Significant Workplace Relations Issues

22 February 2018

Ai GROUP

EXECUTIVE SUMMARY:

- ***A Ministerial reshuffle on 19 December impacts upon workplace relations responsibilities. Previous Employment Minister Michaelia Cash has been appointed as Minister for Jobs and Innovation. Working closely with her is Craig Laundy, Minister for Small and Family Business, Workplace and Deregulation. Minister Laundy has direct responsibility for workplace relations matters. The role of Minister for Women has been transferred from Minister Cash to Minister Kelly O'Dwyer.***

- ***Minister Laundy has appointed Mr Stephen McBurney as the new Australian Building and Construction Commissioner. Mr McBurney commenced in the role on 6 February.***

- ***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 were not debated during the first session of Parliament in 2018 which concluded on 15 February.***

- ***The Labor Party has been floating various workplace relations policy proposals that will be problematic for businesses if implemented.***

- ***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 Fair Work Commission (FWC).***

- ***On 20 February, Ai Group made a detailed 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.***

- ***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. The range of businesses that will be covered by the legislation 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'.

- ***A large number of employers are currently exposed to substantial cost risks associated with a series of unfavourable decisions of the FWC and the Federal Court regarding the meaning of the expression '10 days of paid personal/carer's leave' in section 96 of the Fair Work Act.***

- ***On 19 February Ai Group filed a submission opposing aspects of an exposure draft of legislative amendments intended to give effect to the Government's Superannuation Guarantee Integrity Package.***

- ***Amendments to the Fair Work Regulations relating to "Corrupting Benefits" came into operation on 29 January 2018. The amendments were made in response to representations by Ai Group to the Federal Government. The amendments set out the form of the disclosure that a bargaining representative must make when a proposed enterprise agreement contains a provision that is expected to provide a financial benefit to the representative.***

- ***On 14 February, the High Court confirmed the power of Courts to order union officials to pay their own fines.***

- ***In a case pursued by the Australian Competition and Consumer Commission, the Federal Court has fined the CFMEU $1 million for engaging in an illegal secondary boycott of concrete supplier Boral. The CFMEU imposed the boycott because Boral supplied Grocon with concrete during its industrial dispute with the CFMEU in 2012.***

- ***On 25 January, Senior Deputy President Hamberger of the FWC suspended the right of the employees of Sydney Trains and NSW Trains to take industrial action for six weeks. The decision avoided a planned strike on 29 January that would have caused major disruption for commuters and businesses.***

- ***Hearings in the FWC's Family Friendly Work Arrangements Case concluded on 22 December. Ai Group is taking the leading role in the case in opposing the ACTU's unworkable claims and protecting the rights of companies to manage their businesses in a workable manner.***

- ***The Fair Work Act requires that the next 4 Yearly Review of Awards commence as soon as practicable after 1 January 2018. The current 4 Yearly Review has been continuing for 4 years and is still a long***

way from being completed. On 2 January 2018, a Statement was issued by the President of the FWC, Justice Iain Ross, confirming that the Commission does not propose to commence the second 4 yearly review until the current review has been completed and parties have been given an opportunity to consider how the recently reviewed modern awards are operating in practice.

- ***On 20 February, a Full Bench of the FWC handed down its decision in the 4 Yearly Review of Awards – Annualised Salaries Case. In this case, a Full Bench of the FWC reviewed the annualised salary clauses in those awards that contain such clauses, including the Clerks – Private Sector Award 2010 and 18 other awards.***

- ***A further decision in the FWC's Family and Domestic Violence Leave Case is reserved. After the rejection of the ACTU's claim for 10 days of paid domestic violence leave per employee per year, the FWC called for submissions and scheduled further hearings to consider arguments about unpaid family and domestic violence leave entitlements. The Full Bench has reserved its decision on what form unpaid family and domestic leave entitlements should take in awards.***

- ***On 8 December, a Full Bench of the FWC handed down its decision in the Khayam v Navitas English case. At the invitation of the FWC President, Ai Group intervened in this case, which dealt with the effect of fixed term and maximum term contracts, and whether employees covered by these contracts have access to unfair dismissal laws when employment ends at the expiry of the contract.***

