendments to the *Fair Work Act*.

The amendments give the FWC more discretion to approve an enterprise agreement despite 'minor procedural or technical errors' made by the employer in the agreement-making process if the employees 'were not likely to have been disadvantaged by the errors'.

The Revised Explanatory Memorandum for the Amendment Act explains that 'minor procedural or technical errors' may include:

- Employees being informed of the time and place for voting on the proposed enterprise agreement or the voting method that will be used for the agreement just after the start of the 'access period' rather than by the start of the 'access period';

- Employees being requested to approve a proposed enterprise agreement on the 21st day after the last Notice of Employee Representational Rights (NERR) was given to the employees, rather than at least 21 days after the day on which the last NERR was given;

- The inclusion of the employer's company logo or letterhead on a NERR;

- The inclusion of additional materials that are stapled with a NERR; or

- Minor changes to the text of the NERR that had no relevant effect on the information that was being communicated in it (for example, the NERR may say to contact a particular person in the human resources department rather than to 'contact your employer').

The new discretion for the FWC to approve an enterprise agreement despite 'minor procedural or technical errors' made by the employer in the agreement-making process applies to:

- Approval applications lodged with the FWC on or after 12 December 2018; and

- Approval applications lodged with the FWC before 12 December 2018 which have not been finally determined.

Full Bench FWC proceedings to provide clarity about the operation of the new FWC discretion

On 11 December 2018, a Full Bench of the FWC issued a Statement announcing that a hearing will be conducted on Friday 21 December to hear submissions about the effect of the new provisions on 10 specific enterprise agreement approval applications that appear to contain errors to which the new discretion may apply. Written submissions must be lodged by Noon on 20 December.

The Australian Government, peak councils (including Ai Group) and any other interested parties have been invited to make submissions by Noon on 20 December. Ai Group will lodge a detailed written submission and appear at the hearing on 21 December.

Abolition of 4 yearly reviews of awards

The previous requirement for the FWC to conduct 4 yearly reviews of awards has been abolished. The FWC is able to complete the current 4 yearly review which has been continuing for five years so far and will continue for at least one more year.

An application to vary an award can still be made at any time and the FWC can vary an award on its own initiative, including on the basis that:

- A variation is necessary to achieve the modern awards objective (section 157 of the FW Act); or

- The award contains ambiguity, uncertainty or an error (section 160).

The amendments relating to 4 yearly awards operate retrospectively to 1 January 2018.

UNPAID FAMILY AND DOMESTIC VIOLENCE LEAVE – AMENDMENTS TO THE FAIR WORK ACT

The *Fair Work Amendment (Family and Domestic Violence Leave) Act 2018* passed through Parliament in the final sitting week for 2018. The legislation amends the NES in the *Fair Work Act* to give all employees up to five days of unpaid family and domestic violence leave per year.

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

An employee may take unpaid family and domestic violence leave if: the employee is experiencing family and domestic violence; and the employee 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 the employee's ordinary hours of work.

The Act gives the following examples of actions, by an employee who is experiencing family and domestic violence, that could be covered by the new entitlement:

- arranging for the safety of the employee or a close relative (including relocation);
- attending urgent court hearings; or
- accessing police services.

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

The provisions in the Act are very similar to those in the model clause that the FWC recently inserted into all modern awards. Therefore, an employer who complies with the award provisions for award-covered employees is unlikely to encounter any compliance difficulties.

Given that the new unpaid family and domestic violence provisions are terms of the NES, the provisions apply to enterprise-agreement-covered employees. Enterprise agreements are able to include more generous family and domestic violence leave provisions but less generous provisions in an agreement are of no effect and the provisions in the Act apply.

The Amendment Act gives the FWC the power to make a determination varying an enterprise agreement to resolve any uncertainty or difficulty relating to the interaction between the agreement and the new provisions in the NES. Ai Group is able to assist any Members who wish to make such an application.

The amendments operate from 12 December 2018.

NEW NATIONAL MODERN SLAVERY ACT

The *Modern Slavery Act 2018 (Cth)* was passed by Parliament on 29 November. The Act creates obligations on large businesses with an annual consolidated revenue of at least $100 million to report on modern slavery risks in their operations and supply chains, and actions to address those risks. A commencement date for the Act has not yet been proclaimed.

