SIGNIFICANT WORKPLACE RELATIONS ISSUES

The Australian Industry Group

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Ai GROUP | INFLUENCE & POLICY

EXECUTIVE SUMMARY

In December, the Australian Government made the *Fair Work Amendment (Casual Loading Offset) Regulations 2018* which amend the *Fair Work Regulations 2009* to insert a new regulation 2.03A. Regulation 2.03A gives employers more protection against "double dipping" claims by casual employees following the Federal Court's very problematic decision in the *WorkPac v Skene* case.

On 13 February, the Australian Government introduced the *Fair Work Amendment (Right to Request Casual Conversion) Bill 2019* into Parliament.

WorkPac has initiated a further important Federal Court case about casual employment.

In December, the Australian Labor Party National Conference endorsed Labor's 2018 National Platform. The Platform includes details of Labor's workplace relations policies.

At the State level, Labor Governments and Labor Oppositions in various States have implemented, or have committed to introduce, labour hire licensing schemes and "wage theft" laws.

For the past few years, the ACTU has pressed Labor to commit to introducing sweeping changes to workplace relations laws through its "Change the Rules" campaign. Ai Group has sought to ensure that the facts about a range of key topics are understood through our "Working Together, the Facts" initiative.

On 21 February 2019, the Full Court of the 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 case has important implications for most employers in Australia. Ai Group Workplace Lawyers is representing Mondelēz in the proceedings and has 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 Australian Government.

A number of class actions are being pursued against major employers, including some Ai Group members, relating to claims under the *Fair Work Act*.

The Coal Mining Industry (Long Service Leave Funding) Corporation is currently pursuing claims against numerous employers, large and small, that provide equipment and services to coal mining clients. The companies are typically covered under the *Manufacturing and Associated Industries and Occupations Award 2010*.

The claims relate to the payment of the payroll levy under the Coal Industry Long Service Leave Scheme, including back-pay from 1 January 2010 in most cases.

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 in the *Fair Work Act* to give all employees up to five days of unpaid family and domestic violence leave per year.

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*, including addressing some of the problems that have been occurring regarding the Fair Work Commission's (FWC's) enterprise agreement approval process.

The FWC's 4 Yearly Review of Awards has continued for over five years so far, with no end in sight. On 24 December, Justice Iain Ross, the President of the FWC, issued a Statement dealing with the substantive claims made by employer and union parties during the 4 Yearly Review of Awards.

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. The legislation was proclaimed to commence on 1 January 2019.

The Australian Human Rights Commission's National Inquiry into Sexual Harassment in Australian Workplaces is underway with the AHRC receiving submissions and conducting its national consultations. Ai Group is preparing a detailed submission which will be lodged by the 28 February deadline.

In January, Ai Group made a further submission to the Australian Taxation Office (ATO) expressing opposition to advice that the ATO is giving that superannuation contributions are payable on annual leave loading unless an employee is demonstrable working overtime on a permanent regular basis. Ai Group's latest submission follows one made in October last year on this topic, and follows a teleconference between Ai Group and the ATO in November.

Ai Group Workplace Lawyers is representing Hair and Beauty Australia (HABA) in the Hair and Beauty Industry Penalty Rate Case. The case is listed for hearing before a Full Bench of the FWC over eight days in March.

On 20 December, a Full Bench of the FWC, headed by President Ross, handed down a decision clarifying that there is no power under the *Fair Work Act* for the FWC to redact the wage rates in an enterprise agreement when it is published on the FWC website.

As part of the 4 Yearly Review of Awards, the FWC reviewed the abandonment of employment clauses in those modern awards that contained these clauses, including the *Manufacturing and Associated Industries and Occupations Award 2010*. In a hard-fought case over the past two years, Ai Group was successful in establishing that abandonment of employment constitutes termination of employment by the employee, not the employer.

The FWC has accepted an Ai Group proposal to vary the *Nurses Award 2010* and the *Health Professionals and Support Services Award 2010* to give employers and employees more flexibility regarding the taking of meal breaks.

In December, a Full Bench of the FWC reserved its decision following lengthy proceedings relating to the classification structure in the *Graphic Arts, Printing and Publishing Award 2010*. Throughout most of the proceedings the Australian Manufacturing Workers Union sought to change the list of competency standards in the Award that are weighted and linked to the classifications in the Award. The AMWU's proposed variations would have led to significant reclassification and cost risks for employers. The AMWU ultimately dropped its claim in the face of strong opposition from Ai Group.