- ***A number of variations to specific awards arising from the FWC's July 2017 Casual and Part-time Employment Decision are operative from 1 January 2018, including provisions imposing an obligation on employers to pay overtime penalties to casuals in various industries. The FWC has still not determined the specific terms of the model casual conversion clause to implement the Commission's decision.***

- ***A 5-Member Full Bench of the FWC has not yet issued directions for the next stage of the proceedings in the Loaded Rates in Agreements Case. The case is considering issues associated with the application of the Better Off Overall Test to enterprise agreements containing loaded rates of pay. The President of the FWC invited Ai Group and other peak councils to intervene in the case.***

- ***The FWC has issued determinations varying the coverage clause of the Horticulture Award 2010, retrospectively to 1 January 2010, to reflect the outcome of an important decision late last year that***

protects employers in the horticulture industry from a push by the National Union of Workers to impose warehousing award conditions on horticulture businesses. The claim would have cost horticultural businesses many millions of dollars a year. Ai Group played a leading role in representing employers in the case.

- ***Ai Group is currently representing Hair and Beauty Australia in a substantial case concerning proposed adjustments to the penalty rates payable by employers in the hair and beauty industry.***

- ***In December, a Full Bench of the FWC reserved its decision in Sam Technology Engineers v Bernardou. The FWC invited Ai Group and other peak councils to intervene in the case, which is considering the way that car allowances should be treated when determining whether an employee is paid above the 'high income threshold' under the unfair dismissal laws.***

- ***On 15 February, the Federal Government published the final report of former FWC Senior Deputy President Matthew O'Callaghan into the greenfields agreement provisions of the Fair Work Act.***

- ***Ai Group is continuing to work hard to stop the Victorian construction industry portable long service leave scheme expanding into areas of the manufacturing industry. Manufactured products with electrical components are the main area of risk. Ai Group made a further detailed submission to CoINVEST – the administrator of the construction industry scheme – on 19 January. The CoINVEST Board, which determines the coverage rules for the scheme, is considering a raft of coverage changes that the Electrical Trades Union has proposed.***

- ***Ai Group has made a submission to the Victorian Government expressing concern about some aspects of the Long Service Leave Bill 2017 (Vic). The Bill is before the Victorian Parliament and would replace the Long Service Leave Act 1992 (Vic).***

- ***On 10 January 2018, the Department of Employment released its report on Trends in Federal Enterprise Bargaining for the September 2017 quarter.***

- ***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.***

MINISTERIAL RESHUFFLE – WORKPLACE RELATIONS PORTFOLIOS

A Ministerial reshuffle on 19 December impacts upon workplace relations responsibilities. Previous Employment Minister Michaelia Cash has been appointed as Minister for Jobs and Innovation. Working closely with her is Craig Laundy, Minister for Small and Family Business, Workplace and Deregulation. Minister Laundy has direct responsibility for workplace relations matters. The role of Minister for Women has been transferred from Minister Cash to Minister Kelly O'Dwyer.

Ai Group has written to Minister Laundy setting out some key workplace relations priorities, and we met with the Minister on 8 February.

APPOINTMENT OF NEW ABC COMMISSIONER

Minister Laundy has appointed Mr Stephen McBurney as the new Australian Building and Construction Commissioner. Mr McBurney commenced in the role on 6 February.

Until his appointment, Mr McBurney was the Chief Examiner in the Victorian Office of the Chief Examiner – an agency established under the *Major Crimes (Investigative Powers) Act* to investigate and prosecute organised crime offences.

Mr McBurney has also spent 18 years as an AFL field umpire.

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 were not debated during the first session of Parliament in 2018 which concluded on 15 February.

Fair Work Amendment (Repeal of 4 Yearly Reviews of Modern Awards and Other Measures) Bill 2017

This Bill 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.

Last year Ai Group made a detailed submission on the Bill to a Senate Committee inquiry, expressing strong support for the Bill.

Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017

This Bill 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. Currently, millions of dollars per year flow to unions from very large, inappropriate commissions paid to them by insurance companies which offer substandard income protection insurance products at grossly inflated prices.

Ai Group made a detailed submission on the Bill to a Senate Committee inquiry on 25 October 2017, and appeared before the Committee at a public hearing on 30 October. The Bill addresses issues of concern that Ai Group has been pressing for over 15 years.

Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017

This Bill 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.

The Bill, if passed in time, would make it more difficult for the proposed merger between the CFMEU, MUA and TCFUA to proceed.

On 14 September 2017, Ai Group made a submission to the Senate Committee inquiry expressing support for the Bill, and Ai Group appeared before the Committee at a public hearing on 28 September.

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.

Workplace relations policy proposals that have been recently mentioned by Opposition Leader Bill Shorten and Shadow Employment and Workplace Relations Minister Brendan O'Connor include:

- 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.
- 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.
- 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.

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

The number of applications made to terminate expired enterprise agreements, as extracted from the FWC's Annual Reports, are set out in the table below.

Year	***Type of application under Fair Work Act***	***Number of applications***
2016-17	s.225	303
	s.222	97
2015-16	s.225	311
	s.222	92
2014-15	s.225	161
	s.222	91

In considering the above table, it is important to note that:

- All s.222 applications are agreed between the employer and employees covered by the agreement.
- The s.225 applications include applications made by employers and those made by unions.
- Only a miniscule proportion of the s.225 applications (less than 3%) are contested by one of the parties. Most relate to enterprise agreements which cover projects or contracts that have been completed.

There have only been a handful of cases over the last few years where an enterprise agreement has been terminated in response to an employer application which has been contested by unions (notably the Aurizon, Griffin Coal, Peabody, AGL and Murdock University cases). In each case, the application was made by the employer after a lengthy period of bargaining and the FWC was convinced that it would not be contrary to the public interest to terminate the agreement. Compelling circumstances were present in each case, for example, in a few of the cases the enterprise agreement gave the employer no ability to implement redundancies other than for volunteers.

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.

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. For example, the ACTU is alleging that the Coalition Government has cut the powers of the FWC. This is not correct. The Commission's powers were set by Labor's *Fair Work Act* in 2009 and there have been no cuts to those powers. In fact, when the Act was introduced by the Labor Government, the legislation increased powers for unions in more than 100 areas, and gave the Commission more power to settle disputes.

Ai Group will continue to argue that some sensible changes are needed to the *Fair Work Act*, but not the ones that the unions are seeking to swing the balance even more in their favour. Necessary changes include:

1. To give the Commission more discretion to overlook minor procedural defects in enterprise agreement approval applications, as would be delivered through the passage of the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017* through Parliament;

2. To address current problems with the Better Off Overall Test for enterprise agreements to ensure that the test is applied by the Commission to logical groups of employees, and not individual employees;

3. Redressing the transfer of business laws that are impeding businesses in restructuring to remain competitive, and are reducing job opportunities for workers; and

4. Tightening the permitted matters for bargaining claims and enterprise agreement content, including outlawing clauses that restrict the engagement of contractors.

FUTURE OF WORK INQUIRY

On 20 February, Ai Group made a detailed 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 changing nature of work is requiring that workers have different skills. Industry increasingly needs workers who have the relevant specialist technical skills, foundational skills including digital literacy and, importantly, new enterprise capabilities in creativity, problem solving, advanced reasoning, complex judgement, social interaction and emotional intelligence. A key component of the future workforce will be the acquisition of Science, Technology, Engineering and Mathematics (STEM) skills. Similarly, management capabilities will need to be developed to ensure businesses and their workforces are transforming successfully in the face of widespread change.

