2017

EMPLOYMENT, LABOUR & SAFETY:
MID-YEAR REVIEW

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In this Mid-Year Review, we examine the major legislative and policy developments, significant court and tribunal decisions, and key work health and safety (WHS) issues that have arisen over the last 12 months.

We also look ahead to what we see as the 'Top 5' employment, labour and safety issues that will be confronting Australian businesses in 2017-18 and beyond.

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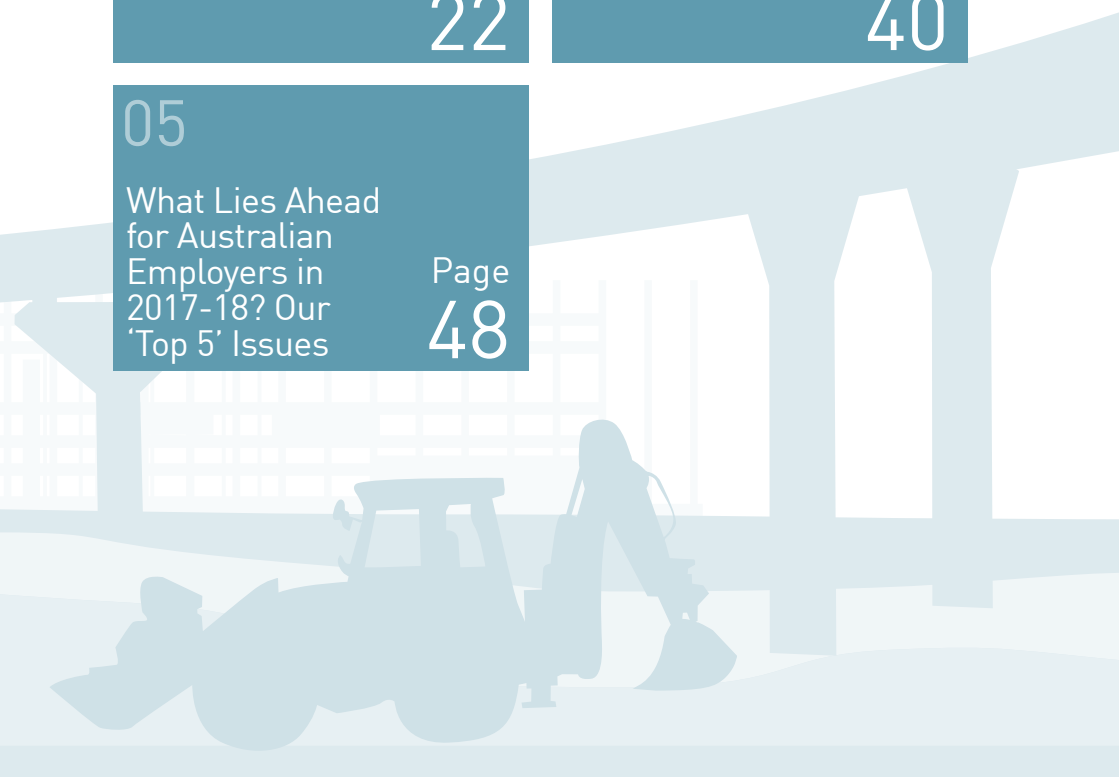


1 Introduction

In our fourth annual review of Australian employment, labour and safety law, we highlight the key legislative and policy developments that have occurred over the last 12 months, and also examine a number of major court and tribunal decisions.

In 2016-17, the five most significant developments were:

1. The Turnbull Government's re-election and its success in having the double dissolution election trigger bills passed by Parliament in late 2016. After three years of trying, the Government finally implemented its proposals to:

    - 'restore the rule of law' in the building industry through stronger enforcement measures and a revamped construction code; and
    - establish a new regulator and higher standards of accountability for trade unions.

    The Government then introduced legislation into Parliament in March 2017, to implement further recommendations of the 2015 Heydon Royal Commission on Trade Union Governance and Corruption. The Fair Work Amendment (Corrupting Benefits) Act 2017 aims to stamp out so-called 'corrupting benefits': payments by an employer to a union (or union official) which are intended to improperly influence the latter, and which (the Royal Commission found) have often been made in the context of bargaining for a new enterprise agreement.