Ai Group is preparing a detailed submission to the Victorian Inquiry into the "On-demand" Workforce, which needs to be lodged by 20 February. Ai Group has scheduled roundtable discussions of employers in several industries which will be attended by the chair of the inquiry, Natalie James, the previous Fair Work Ombudsman.

On 7 January, Ai Group wrote to the Hon Tim Pallas MP, the Victorian Treasurer and Minister for Industrial Relations expressing strong opposition to a proposal by CoINVEST – the administrator of the construction industry portable long service leave scheme – to expand the coverage of the scheme.

The ACT Government's Secure Local Jobs Code commenced operating in the Australian Capital Territory on 15 January 2019. The Code utilises the purchasing power of the ACT Government to require contractors to comply with Code provisions in areas which include pay, employment conditions, insurance, tax, superannuation, health and safety, training, inductions, collective bargaining, freedom of association and representation rights.

CONTENTS

CASUAL EMPLOYMENT – LATEST DEVELOPMENTS

New regulation to protect employers against "double-dipping" claims

In December, the Australian Government made the *Fair Work Amendment (Casual Loading Offset) Regulations 2018* which amend the *Fair Work Regulations 2009* to insert a new regulation 2.03A. Regulation 2.03A gives employers more protection against "double dipping" claims by casual employees following the Federal Court's very problematic decision in the *WorkPac v Skene* case.

In its decision, the Federal Court held that the term "casual employee" in the *Fair Work Act* has no precise meaning and whether or not an employee is a casual for the purposes of the Act depends upon the circumstances surrounding the employee's employment. The 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*.

The new regulation expressly allows an employer to make a claim to offset the cost of any casual loading paid. Such a claim would be able to be pursued by an employer in a Court in response to any employee claim for annual leave or other entitlements of permanent employees under the *Fair Work Act*. The regulation applies in relation to employment periods that occur before or after the regulation was made. Ai Group worked very hard, on behalf of Members, to achieve this outcome

Right to request casual conversion Bill

On 13 February, the Australian Government introduced the *Fair Work Amendment (Right to Request Casual Conversion) Bill 2019* into Parliament. If passed by Parliament, the provisions in the Bill would:

- Amend the National Employment Standards in the *Fair Work Act* to ensure that casual employees with 12 months of regular service have the right to request conversion to full-time or part-time employment;
- Give employers the right to reasonably refuse a casual employee's conversion request.
- Not disturb casual conversion provisions in modern awards;
- Apply to award-free and enterprise agreement-free employees;
- Apply to enterprise agreement-covered employees whose enterprise agreement does not have a casual conversion term that is:
    - the same or substantially the same as the casual conversion term included in the relevant modern award; or
    - more beneficial on an overall basis than the casual conversion term included in the relevant modern award.

- Clarify that, for an employee who converts from casual employment to full-time or part-time employment, periods of casual employment do not count for the purposes of calculating entitlements to annual leave, personal/carer's leave, redundancy pay and notice of termination. However, periods of casual employment count for the purposes of calculating service to qualify for the right to request flexible work arrangements and to take unpaid parental leave.

The Bill defines the class of employees who are entitled to make a request for conversion from casual employment to full-time or part-time employment but does not define casual employment for other purposes under the Act.

Further Federal Court test case on casual employment

WorkPac has initiated a further important Federal Court case about casual employment.

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 proceedings.

FEDERAL ALP WORKPLACE RELATIONS POLICIES

Labor's workplace relations policies are included in its 2018 National Platform that was endorsed at the December 2018 ALP National Conference. Relevant extracts from the Platform are set out below:

Forms of employment and engagement

- **Casual employment**

  "Labor will set an objective test in legislation for determining when a worker is a casual."

- **Sham contracting**

  "Labor will strengthen the laws that prohibit sham contracting."

- **Gig workers**

  "Labor understands the growth of the 'gig economy' and information technology platforms will have both positive and negative impacts on the way Australians work. Labor is committed to ensuring that the Fair Work Act provides appropriate coverage and protection for all forms of work and that gig economy platforms and other working arrangements are not used to circumvent industrial standards, or to undermine workers' rights to collectively organise and access their union."

- **Labour hire**

  “Labor will protect labour hire workers by establishing a national labour hire licensing scheme to regulate the labour hire industry and ensure that minimum legal standards are met. Labor will also legislate to guarantee that labour hire workers receive the same pay and conditions as directly employed workers doing the same work.”