- 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 disrupters', Australia's workplace relations laws need to be amended to better enable established businesses to compete effectively with 'digital disrupters'. Key changes that are required include:

    - Addressing problems with the transfer of business laws in the *Fair Work Act* that are impeding the restructuring of businesses;

    - Tightening up the general protections in the *Fair Work Act* to remove barriers to outsourcing and restructuring;

    - Tightening up the 'permitted matters' and 'unlawful terms' for bargaining claims and enterprise agreement content in the *Fair Work Act* to prevent enterprise agreements imposing restrictions on outsourcing and the engagement of contractors;

    - Redressing the overly technical approach that the Fair Work Commission is taking when assessing enterprise agreements at the approval stage, which is operating as a major deterrent to enterprise agreement-making and impeding the tailoring of employment arrangements to meet the needs of enterprises and their employees; and

    - Repealing recently enacted State labour hire licensing laws which will impose very onerous and unreasonable impediments on a very wide range of businesses, and which extend far beyond any reasonable conception of 'labour hire'.

- Some other parties who have made submissions to the 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, which would operate as a tax on employment and consequently inhibit employment growth and competitiveness.

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. The range of businesses that will be covered by the legislation 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* will commence on 1 March 2018. Businesses that provide labour hire services will 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.

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 several detailed submissions to the Queensland, South Australian and Victorian Governments over recent months.

On 6 February, Ai Group filed a detailed submission on the regulations that will clarify the coverage of the Queensland scheme. Ai Group and the Australian Constructors Association also filed a joint submission highlighting various issues of importance to the construction industry.

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

A large number of employers are currently exposed to substantial cost risks associated with a series of unfavourable decisions of the FWC and the Federal Court regarding the meaning of the expression *'10 days of paid personal/carer's leave'* in section 96 of the *Fair Work Act*.

In some of the decisions a 'day' has been interpreted as the ordinary working hours which fall within a 24 hour period. This interpretation would result in 12 hour shift workers receiving 120 hours of personal/carer's leave per year rather than 76 hours and a part-time worker who works one day per week receiving the equivalent of 10 weeks of personal/carer's leave per year. The interpretation is unworkable and conflicts with widespread industry practice. Businesses with employees who work 8, 10 or 12 hour days/shifts and those with part-time employees are particularly impacted. This issue affects thousands of businesses and hundreds of thousands of employees.

Ai Group is currently representing Mondelez Australia Pty Ltd in an important case about the issue. The case was listed for an initial hearing on 30 January 2018 at which Ai Group applied under s.615A(2) of the *Fair Work Act* for the President of the FWC to refer the matter to a Full Bench. At the time of writing, the President had not made a decision in response to the application.

SUPERANNUATION GUARANTEE INTEGRITY PACKAGE – EXPOSURE DRAFT

On 19 February Ai Group filed a submission opposing aspects of an exposure draft of legislative amendments intended to give effect to the Government's Superannuation Guarantee Integrity Package.

Amongst other aspects, the exposure draft deals with the following issues:

- The Taxation Commissioner could direct an employer to pay unpaid and overdue superannuation guarantee charge liabilities. (NB. The maximum

penalties for failure to comply with such a direction include imprisonment for up to 12 months).

- The Taxation Commissioner could direct an employer to undertake an approved training course relating to their superannuation guarantee obligations.

Ai Group's submission opposes the criminal penalties in the legislation and argues that civil penalties are sufficient. The submission also proposes a number of amendments aimed at ensuring fairness for employers who disagree with an ATO assessment of the amount of superannuation that is payable.

AMENDMENTS TO THE FAIR WORK REGULATIONS – CORRUPTING BENEFITS

Amendments to the Fair Work Regulations relating to 'Corrupting Benefits' came into operation on 29 January 2018. The amendments were made in response to representations by Ai Group to the Federal Government. The amendments set out the form of the disclosure that a bargaining representative must make when a proposed enterprise agreement contains a provision that is expected to provide a financial benefit to the representative.

Many of the Corrupting Benefits disclosures that have been made by unions to date have lacked detail and have been buried in union promotional material. The new prescribed form for disclosures will ensure that employees and employers know what revenue is flowing back to unions from benefits included in proposed enterprise agreements.