2. The decision by the Fair Work Commission (FWC) in February 2017 to reduce Sunday and public holiday penalty rates in awards covering the fast food, restaurants, hospitality, clubs, pharmacies and retail sectors. As well as representing a major shift in the FWC's position, reflecting the changing nature of the '24/7' services economy, the decision is important because it has focused the 'battlelines' in the debate over further workplace reform. While business groups welcomed the reduction, the union movement and Labor Opposition have used the FWC's decision to harden their political campaigning to oppose the changes.

3. The continuing focus on exploitation of vulnerable workers, with ongoing revelations of systemic underpayment and other workplace law breaches in the supply chains of several major Australian corporations. This has triggered a range of regulatory responses, including:

    - an increased focus on compliance in labour contracting structures and supply chains on the part of the Fair Work Ombudsman (FWO);
    - the Coalition Government's proposed legislation to increase the liability of franchisors and parent companies for workplace contraventions, significantly raise penalties and enhance the FWO's investigatory powers; and
    - proposals emerging at state level to introduce licensing schemes for labour hire providers, with stringent standards attached to the issuing and renewal of licences in Queensland, Victoria and South Australia.

4. The disputes that have arisen where new servicing and maintenance contracts have been engaged on enterprise agreements that have corrected market rates in industries under pressure. For example, the dispute at Viva Energy, Geelong and the dispute at the Abbotsford manufacturing plant of Carlton and United Breweries (CUB) in the second half of 2016.

   Programmed invited employees of the former contractor to apply for their positions on substantially reduced wage rates. Programmed had entered into an enterprise agreement in Western Australia which had a very broad scope/coverage clause which enabled it to be applied to employees in other parts of Programmed's business (including the CUB Abbotsford plant).

   The unions have reacted very aggressively to this approach. The CUB dispute led to many months of union picketing at the site, and a consumer boycott of CUB products before the maintenance workers returned to work in December 2016 under a new enterprise agreement. Subsequently, there has been established a Senate Committee Inquiry into the making of agreements by employers with small numbers of employees, to impose the agreement on a larger group of employees.[1] The unions have described this approach as a strategy of 'corporate avoidance' of federal workplace laws.

5. The ongoing growth of the 'gig economy' and the challenges this continues to present to traditional systems of employment regulation, both in Australia and globally. In what was described as 'the case of the year' in employment law,[2] a UK Employment Tribunal determined in October 2016 that two Uber drivers were 'workers' for the purposes of laws regulating working time and the minimum wage.[3] Uber's appeal against that ruling will be heard later this year.

   While these kinds of test cases have not yet been initiated in Australia, the rapid expansion of platforms like Airtasker and those in the food delivery sector are attracting considerable attention from the union movement.

1. This approach has been endorsed by the Full Federal Court in *CFMEU v John Holland Pty Ltd* (2015) 228 FCR 297 and subsequent case law.
2. See e.g. Hilary Osborne, 'Uber faces court battle with drivers over employment status', *The Guardian*, 20 July 2016.
3. *Aslam and Farrar v Uber B.V., Uber London Ltd and Uber Britannia Ltd* (Case Nos. 2202550/2015, 28 October 2016).

2 Legislation & Policy

The re-election of the Coalition Government on 2 July 2016 saw the Prime Minister pressing ahead quickly with two key workplace reform measures: legislation to re-establish the Australian Building and Construction Commission (ABCC) and legislation to increase regulation of trade unions. Having called the double dissolution election on the basis of these two issues, the Government then had the possibility of calling a joint sitting of Parliament if the Senate continued to reject these bills.

In the end, that did not prove to be necessary. By the end of 2016, the Government had secured passage of both bills, with support in the Senate from the Nick Xenophon Team (NXT), One Nation and several independents. Parliament also passed the Government's legislation aimed at resolving Victoria's Country Fire Authority (CFA) dispute.

Legislation seeking to implement the Coalition's policy to increase protections for vulnerable workers was introduced into Parliament in early 2017, along with a further bill in response to the Trade Unions Royal Commission (TURC) and an omnibus bill proposing various changes to the *Fair Work Act 2009* (Cth) (FW Act).