Employee entitlements

- **Penalty rates**

  “Labor will reverse the cuts to Sunday and public holiday penalty rates, and will amend the Fair Work Act so awards cannot be varied to cut workers’ take home pay.”

- **Domestic violence leave**

  “Labor will introduce 10 days paid Domestic Violence leave as a universal workplace right in the National Employment Standards.”

- **National minimum wage**

  “Labor is committed to a minimum wage that provides a living wage and will maintain or improve the relative living standards of low paid workers.”

- **Long service leave**

  “Labor will work with State and Territory governments to achieve a national minimum standard for long service leave to form part of the National Employment Standards.”

- **Public holidays**

  “Labor will work with State and Territory governments to ensure consistent treatment of public holidays, including the issue of Easter Sunday and the treatment of Christmas Day, Boxing Day and New Year’s Day where they fall on weekends.”

- **Portable leave entitlements**

  “Labor will work with State and Territory Governments, employers and unions to facilitate and establish the portability of entitlements including through industry-wide schemes.”

- **National Employment Standards**

  “Labor will review the operation of the National Employment Standards and clarify any questions relating to the application of those standards which have arisen since their introduction.”

- **Supply chain responsibilities for worker underpayments**

  “Labor will extend, where appropriate, responsibility for compliance with workplace laws to corporations who are the economic decision makers, including franchisors and along the supply chain.”

- **Penalties for employers who underpay workers**

  “Labor will increase penalties for employers and related entities who systematically underpay and exploit workers. Labor will provide the resources necessary to focus on detection and prosecution of serious contraventions of the Fair Work Act by employers.”

- **Regulation of internships**

  “Labor will ensure the effective regulation of internships to provide a positive culture that promotes portable skills and development opportunities as part of obtaining an accredited training qualification while avoiding negative impacts and exploitation.

- **Employee entitlements upon insolvency**

  “Labor will introduce an improved ranking of employee entitlements relative to other creditors, ensuring employers and directors meet their responsibilities, and ensure any burden placed on taxpayers is reasonable. Labor will amend corporations law to strengthen the recovery of employee entitlements including prohibiting corporate and director conduct which has the consequence of preventing recovery and stronger penalties for individuals and corporations whose actions result in a company being unable to pay its workers. Employee creditors and their representatives should also have the capacity to directly recover employee entitlements including unpaid superannuation contributions.”

Collective bargaining

- **Coverage of enterprise agreements**

  “Labor will ensure that collective agreements are genuinely agreed to by a representative cohort of the workers to which they apply.”

- **Termination of enterprise agreements after the nominal expiry date**

  “Labor will also prevent the unilateral terminations of collective agreements that reduce workers’ entitlements and provide an effective mechanism for the termination of any remaining “WorkChoices” agreements.”

- **Good faith bargaining**

  “Labor will promote and ensure good faith bargaining in workplaces including by developing guidelines on good faith conduct in negotiations to allow access to and assistance from the independent umpire to resolve disputes.”

- **Multi-employer collective bargaining**

  “The Fair Work Act has not adequately facilitated multi-employer collective bargaining. This is a particular issue for those industries where employees are low paid and where they lack industrial power. Labor will improve access to collective bargaining, including where appropriate through multi-employer collective bargaining. Labor will faciliate bargaining for multi-employer and multi-agency public sector agreements.”

Union rights

- **Freedom of association and industrial action**

  "Freedom of association includes the right of union members to conduct their affairs without interference. Labor recognises that the right to organise, the right to trade union representation and the right to take industrial action if necessary are protected under international law and Labor will adopt and comply with all relevant international labour treaties and conventions."

Arbitration

- **Access to arbitration by the Fair Work Commission**

  "Labor will ensure all workers, employers and unions have equal access to assistance from the independent umpire to resolve award, NES and agreement and other disputes by arbitration where disputes cannot be resolved through discussion, conciliation or mediation. Labor will provide parties with access to arbitration of disputes. Labor will ensure that an independent umpire has the responsibility and necessary powers to ensure that unions can be effective in fulfilling their role as the legitimate representatives of working people."

Regulators

- **ABCC and the Building Code**

  "Labor will abolish the Australian Building and Construction Commission and repeal the Building and Construction Industry (Improving Productivity) Act including the Code for the Tendering and Performance of Building Work 2016. The appropriate body to regulate registered organisations is the Fair Work Commission."