HIGH COURT *ABCC V CFMEU* DECISION – COURTS CAN ORDER UNION OFFICIALS TO PAY THEIR OWN FINES

On 14 February, the High Court confirmed the power of Courts to order union officials to pay their own fines.

In its public comments in response to the decision, Ai Group said that "the decision will discourage CFMEU officials from blatantly disregarding industrial laws because, if they do, they can be ordered to personally pay large fines from their own assets. Despite numerous fines being imposed on the CFMEU and numerous strong criticisms from Judges, the CFMEU has not changed its unlawful behaviour. Hopefully, this decision will finally lead to CFMEU officials taking responsibility for their own actions and complying with the law like every citizen in a civilised society is rightly expected to do,"

CFMEU FINED $1 MILLION FOR BORAL SECONDARY BOYCOTT

In a case pursued by the Australian Competition and Consumer Commission, the Federal Court has fined the CFMEU $1 million for engaging in an illegal secondary boycott of concrete supplier Boral. The CFMEU imposed the boycott because Boral supplied Grocon with concrete during its industrial dispute with the CFMEU in 2012.

The fine is in addition to the reported $9 million that the CFMEU paid to Boral in 2015 to settle the company's damages claim against the CFMEU.

Criminal proceedings against CFMEU Victorian Secretary John Setka and Deputy Secretary Shaun Reardon are continuing. In 2015, a joint Federal Police and Victorian State Police taskforce arrested and charged Mr Setka and Mr Reardon with alleged blackmail of Boral. The charges carry a maximum penalty of 15 years' imprisonment.

FWC DECISION RE. SYDNEY TRAINS

On 25 January, Senior Deputy President Hamberger of the FWC suspended the right of the employees of Sydney Trains and NSW Trains to take industrial action for six weeks. The decision avoided a planned strike on 29 January that would have caused major disruption for commuters and businesses.

Hamberger SDP was satisfied on the evidence that the planned industrial action threatened to harm the welfare of a part of the population and threatened to damage an important part of the economy. Accordingly, an order was issued under s.424 of the *Fair Work Act* suspending the right of employees to take industrial action.

The ACTU and some academics have criticised the decision as lowering the bar for when the FWC can intervene in bargaining disputes to protect the community's interests, and have called for the *Fair Work Act* to be amended to give employees more rights to take industrial action. In its public comments, Ai Group welcomed the decision, and expressed the view that the bar remains high under s.424 of the *Fair Work Act* and that the decision is consistent with previous authorities.

FAMILY FRIENDLY WORK ARRANGEMENTS CASE

Hearings in the FWC's *Family Friendly Work Arrangements Case* concluded on 22 December. Ai Group is taking the leading role in the case in opposing the ACTU's unworkable claims and protecting the rights of companies to manage their businesses in a workable manner.

If the unions succeed with their claims in this case, employees would have the right to dictate to employers what days, hours and times they work, with employers having no right to refuse regardless of the circumstances or the needs of their businesses.

COMMENCEMENT OF THE NEXT 4 YEARLY REVIEW OF AWARDS

The *Fair Work Act* requires that the next 4 Yearly Review of Awards commence as soon as practicable after 1 January 2018. The current 4 Yearly Review has been continuing for 4 years and is still a long way from being completed. On 2 January 2018, a Statement was issued by the President of the FWC, Justice Iain Ross, confirming that the Commission does not propose to commence the second 4 yearly review until the current review has been completed and parties have been given an opportunity to consider how the recently reviewed modern awards are operating in practice.

The FWC President's Statement refers to an Ai Group submission filed on 11 December 2017 which expressed strong support for delaying the commencement of the next four yearly review to avoid the following adverse consequences:

- The creation of a great deal of confusion for employers, employees and other parties;
- The imposition of unreasonable resource demands on industrial parties, given that the parties are currently devoting extensive resources to the large number of matters which are underway relating to the current 4 Yearly Review;
- The risk of unjust outcomes due to:
    - Confusion about the potential award variations being considered by the Commission;
    - Industrial parties being unable to devote sufficient resources to the second 4 Yearly Review, when their finite resources are being devoted to the first 4 Yearly Review.