Construction Industry Legislation and Code

With effect from 2 December 2016, the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth) (BCIIP Act) replaced the *Fair Work (Building Industry) Act 2012* (Cth). The BCIIP Act re-established the Howard-era construction industry regulator, the ABCC, in order to restore the rule of law in this industrially volatile sector. The legislation also introduced new prohibitions on unlawful industrial action and unlawful picketing in respect of building work, backed up by substantial civil penalties.[4]

To obtain the support of key senators for the BCIIP Act, however, the Government had to compromise on a number of elements of its original proposals for workplace reform in the building industry. For example, the Government agreed to the retention of administrative law oversight of the ABCC's exercise of its compulsory evidence-gathering powers, and to an amendment requiring the regulator to 'act in a reasonable and proportionate manner' in carrying out investigatory and enforcement activity under the legislation.[5]

4. See: http://www.corrs.com.au/publications/corrs-in-brief/what-the-return-of-the-abcc-means-for-you/
5. See: http://www.corrs.com.au/publications/corrs-in-brief/senate-passes-the-abcc-bill-the-abcc-is-back-in-business/

The Government also had to compromise on its plans to implement a stringent new federal building code, which establishes procurement rules for companies that wish to be eligible and tender for Commonwealth funded projects. The *Code for the Tendering and Performance of Building Work 2016* (2016 Code) was implemented with effect from 2 December 2016, and includes prohibitions on enterprise agreement clauses which impede workplace efficiency or provide various rights to construction industry unions.[6]

The Government had proposed that these new limitations would apply to enterprise agreements made from 24 April 2014. In order to obtain Senate passage of the BCIIP Act, the Government agreed to allow building companies which had entered into non-compliant enterprise agreements a two-year period to negotiate new deals that complied with the 2016 Code. Those companies would remain eligible to bid for federally funded building work during this interim period.

Over the summer break, though, the Government reached a new agreement with Senator Hinch to significantly reduce the two-year 'grace period'. In February 2017, Parliament passed the *Building and Construction Industry (Improving Productivity) Amendment Act 2017* (Cth).

This legislation requires that by 1 September 2017, building companies must be fully compliant with the 2016 Code. Before that date, they may tender for Commonwealth funded work without a code-compliant agreement (but may not be awarded the work until their agreement complies).[7]

The changes to the regulation of the construction industry has led to a challenging year for employers — particularly where the construction unions have been reluctant to renegotiate code compliant agreements. The unions have been especially difficult in some states.

6. See: http://www.corrs.com.au/publications/corrs-in-brief/what-the-return-of-the-abcc-means-for-you/; http://www.corrs.com.au/assets/publications/WPR-Building-Code-Fact-Sheet-2.pdf; and http://www.corrs.com.au/assets/publications/WPR-Building-Code-Fact-Sheet-3.pdf
7. See: http://www.corrs.com.au/publications/corrs-in-brief/how-the-recent-amendments-to-building-and-construction-industry-legislation-and-code-will-affect-you/; and, on the complex transitional rules accompanying these changes, see: http://www.corrs.com.au/assets/publications/WPR-Building-Code-Fact-Sheet-1.pdf

Legislation Implementing the TURC Recommendations

The *Fair Work (Registered Organisations) Amendment Act 2016* (Cth) (FWROA Act) implemented various changes to enhance the framework of regulation for registered unions and employer associations under the *Fair Work (Registered Organisations) Act 2009* (Cth). These amendments were first proposed by the Coalition in 2013, and were subsequently endorsed in the TURC Final Report in 2015. Reform of this regulatory framework has been necessitated by the widespread corruption and financial mismanagement identified by TURC in the Health Services Union, National Union of Workers (NSW) Branch and the Australian Workers Union (among others).

