

SIGNIFICANT WORKPLACE RELATIONS ISSUES



9 June 2015

FULL FEDERAL COURT RESERVES JUDGMENT IN AURIZON CASE

After a hearing on 21 May, the Full Federal Court (Jessup, Tracey and Reeves JJ) reserved its judgment in respect of the Rail, Tram and Bus Union's application to overturn an FWC decision to terminate 12 enterprise agreements applicable to rail operator Aurizon.

In its 22 April 2015 decision, the FWC Full Bench established some new principles which arguably 'lower the bar' for employers wishing to terminate an expired enterprise agreement. In the past, the FWC has adopted an approach which has made it extremely difficult to terminate an agreement without the consent of the employees and the relevant union/s. The FWC decision followed lengthy Commission proceedings with extensive evidence.

COSTLY CLAIMS BY THE COAL INDUSTRY LONG SERVICE LEAVE CORPORATION

The Coal Mining Industry (Long Service Leave Funding) Corporation (Coal LSL Corporation) is pursuing costly claims against a large number of employers, including Ai Group Members, which provide maintenance services to clients in the coal mining industry.

The Coal LSL Corporation is the administrator of the coal mining industry portable long service leave scheme (Coal LSL Scheme). Under this scheme, a 2.7% Levy is payable by employers on "eligible wages" of employees "in the black coal mining industry". There is significant scope for argument about the meaning of the phrase "in the black coal mining industry" which appears in the definition of "eligible employee" in the *Coal Mining Industry (Long Service Leave) Administration Act 1992*.

At a meeting between Ai Group and the Coal LSL Corporation on 12 May, which was scheduled at the request of the Corporation, the Corporation advised that:

- It has received claims from 6,600 employees for their service to be recognised under the Coal LSL Scheme;
- Of the above claims, 3,500 employees' claims have been accepted by the Corporation, and a further 1,250 employees' claims have not yet been assessed;
- The Corporation has identified 900 companies which are not currently paying the 2.7% Levy and which employ workers whose service has been recognised by the Corporation.

The Coal LSL Corporation has advised of its intention to write to the 900 companies (in batches over the coming period) and to give each company the opportunity to provide information about the Corporation's claims against the company. In most cases, back-payment of the Levy will be sought by the Corporation from at least 1 January 2010 and in some cases from an earlier date.

Clearly, a large number of companies are facing very costly back-pay claims. The implications for the companies extend beyond potential liability to pay the LSL Levy. The coverage of the Coal LSL Scheme is based on the coverage of the *Black Coal Mining Industry Award 2010* which includes a 35 hour week, paid meal breaks, 5-6 weeks of annual leave, 15 days per year of personal / carer's leave, generous redundancy entitlements, generous accident pay entitlements, and other costly provisions.

Ai Group and Ai Group Workplace Lawyers are providing detailed assistance to companies regarding this matter. Ai Group has had success in some recent FWC cases in arguing that the employees of a major maintenance contracting firm are not engaged "in the black coal mining industry".

Also, Ai Group is continuing to stress to the Federal Government the pressing need to make a Regulation to clarify the scope of the Coal LSL Scheme and to protect employers which provide contracting and other services to clients in the coal mining industry. Many of these employers are covered by the *Manufacturing and Associated Industries and Occupations Award 2010* and other relevant awards and, in Ai Group's view, are not legitimately covered under the *Black Coal Mining Industry Award 2010* or the Coal LSL Scheme. Ai Group has made a detailed submission to the Government in support of the proposed Regulation.

Further, Ai Group has established a Reference Group of some Ai Group Members with substantial involvement in providing maintenance services to client companies in the coal industry. The Reference Group is monitoring developments and assisting Ai Group to formulate positions and strategies regarding this matter to protect the interests of employers.

COSTLY CLAIMS BY COINVEST

Ai Group is continuing to strongly oppose attempts by CoINVEST – the administrator of the Victorian construction industry long service leave scheme - to expand the coverage of the scheme through expansive interpretations of the coverage Rules.

CoINVEST has taken court action against a number of Ai Group members in the manufacturing and labour hire industries for payment of the 2.7% levy, including several years of back-pay. At least one Ai Group Member has been driven into insolvency as a direct result of CoINVEST's litigation.

Areas which have been the subject of recent CoINVEST claims include:

- Mechanical service work carried out by manufacturers;
- Electrical service work carried out by manufacturers;
- Electrical assembly work in factories; and
- The provision of labour hire workers to manufacturers

Throughout the term of the previous Victorian Coalition Government, Ai Group vigorously pressed the Government to amend the coverage Rules through amendments to the relevant legislation. The Government convened a series of roundtable discussions of employer groups to discuss the issues but time ran out for legislative changes before the State Election. Ai Group is continuing to press the issues with the current Victorian Labor Government.

The outcome of the *Baytech Trades v Coinvest* Victorian Supreme Court case (see article below) will be very important in clarifying the existing coverage of the scheme.

In addition, a Victorian Parliamentary inquiry is underway into portable long service leave schemes (see article below).

COINVEST V BAYTECH TRADES CASE

On 3 June 2015, the *Coinvest v Baytech Trades* case was heard by the Full Bench of the Supreme Court of Victoria. Ai Group Workplace Lawyers, Mr Stuart Wood QC and Mr Ben Jellis of Counsel represented Baytech in this important case about the breadth of coverage of the Victorian construction industry portable long service leave scheme and the requirement to pay the 2.7% levy under the scheme.