Modern slavery is defined broadly in the legislation. It is based on specific conduct that would constitute:

- an offence under Division 270 or 271 of the *Criminal Code Act 1995 (Cth);* or
- an offence under those Divisions if the conduct took place in Australia; or
- trafficking in persons and the worst forms of child labour as recognised by specific international agreements in the Australian Treaty Series.

Modern slavery includes all forms of trafficking in persons, slavery and slavery-like practices, and the worst forms of child labour. Examples of modern slavery offences include:

- Trafficking in people and/or children, including associated deceptive recruiting for labour or services;
- Sexual servitude;
- Forced labour; and
- Debt bondage.

Modern slavery also includes conduct outside Australia that would be an offence if it occurred in Australia under the jurisdiction of the Criminal Code.

Under the Federal Act, organisations that have a consolidated annual revenue of at least $100 million must prepare an annual modern slavery statement and lodge it with the relevant Government Department. A reporting entity may lodge its own statement as a single reporting entity, or it may be covered by a modern slavery statement of another reporting entity through a joint modern slavery statement.

Interaction of the Federal Modern Slavery Act with the NSW Modern Slavery Act

On 21 June 2018, the NSW Parliament passed the *Modern Slavery Act 2018* (NSW). The NSW Act will require businesses in NSW with an annual total turnover of $50 million or more to prepare and make public a modern slavery statement for each financial year. The NSW Act imposes maximum financial penalties of up to $1.1 million for organisations that fail to comply. A commencement date for the NSW Act has not yet been announced. In addition, the NSW Government has not yet released Regulations providing important details about the reporting requirements.

In its submissions, Ai Group has expressed concern about the regulatory impact of organisations having a dual requirement to comply with both the Federal and NSW reporting requirements. The NSW Act states that commercial organisations do not need to comply with obligations in the Act relating to the preparation of a modern slavery statement if the organisation is subject to obligations under a Federal, State or Territory corresponding law that is prescribed. No corresponding laws have yet been prescribed.

Ai Group understands that the Federal Government and the NSW Government are working to streamline the operation of the two modern slavery reporting requirements to reduce the regulatory burden on business.

FEDERAL ALP WORKPLACE RELATIONS POLICIES

Ai Group is strongly opposing a series of workplace relations policy proposals announced by the Federal Labor Party that will be problematic for businesses if implemented.

Labor's workplace relations policy announcements, so far, include the following:

- 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.

- Requiring that labour hire companies provide the same rates and conditions to their employees as their clients provide to their own employees.

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

- 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 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 (including after a protracted period of bargaining for an enterprise agreement).

- Abolishing the ABCC and Building Code.

- Abolishing the Registered Organisations Commission.

- Giving an independent body the power to establish a system of 'safe rates' for contract transport drivers, including those working in the 'gig economy'.

- Amending the equal pay provisions of the *Fair Work Act* to remove the requirement that there be a male comparator when equal pay claims are pursued, and establishing an equal pay division within the FWC.

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

On 21 February 2019, the Full Federal Court will hear an application by Mondelēz International for a declaration relating to the meaning of the expression *"10 days of paid/personal carer's leave"* in section 96 of the *Fair Work Act*. The relevant employees of Mondelēz work 12-hour shifts at the company's Claremont plant in Tasmania.

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

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

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

Members are urged to contact Ai Group for advice if faced with claims.

APPEAL AGAINST THE MERGER OF THE CFMEU, MUA AND TCFUA

On 14 December, the Full Federal Court rejected an application by the Australian Mines and Metals Association to overturn 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.

AHRC'S NATIONAL INQUIRY INTO SEXUAL HARASSMENT AT WORKPLACES

The Australian Human Rights Commission's National Inquiry into Sexual Harassment is underway with the AHRC receiving submissions and conducting its national consultations.

Established by the Federal Government, the National Inquiry will be informed by the results of the Commission's fourth national survey on sexual harassment in Australian workplaces, which found that:

- 1 in 3 people had experienced sexual harassment at work in the past five years. In the last 12 months, 23% of women and 16% of men had experienced some form of workplace sexual harassment.

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

Ai Group's Chief Executive Innes Willox has been appointed as a member to the Commission's Reference Group that will oversee the National Inquiry.

Ai Group is co-hosting special member consultations with the Sex Discrimination Commissioner, Kate Jenkins, for the Commission to hear about the employer experience in both preventing sexual harassment and managing complaints. Members interested in attending these consultations can register here.