Ai Group's submission also refers to the fact that a Bill is before Parliament that would abolish the requirement for the Commission to conduct 4 Yearly Reviews (see above).

A further Statement will be issued by the Commission shortly providing an indicative timetable for the completion of the current review.

FWC ANNUALISED SALARIES DECISION

On 20 February, a Full Bench of the FWC handed down its decision in the *4 Yearly Review of Awards – Annualised Salaries Case*. In this case, a Full Bench of the FWC reviewed the annualised salary clauses in those awards that contain such clauses, including the *Clerks – Private Sector Award 2010* and 18 other awards.

In its decision, the Full Bench reached a number of conclusions about annualised salary clauses in modern awards and their compliance with the *Fair Work Act*, including:

- There should be a requirement for individual agreement to be reached with the relevant employee before an annualised salary arrangement is introduced in circumstances where the working hours of the employee are highly variable from one week to the next or over the course of a year.
- Where the annualised salary arrangement is by agreement, it should be terminable by the employer or employee at annual intervals upon notice.
- The annualised salary arrangement should be in writing.
- In no circumstances should an annualised salary clause in a modern award permit or facilitate an employee receiving less pay over the course of a year than they would have received had the terms of the modern award been applied in the ordinary way, and it is essential that the clause contain a mechanism or combination of mechanisms to ensure that this does not happen. The Full Bench has identified three types of mechanism to ensure this:
    - A requirement for a minimum increment above the base rate of pay, prescribed in the annualised salaries clause itself, including an outer limit on the number of overtime or penalty rate hours which are compensated by the increment.
    - A requirement that the arrangement identify the way the annualised salary is calculated.
    - A requirement that the employer undertake an annual reconciliation or review exercise, and be required to keep records of overtime and penalty rate hours.
- Annualised salary arrangements should only have application to full-time employees unless a workable proposition can be identified for the application of such provisions to part-time employees.

The Full Bench has provisionally proposed a number of model annualised salary clauses to give effect to the above conclusions, all of which have problematic elements.

Submissions in response to the Commission's model clauses are due by 20 March with reply submissions due by 3 April. Ai Group will lodge detailed submissions and work hard to ensure that annualised salary clauses in awards remain workable and continue to provide the flexibility to employers and employees that these clauses were intended to provide when they were originally inserted into the awards.

FAMILY AND DOMESTIC VIOLENCE LEAVE CASE

A further decision in the FWC's *Family and Domestic Violence Leave Case* is reserved. After the rejection of the ACTU's claim for 10 days of paid domestic violence leave per employee per year, the FWC called for submissions and scheduled further hearings to consider arguments about unpaid family and domestic violence leave entitlements. The Full Bench has reserved its decision on what form unpaid family and domestic leave entitlements should take in awards.

Issues considered at the latest round of hearings included: the quantum of unpaid leave, whether unpaid leave entitlements should accrue from year to year, notice and evidence requirements, how 'family and domestic violence' should be defined, the circumstances in which unpaid leave should be able to be taken, whether casuals should be entitled to unpaid leave, and confidentiality requirements.

Ai Group has played a leading role throughout the case in representing the interests of employers.

IMPORTANT FWC DECISION RELATING TO FIXED TERM AND MAXIMUM TERM CONTRACTS

On 8 December, a Full Bench of the FWC handed down its decision in the *Khayam v Navitas English* case. At the invitation of the FWC President, Ai Group intervened in this case, which dealt with the effect of fixed term and maximum term contracts, and whether employees covered by these contracts have access to unfair dismissal laws when employment ends at the expiry of the contract.

The interpretation of the *Fair Work Act* adopted by the Majority of the Members of the Full Bench will lead to more uncertainty about whether or not an employee engaged under a fixed term or 'outer limit' contract can pursue an unfair dismissal case if the employment ends when the contract expires.