- **Registered Organisations Commission**

  "Labor will abolish the Registered Organisations Commission, with serious contraventions of regulatory laws by registered organisations referred to ASIC for investigation and prosecution."

Road safety remuneration

- **Independent body to set pay and conditions for contract drivers**

  "A Federal Labor Government will, as a matter of urgency, legislate for a national system of Safe Rates consisting of an independent body with responsibility for safe standards of work including fair payments and conditions. This task has become more pressing given the emergence of new technology and the gig economy in passenger and freight transport which has accelerated the downward spiral throughout the transport industry."

Gender equality

- **Pay equity**

  "Labor will make gender pay equity an object of the Fair Work Act. Labor will establish a statutory Equal Remuneration Principle, to guide the Fair Work Commission's consideration of whether feminised industries are paid fairly. Labor will establish a new Pay Equity Panel within the Commission led by a new Presidential Member with specific expertise in gender pay equity, and fund the Commission to establish a Pay Equity Unit that will provide expert research support during equal remuneration matters, and more generally. Labor will shine a light on pay inequity, including by updating Parliament each year on Australia's progress in closing the gender pay gap, by requiring companies with more than 1000 employees to report their gender pay gap, and by prohibiting the use of pay secrecy clauses."

Superannuation

- **Default superannuation funds in awards**

  "Labor believes a practical industry-based system for selecting default funds in modern awards should be overseen by the Fair Work Commission with input from workers, employers and experts."

STATE LABOR WORKPLACE RELATIONS POLICIES

At the State level, Labor Governments and Labor Oppositions in various States have implemented, or have committed to implementing, labour hire licensing schemes and "wage theft" laws:

- The Queensland Labor Government has implemented legislation to create a State labour hire licensing scheme. It has also expressed support for "wage theft" legislation which would make it a criminal offence for an employer to deliberately underpay an employee.

- Legislation to implement a labour hire licensing scheme in Victoria has been passed by the Victorian Parliament and the licensing requirements under the scheme will commence shortly. The Victorian Labor Government has also committed to introduce "wage theft" legislation during the current term of Government, through amendments to the Crimes Act.

- The NSW Labor Opposition has indicated its intention to introduce a labour hire licensing scheme and "wage theft" legislation, if elected in the March 2019 State election.

- The former SA Labor Government introduced labour hire licensing legislation during its period of Government but the current Liberal Government has delayed the commencement of the licensing scheme.

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

For the past few years, the ACTU has pressed Labor to commit to introducing sweeping changes to workplace relations laws through its "Change the Rules" campaign. Ai Group has sought to ensure that the facts about a range of key topics are understood through our *"Working Together, the Facts"* initiative.

The materials emphasise the shared interests of businesses and workers in ensuring that businesses are successful. The materials are available on the *"Working Together, The Facts"* section of Ai Group's website.

The fact sheets and research papers which Ai Group has released include:

- *Working Together, The Facts – Casual Employment;*
- *Working Together, The Facts – Part-time Employment;*
- *Working Together, The Facts – Self-Employment;*
- *Working Together, The Facts – Productivity;*
- *Working Together, The Facts – Company Profits;*
- *Working Together, The Facts – Diversity and Inclusion;*
- *Working Together, The Facts – Migration;*
- *Working Together, The Facts – Labour Hire*.
- *Recent wages growth in Australia – trends and causes* – Research Paper;
- *Casual work and part-time work in Australia* – Research Paper;
- *Where do casuals work?* – Economic Fact Sheet.

The fact sheets and research papers do not refer to unions or any political parties. The materials are simply designed to set out the facts.

MONDELĒZ V AMWU CASE – MEANING OF A "DAY"

On 21 February 2019, the Full Court of the 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 case has important implications for most employers in Australia. Ai Group Workplace Lawyers is representing Mondelēz in the proceedings and has 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 Australian Government.

The outcome of the case will be important 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 relevant employees of Mondelēz work 12-hour shifts at the company's Claremont plant in Tasmania. The current enterprise agreement agreed to by Mondelēz 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 and the Australian Government contends.

CLASS ACTIONS RELATING TO CLAIMS UNDER THE FAIR WORK ACT

A number of class actions are being pursued against major employers, including some Ai Group members, relating to claims under the *Fair Work Act*.