Ai Group will also be making a submission to the Inquiry to better support business and offer effective solutions to reduce sexual harassment. Individual employers may also make their own submission. Further information about the National Inquiry is available here. Submissions close on 31 January 2019.

Limited waivers of confidentiality

Businesses that have entered into non-disclosure agreements with complainants of sexual harassment but wish to enable complainants to make a confidential submission to the Inquiry, may contact the Commission to issue a limited waiver of confidentiality. The Commission has announced that it wishes to hear from such complainants to inform the National Inquiry. Businesses that wish to consider issuing a limited waiver can find further information here.

The AHRC has also released a Workplace Conversation Toolkit that businesses can distribute to their workforce to encourage conversations about sexual harassment and how it can be prevented.

VICTORIAN LABOUR HIRE LICENSING REGULATIONS AND COMMISSIONER

The Victorian Government has announced that the licensing requirements under the Victorian *Labour Hire Licensing Act 2018* will commence in 2019, and that the commencement date will be announced well in advance.

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

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

The Victorian *Labour Hire Licensing Act 2018* was passed by the Victorian Parliament on 20 June 2018. On 27 June, certain provisions of the Victorian Act came into effect. These provisions only relate to the establishing of the Victorian Labour Hire Licensing Authority and other related provisions.

VICTORIAN INQUIRY INTO THE ON-DEMAND WORKFORCE

Ai Group is preparing a detailed submission to the Victorian Inquiry into the On-demand Workforce, which needs to be lodged by 6 February 2019. The inquiry is being led by Natalie James, the previous Fair Work Ombudsman.

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

WAGE OUTCOMES UNDER ENTERPRISE AGREEMENTS

On 16 November 2018, the Department of Employment released its report on *Trends in Federal Enterprise Bargaining* for the June 2018 quarter. Average annualised wage increases (AAWI) for enterprise agreements approved in the June 2018 quarter are summarised in the following table.

Industry Sector or Type of Agreement	AAWI (%) for agreements approved in June 2018	Change from March 2018 (%)
All sectors	2.7	Same
Private sector	2.8	Up 0.1
Public sector	2.5	Same
Manufacturing	2.6	Up 0.1
Metals manufacturing	2.9	Up 0.5
Non-metals manufacturing	2.5	Same
Construction	5.9	Up 0.4
Transport, postal & warehousing	2.7	Up 0.5
Mining	2.2	Down 0.3
Information media and telecommunications	1.6	Down 0.6
Retail	2.9	Down 0.1
Single enterprise non-greenfields	2.7	Same
Single enterprise greenfields	3.5	Up 0.9
Union/s covered	2.7	Same
No Union/s covered	2.4	Up 0.1

NATIONAL WORKPLACE RELATIONS POLICY AND ADVOCACY TEAM

This report has been prepared by Ai Group's National Workplace Relations Policy and Advocacy Team. The Team represents the interests of Ai Group Members through:

- Protecting and representing the interests of Ai Group Members in relation to workplace relations matters;
- Writing submissions and appearing in major cases in the Fair Work Commission and Courts;
- Pursuing appeals and other cases in Tribunals and Courts on issues of importance to Ai Group Members;
- Representing Members' interests in modern award cases and reviews;
- Keeping Ai Group Members informed and involved in workplace relations developments;
- Providing forums for Ai Group Members to share information on best practice workplace relations approaches, and to influence developments, e.g. through Ai Group's PIR (Policy-Influence-Reform) Forum and PIR Diversity and Inclusion Forum;
- Developing policy proposals for worthwhile reforms to workplace relations laws;
- Making representations to Government and Opposition parties in support of a more productive and flexible workplace relations system;
- Leading and influencing the workplace relations policy agenda;
- Writing submissions and appearing in numerous inquiries and reviews carried out by a wide range of bodies including Parliamentary Committees, the Productivity Commission, the Australian Human Rights Commission, the Australian Law Reform Commission, and others; and
- Opposing union campaigns on issues which would be damaging to competitiveness and productivity.

Ai Group welcomes and values your input and support. Should you wish to discuss any of the issues in this report, please contact Stephen Smith, Head of National Workplace Relations Policy on email stephen.smith@aigroup.com.au or telephone 02 9466 5521.