Where termination of employment occurs at the expiry of a fixed term or 'outer limit' contract, in most circumstances the termination will arise from the effluxion of time and not at the initiative of the employer. However, the Majority have set out a list of principles and identified circumstances where it may be necessary to look beyond the agreed terms of employment; particularly *"in the case of an employment relationship made up of a sequence of time-limited contracts of employment, where the termination has occurred at the end of the term of the last of those contracts. In that situation, the analysis may, depending on the facts, require consideration of the circumstances of the entire employment relationship, not merely the terms of the final employment contract."*

AWARD VARIATIONS ARISING FROM THE CASUAL AND PART-TIME EMPLOYMENT DECISION

A number of variations to specific awards arising from the FWC's July 2017 *Casual and Part-time Employment Decision* are operative from 1 January 2018, including provisions imposing an obligation on employers to pay overtime penalties to casuals in various industries. The FWC has still not determined the specific terms of the model casual conversion clause to implement the Commission's decision.

Proceedings are continuing in the FWC regarding overtime arrangements for casuals in the horticulture industry to determine: the rate for overtime, the period over which ordinary hours can be averaged, the spread of hours for day work, and the rate of pay that will apply for ordinary time worked outside the spread of hours.

Ai Group is playing the leading role in representing employers in the case, which has continued for over two years. Most of the unions' claims in the case, which would have wreaked havoc on Australia's labour market, were rejected. The FWC's decision preserves an employer's right of reasonable refusal of a casual employee's request to convert to permanent employment.

Ai Group Members are being advised of the specific variations, as each relevant award is varied.

FWC LOADED RATES IN AGREEMENTS CASE

A 5-Member Full Bench of the FWC has not yet issued directions for the next stage of the proceedings in the *Loaded Rates in Agreements* Case. The case is considering issues associated with the application of the Better Off Overall Test to enterprise agreements containing loaded rates of pay. The President of the FWC invited Ai Group and other peak councils to intervene in the case.

Ai Group has filed a detailed submission which argues that in recent times the FWC has often adopted an overly theoretical approach when assessing enterprise agreements at the approval stage, and that a more practical approach

needs to be taken. Ai Group's submission proposes a set of principles drawn from relevant cases and legislative provisions, aimed at delivering a more practical enterprise agreement approval process.

At the conclusion of a hearing on 15 November 2017, the Full Bench indicated that it will consider the submissions made and issue directions relating to the next stage of the proceedings.

AWARD VARIATIONS TO IMPLEMENT IMPORTANT HORTICULTURE INDUSTRY DECISION

The FWC has issued determinations varying the coverage clause of the *Horticulture Award 2010*, retrospectively to 1 January 2010, to reflect the outcome of an important decision late last year that protects employers in the horticulture industry from a push by the National Union of Workers to impose warehousing award conditions on horticulture businesses. The claim would have cost horticultural businesses many millions of dollars a year. Ai Group played a leading role in representing employers in the case.

A central issue in the case was the concept of the 'farm gate' and whether this should be construed as a reference to the physical boundaries of a farm or, as argued by Ai Group, the first point of sale from the producer to a customer (e.g. a retailer or a food manufacturer). When the Horticulture Award came into operation in January 2010, the Commission stated that it was intended to cover activities within the 'farm gate'. The Full Bench accepted Ai Group's arguments and determined that the 'farm gate' is a virtual concept – not a physical location.

Horticultural producers and related entities are typically involved in a series of integrated activities such as growing, picking, cleaning, grading, bagging and then despatching their produce to supermarkets and food processing companies. The Horticulture Award will now cover all of these activities. Over the past few years, the NUW has endeavoured to force horticulture businesses to apply the inflexible and overly costly conditions in the Storage Services Industry Award to the centralised washing and packing facilities that are common in the horticulture industry.

There was a great deal of evidence heard by the FWC Full Bench in the case, as well as site inspections and many days of hearings. The outcome is very important for the horticulture industry.

HAIR AND BEAUTY INDUSTRY PENALTY RATES CASE

Ai Group is currently representing Hair and Beauty Australia in a substantial case concerning proposed adjustments to the penalty rates payable by employers in the hair and beauty industry.