A few of the class actions are being pursued by Canberra based law firm Adero, with the support of overseas litigation funder – Augusta Ventures. The Australian Securities and Investments Commission (ASIC) is investigating whether Adero and Augusta Ventures are misleading employees through the highly complex terms that employees are being asked to agree to by clicking on links on Adero's website. The matter was referred to ASIC by Ai Group and the Australian Competition and Consumer Commission.

The growth in class actions relating to claims under the *Fair Work Act* raises some important policy issues, including:

- Whether law firms that pursue class actions under the Act should be exposed to cost orders if the claims are not successful (Note: currently it is only in rare circumstances that costs can be awarded in matters arising under the *Fair Work Act*); and

- Whether class action litigation funders should be subjected to more regulation.

The Australian Law Reform Commission (ALRC) has recently conducted an inquiry into class action proceedings and litigation funding arrangements. In its final report issued in January 2019, the ALRC recommended a number of legislative amendments, including giving Courts more powers to ensure that class action and litigation funding arrangements do not operate unfairly for class members.

CLAIMS BY THE COAL LONG SERVICE LEAVE CORPORATION

The Coal Mining Industry (Long Service Leave Funding) Corporation is currently pursuing claims against numerous employers, large and small, that provide equipment and services to coal mining clients. The companies are typically covered under the *Manufacturing and Associated Industries and Occupations Award 2010*. The claims relate to the payment of the payroll levy under the Coal Industry Long Service Leave Scheme, including back-pay from 1 January 2010 in most cases.

The businesses faced with the claims are not mining companies. They typically provide equipment and services to businesses in numerous industries, e.g. the manufacturing, construction, food and mining industries. The businesses are typically located or have substantial operations around Newcastle and Mackay. Given the geographic location of the businesses it is not surprising that a significant proportion of their revenue is often derived from the sale and service of equipment or the provision of maintenance services to mining industry clients.

The businesses have typically never applied the Coal Industry Long Service Leave Scheme. Employees of the businesses receive long service leave entitlements under the National Employment Standards through the "applicable award-derived long service leave terms" arising from Part IV of the pre-modern *Metal, Engineering and Associated Industries Award 1998*, or through State long service leave laws.

Given the similarity in coverage between the Coal Long Service Leave Scheme and the *Black Coal Mining Industry Award 2010*, a company conceding coverage of the long service leave scheme would find it difficult to sustain an argument that the award (with its 35-hour week and other very costly and inflexible provisions) does not apply.

Ai Group is taking a number of actions to assist Members faced with the claims, including:

- Providing advice to Member;
- Representing Members is dealings with the Coal LSL Corporation;
- Keeping Members informed through regular industry meetings;
- Pressing the Australian Government to make a regulation clarifying the coverage of the Coal Long Service Leave Scheme to ensure that businesses providing equipment and services to coal industry clients are not covered; and
- Exploring various options.

A further industry meeting of impacted Members is scheduled for 1 March via videoconference between Sydney, Newcastle, Melbourne, Brisbane and Adelaide.

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 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.

"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 Fair Work Commission (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 legislative amendments operate from 12 December 2018.

In a related development, on 11 February 2019 the FWC issued a Statement expressing the provisional view that the model unpaid family and domestic violence leave clause should be deleted from modern awards and replaced with a reference to the new provisions in the NES. Parties have been given until 13 March 2019 to express any objections to the provisional view.

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

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*, including addressing some of the problems that have been occurring regarding the FWC's enterprise agreement approval process.

The amendments give the FWC more discretion to approve an enterprise agreement despite "minor procedural or technical errors" made by the employer in relating to certain aspects of the agreement-making process, provided that the employees "were not likely to have been disadvantaged by the errors'".

The new provisions apply 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.

FWC Amendment Act Decision

A hearing was conducted on 21 December by a Full Bench of the FWC to hear submissions about the effect of the new provisions on 10 specific enterprise agreement approval applications that appeared to contain errors to which the new legislative provisions may apply. Ai Group lodged a detailed submission and appeared at the hearing.

The Full Bench handed down a decision on 18 January 2019 clarifying the FWC's interpretation of certain aspects of the new legislative provisions, including the points dealt with in the following extracts from the decision:

- "Section 188(2) does not apply to all procedural or technical requirements with which an employer must comply when bargaining for an enterprise agreement. The 'minor procedural or technical errors' referred to in s.188(2)(a) must be errors 'made in relation to the requirements mentioned in paragraph (1)(a) or (b), or the requirements of sections 173 and 174 relating to a notice of employee representational rights' (NERR).
- "Generally speaking, the lower the level of non-compliance the more likely it is to be characterised as a 'minor error'."

- “Some species of error are unlikely to be classified as ‘minor’, for example the deletion of the prescribed text of the NERR which deals with an employee’s right to appoint a bargaining representative and the role of the unions as the default bargaining representatives.”

- “Cost or inconvenience to the employer and employee covered by an agreement associated with a delay in the approval of the agreement is not relevant to the question of whether the employees covered by the agreement ‘were not likely to be disadvantaged by the errors’”.

- “The word ‘likely’ in s.188(2)(b) means ‘probable’ in the sense that there is an odds-on chance of it happening, rather than merely being some possibility of it happening. The word ‘disadvantaged’ suggests a deprivation which manifests in the employees covered by the agreement being prevented from substantively exercising their rights within the bargaining regime in Part 2-4 of the Act.”

- “In assessing whether employees were not likely to have been disadvantaged by an error, it may be necessary to consider the particular circumstances of the employees concerned at the time the error occurred and the impact of the error on the subsequent course of bargaining. This may include considering any steps taken by the employer to address the adverse impact of the non-compliance.”

Abolition of 4 Yearly Reviews of Awards

The previous requirement for the FWC to conduct 4 Yearly Reviews of Awards has been abolished through the legislative amendments. The FWC is able to complete the current 4 Yearly Review which commenced in 2014.

An application to vary an award can still be made at any time and the FWC can still 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 *Fair Work Act*); or

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

The amendments to the Act relating to 4 Yearly Reviews of Awards operate retrospectively to 1 January 2018 – the date when the second 4 Yearly Review of Awards was scheduled to commence. Last year, the FWC decided to delay the commencement of the second 4 Yearly Review given that the previous 4 Yearly Review was still underway.

SUBSTANTIVE CLAIMS – 4 YEARLY REVIEW OF AWARDS

The FWC’s 4 Yearly Review of Awards has continued for over five years so far, with no end in sight. On 24 December, Justice Iain Ross, the President of the FWC, issued a Statement dealing with the substantive claims made by employer and union parties during the 4 Yearly Review of Awards.

The Statement reports that 62 Full Benches have been constituted to hear and determine substantive claims relating to modern awards. 32 of these Full Bench matters have been heard and determined, seven Full Benches have reserved their decision and 23 matters are

part heard or have not yet commenced. These totals do not include the numerous additional major Full Bench cases relating to "common issues" such as casual employment, annual leave, domestic violence leave, award flexibility, apprentices, annualised salaries and payment of wages.

A draft provisional timetable for 2019 has been issued to address the 23 Full Bench matters relating to substantive claims by employer or union parties that are part heard or have not yet commenced.

Ai Group is continuing to devote a large amount of resources to the Review, to ensure that the interests of Members are protected. The Review workload will continue to be heavy throughout 2019.

MODERN SLAVERY LEGISLATION

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. The legislation was proclaimed to commence on 1 January 2019.

With regard to the timeframes for reporting, the Australian Government recently issued the following advice:

> "The Act requires reporting entities to prepare annual statements covering the reporting entity's 12-month reporting period. A reporting entity's reporting period means that entity's financial year or other annual 12-month accounting period used by that entity. For example, if a reporting entity operates on an Australian Financial Year, its reporting period will be 1 July to 30 June. If a reporting entity operates on a calendar year, its reporting period will be 1 January to 31 December. Reporting entities operating on other 12-month accounting periods can seek clarification from the Department about their reporting deadlines.
>
> Entities are required to begin reporting on their first full reporting period **after 1 January 2019**. As a result, the first reporting period for entities operating on an Australian Financial Year will be 1 July 2019 to 30 June 2020. Entities operating on an Australian Financial Year do not need to report on the period from 1 July 2018 to 30 June 2019. The first reporting period for entities operating on a calendar year will be 1 January 2020 to 31 December 2020."

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.

ANNUAL LEAVE LOADING AND SUPERANNUATION

In January, Ai Group made a further submission to the Australian Taxation Office (**ATO**) expressing opposition to advice that the ATO is giving that superannuation contributions are payable on annual leave loading unless an employee is demonstrable working overtime on a permanent regular basis. Ai Group's latest submission follows a submission made in October last year on this topic, and a meeting between Ai Group and the ATO in November.