In the major *Penalty Rates Decision* handed down by the FWC in February last year the Full Bench of the Commission invited hair and beauty industry employers to apply for an adjustment to Sunday and public holiday penalty rates, given that the hair and beauty industry has many similarities to the retail industry.

Ai Group is required to file evidence and submissions in the case by 28 February 2018.

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

In December, a Full Bench of the FWC reserved its decision in *Sam Technology Engineers v Bernardou*. The FWC invited Ai Group and other peak councils to intervene in the case, which is considering the way that car allowances should be treated when determining whether an employee is paid above the 'high income threshold' under the unfair dismissal laws.

The Full Bench proceedings relate to an appeal by Ai Group Member, Sam Technology Engineers, against a decision of Commissioner Ryan who held that an ex-employee (Mr Bernardou) was paid less than the 'high income threshold' and therefore was entitled to pursue an unfair dismissal claim.

In granting leave to the company 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 decision of the FWC is still reserved.

FINAL REPORT OF THE O'CALLAGHAN REVIEW INTO GREENFIELDS AGREEMENTS

On 15 February, the Federal Government published the final report of former FWC Senior Deputy President Matthew O'Callaghan into the greenfields agreement provisions of the *Fair Work Act*.

Mr O'Callaghan has recommended that the mandatory six-month negotiation period with unions, before an employer can lodge a greenfields agreement with the FWC for approval without union consent, should be reduced to three months. This is consistent with Ai Group's submission to the review.

A number of initiatives to expedite the approval of greenfields agreements have also been proposed.

VICTORIAN PORTABLE LONG SERVICE LEAVE DEVELOPMENTS

Ai Group is continuing to work hard to stop the Victorian construction industry portable long service leave scheme expanding into areas of the manufacturing industry. Manufactured products with electrical components are the main area of risk. Ai Group made a further detailed submission to CoINVEST – the administrator of the construction industry scheme – on 19 January. The CoINVEST Board, which determines the coverage rules for the scheme, is considering a raft of coverage changes that the Electrical Trades Union has proposed.

In a further development, the Victorian Government is drafting a Bill to establish portable long service leave schemes for the security, contract cleaning and community services industry.

VICTORIAN LONG SERVICE LEAVE BILL 2017

Ai Group has made a submission to the Victorian Government expressing concern about some aspects of the *Long Service Leave Bill 2017 (Vic).* The Bill is before the Victorian Parliament and would replace the *Long Service Leave Act 1992 (Vic).*

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 has expressed concern to the Victorian Government about the implications of the definition of 'casual employee' in the Bill, and also the absence of a 'double-dipping' provision like s.63(5) of the existing Act. Ai Group is pressing for amendments to the Bill to address these issues.

Prior to the Bill being introduced into Parliament, Ai Group made a submission to a Victorian Government review of the existing Act. During the course of the Review, Ai Group opposed a number of proposals that would have been very costly for employers. Fortunately, a number of costly proposals were ultimately not included in the Bill.

WAGE OUTCOMES UNDER ENTERPRISE AGREEMENTS

On 10 January 2018, the Department of Employment released its report on *Trends in Federal Enterprise Bargaining* for the September 2017 quarter. Average annualised wage increases (**AAWI**) for enterprise agreements approved in the September 2017 quarter are summarised in the following table.

Industry Sector or Type of Agreement	AAWI (%) for agreements approved in September 2017	Change from June 2017(%)
All sectors	2.2	Down 0.4
Private sector	2.4	Down 0.2
Public sector	2.5	Down 0.5
Construction	3.1	Down 0.6
Manufacturing	2.4	Same
Transport, postal & warehousing	2.0	Down 0.1
Mining	2.3	Down 0.4
Single enterprise non-greenfields	2.2	Down 0.4
Single enterprise greenfields	2.5	Up 0.6
Union/s covered	2.1	Down 0.5
No Union/s covered	2.5	Same

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.

INFLUENCE & POLICY

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.