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

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

HAIR AND BEAUTY INDUSTRY PENALTY RATES CASE

Ai Group Workplace Lawyers is representing Hair and Beauty Australia (**HABA**) in the *Hair and Beauty Industry Penalty Rate Case*. The case is listed for hearing before a Full Bench of the FWC over eight days in March.

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.

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.

REDACTION OF WAGE RATES IN ENTERPRISE AGREEMENTS

On 20 December, a Full Bench of the FWC, headed by President Ross, handed down a decision clarifying that there is no power under the *Fair Work Act* for the FWC to redact the wage rates in an enterprise agreement when it is published on the FWC website.

The Full Bench proceedings related to an AWU appeal against a decision of Deputy President Masson to redact the wage rates from the published version of an enterprise agreement applicable to Oji Foodservice Packaging Solutions. The Full Bench overturned DP Masson's redaction decision and published the agreement on the FWC's website without the redaction of the wage rates.

ABANDONMENT OF EMPLOYMENT DECISION

As part of the 4 Yearly Review of Awards, the FWC reviewed the abandonment of employment clauses in those modern awards that contained these clauses, including the *Manufacturing and Associated Industries and Occupations Award 2010*. In a hard-fought case over the past two years, Ai Group was successful in establishing that abandonment of employment constitutes termination of employment by the employee, not the employer.

The Commission's review of abandonment of employment clauses in awards followed the problematic decision of the FWC in *Bienias v Iplex Pipelines* [2017] FWCFB 38. In this decision, a Full Bench of the FWC:

- Appeared to determine that where an employee abandons their employment, termination of employment is at the initiative of the employer; and

- Determined that the abandonment of employment clauses in modern awards are not permitted by the content rules of the *Fair Work Act*.

Ai Group played the leading role in representing the interests of employers in the *4 Yearly Review of Awards – Abandonment of Employment Case*. In the proceedings before a Full Bench of the FWC, Ai Group submitted that:

- Abandonment of employment by an employee constitutes repudiation of the employment contract by the employee; and

- Abandonment of employment constitutes termination of employment at the initiative of the employee, and therefore in such circumstances the employer is not exposed to an unfair dismissal claim and there is no requirement for the employer to give notice of termination to the employee.

The Full Bench accepted Ai Group's arguments and relevantly stated in its decision:

> "[21] "Abandonment of employment" is an expression sometimes used to describe a situation where an employee ceases to attend his or her place of employment without proper excuse or explanation and thereby evinces an unwillingness or inability to substantially perform his or her obligations under the employment contract. This may be termed a renunciation of the employment contract. The test is whether the employee's conduct is such as to convey to a reasonable person in the situation of the employer a renunciation of the employment contract as a whole or the employee's fundamental obligations under it. Renunciation is a species of repudiation which entitles the employer to terminate the employment contract. Although it is the action of the employer in that situation which terminates the employment *contract*, the employment *relationship* is ended by the employee's renunciation of the employment obligations.
>
> [22] Where this occurs, it may have various consequences in terms of the application of provisions of the FW Act. To give three examples, first, because the employer has not terminated the employee's employment, the NES requirement in s 117 for the provision of notice by the employer, or payment in lieu of notice, will not be applicable. Second, if a modern award or enterprise agreement provision made pursuant to s 118 requiring an employee to give notice of the termination of his or her employment applies, a question may arise about compliance with such a provision. Third, if the employee lodges an unfair dismissal application, then the application is liable to be struck out on the ground that there was no termination of the employment relationship at the initiative of the employer and thus no dismissal within the meaning of s 386(1)(a) (unless there is some distinguishing factual circumstance in the matter or the employee can argue that there was a forced resignation under s 386(1)(b))."

The FWC ultimately decided to remove abandonment of employment clauses completely from modern awards.

Ai GROUP SUCCESS IN HEALTH INDUSTRY AWARD CASE

The FWC has accepted an Ai Group proposal to vary the *Nurses Award 2010* and the *Health Professionals and Support Services Award 2010* to give employers and employees more flexibility regarding the taking of meal breaks.

Prior to the award amendments, employees were required to have a meal break within five hours of commencing a shift. The awards now permit an employer and employee to agree that the employee will work up to six hours without a meal break. This flexibility is particularly useful in circumstances where an employee works a 5.5 or 6 hour shift (e.g. a part-time employee who works a pattern of hours that enables the employee to drop off and pick up a child from school).

GRAPHIC ARTS AWARD – CLASSIFICATION AND COMPETENCY STANDARDS CASE

In December, a Full Bench of the FWC reserved its decision following lengthy proceedings relating to the classification structure in the *Graphic Arts, Printing and Publishing Award 2010*. Throughout most of the proceedings the Australian Manufacturing Workers Union sought to change the list of competency standards in the Award that are weighted and linked to the classifications in the Award. The AMWU's proposed variations would have led to significant reclassification and cost risks for employers. The AMWU ultimately dropped its claim in the face of strong opposition from Ai Group.

The proceedings eventually centred upon an Ai Group proposal to remove the link in the award between the compency standards in the Printing and Graphic Arts Training Package and the classifications (and wage rates) in the award. The removal of this link would ensure that the Training Package can be kept up to date without the risk of reclassification claims and large wage increases.

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 20 February 2019. Ai Group has scheduled roundtable discussions of employers in several industries which will be attended by the chair of the inquiry, 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.

The outcomes from the inquiry could have significant implications for a wide range of businesses – not just those operating in the "gig economy". For example, one area that the inquiry is considering is whether the existing common law tests that differentiate between employees and independent contractors are sufficient, given the many "gig economy" businesses that have been established over recent years. Independent contractors are common in numerous industries, including construction, transport and IT.

COINVEST PROPOSALS TO EXPAND PORTABLE LONG SERVICE LEAVE SCHEME

On 7 January, Ai Group wrote to the Hon Tim Pallas MP, the Victorian Treasurer and Minister for Industrial Relations, expressing strong opposition to a proposal by CoINVEST – the administrator of the construction industry portable long service leave scheme – to expand the coverage of the scheme.

CoINVEST has sought the approval of the Victorian Government to expand the coverage of the scheme in the following two areas:

- Electrical work carried out in factories; and
- Maintenance work on rolling stock.

The coverage changes proposed by CoINVEST would have a major adverse impact on the manufacturing and maintenance contracting industries and impose significant cost increases on numerous Ai Group Members due to the 2.7% payroll levy that would be payable for a large number of workers who are not currently covered by the portable long service leave scheme. The workers concerned currently receive long service leave entitlements through the National Employment Standards in the *Fair Work Act 2009* or through the Victorian *Long Service Leave Act 2018*.

Ai Group will continue to vigorously oppose CoINVEST's proposal to expand the coverage of the scheme.

ACT SECURE LOCAL JOBS CODE NOW IN FORCE

The ACT Government's Secure Local Jobs Code commenced operating in the Australian Capital Territory on 15 January 2019. The Code utilises the purchasing power of the ACT Government to require contractors to comply with Code provisions in areas which include pay, employment conditions, insurance, tax, superannuation, health and safety, training, inductions, collective bargaining, freedom of association and representation rights.

From 15 January 2019, businesses tendering for ACT Government work in construction, cleaning, security services or traffic management need to comply with the provisions of the ACT Code and have a Secure Local Jobs Code Certificate. They also need to complete a Labour Relations, Training and Workplace Equity Plan if the value of work is more than $25,000. The plan includes information on how they will comply with the Code and how they support workers' employment security, health, wellbeing, diversity and career development.

Businesses will need a Code Certificate before they tender and for the duration of the project. To obtain a Certificate, a business must engage an approved auditor to prepare a report assessing the company's (as well as any associated entities') compliance with its industrial obligations under prescribed legislation referred to in the ACT Code. The report must be submitted to the Secure Local Jobs Registrar for consideration. ACT Procurement has indicated that the Registrar can issue Code Certification within two business days after receipt of a complete and compliant application.

Ai Group and the Australian Government have identified various potential conflicts between the obligations that building industry contractors may have under the ACT Code and obligations they may have under the Commonwealth *Code for the Tendering and Performance of Building Work 2016.* Affected businesses are able to apply for an exemption from conflicting aspects of the ACT Code. Members can contact Ai Group for advice on this.

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 preparing evidence for major cases in the Fair Work Commission (FWC) and Courts;
- Representing Members' collective interests in modern award cases and reviews;
- Representing Ai Group Members collective interests in significant cases in the FWC and Courts;
- Representing individual Ai Group Members in cases of significant importance in the FWC and Courts;
- 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 policy 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;
- Carrying out research; 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.

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