Under the FWROA Act, a new regulatory agency – the Registered Organisations Commission (ROC) – was established and commenced operating on 1 May 2017. The ROC exercises most of the powers in relation to oversight of unions and employer associations formerly carried out by the Office of General Manager in the FWC. The legislation also imposed more onerous disclosure requirements on officials of registered organisations in respect of related party transactions, material personal interests and remuneration levels. Civil penalties for breaches of union officers' statutory duties were significantly increased, and criminal liability was introduced for serious contraventions of these obligations.[8]

To obtain passage of the FWROA Act in the Senate, the Government agreed to amendments providing greater protections for union whistleblowers – and to have these protections extended to corporate and public sector whistleblowers before 30 June 2018.[9]

In March, the Coalition introduced the *Fair Work Amendment (Corrupting Benefits) Bill 2017* (Corrupting Benefits Bill) into Parliament, seeking to implement several other TURC recommendations.[10]

- The proposals in this legislation are intended to prevent unions and employers from entering into 'secret deals' under which unions obtain benefits (such as workplace access to employees) while the terms and conditions under the agreement are compromised.
- The legislation creates new criminal offences under the FW Act relating to:
    - the giving or receiving of a benefit intended to influence a union official or employee to perform their functions improperly or to gain an illegitimate advantage; and

8. See: http://www.corrs.com.au/publications/corrs-in-brief/registered-organisations-bill-passed-into-law-with-unexpected-whistleblower-protections/
9. See: http://www.corrs.com.au/thinking/insights/what-could-the-new-whistleblower-regime-look-like-and-how-will-it-affect-your-organisation/; and: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections/Terms_of_Reference
10. See: http://www.corrs.com.au/publications/corrs-in-brief/government-responds-to-trade-unions-royal-commission-with-the-corrupting-benefits-bill-2017/

- the provision of a cash or in kind benefit by an employer to a union (and the receipt of such a benefit).

- In addition, new disclosure obligations apply to employers and unions when informing employees before they vote on a proposed enterprise agreement. In that context, any terms of an agreement through which a union will obtain a financial benefit, directly or indirectly, must be disclosed to employees.

The Senate, Education and Employment Legislation Committee recommended passage of the Corrupting Benefits Bill (with an amendment to clarify that certain benefits provided by employers/employer associations to unions would not be caught by the new offences).[11] The Bill was passed by Parliament in early August 2017.

Further legislation followed, implementing the Coalition's 2016 election policy which included commitments to give the courts power to ban union officials from holding office where they repeatedly break the law, and place unions into administration or deregister them if they become dysfunctional or are no longer serving their members' interests.[12]

- Following a CFMEU protest rally in Melbourne on 20 June 2017, where disparaging comments were made about ABCC inspectors, the Government indicated in Parliament on 22 June that it would 'fast-track' legislation making it easier to deregister dysfunctional unions – and disqualifying union officials from holding office if they are not fit and proper persons.[13]

- The *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017* was introduced into Parliament on 16 August 2017.

Although union membership in Australia is at an all-time low, the Turnbull Government is intent on tackling union power where it remains, particularly in the construction industry. The Coalition has also now introduced legislation intended to prevent a proposed merger between the CFMEU and the equally militant Maritime Union of Australia.

11. Senate Education and Employment Legislation Committee, *Report on the Fair Work Amendment (Corrupting Benefits) Bill 2017.*
12. Liberal and National Parties, *The Coalition's Commitment to Fairness and Transparency in Workplaces* (June 2016).
13. 'Government laws to lower threshold for union registration', *Australian Financial Review*, 22 June 2017.

CFA Legislation

The *Fair Work Amendment (Respect for Emergency Services Volunteers) Act 2016* (Cth) was the Turnbull Government's response to the long-running bargaining dispute between the Victorian Labor Government and the United Firefighters' Union (UFU). Negotiations for a new CFA agreement began in March 2013 under the previous Liberal Government. After the Andrews Labor Government moved to conclude a deal with the UFU in mid-2016, the federal Coalition promised (during the 2016 election campaign) to intervene in support of volunteer firefighters who opposed the CFA-UFU agreement.

The resulting legislation was passed with effect from 14 October 2016, and provides that an enterprise agreement with certain 'objectionable emergency management terms' cannot be approved by the FWC. For example, an agreement could not include terms that restrict or limit an emergency management body's ability to deploy or manage volunteers, or provide them with support or agreement.

More recently, the State Government has sought to restructure Victoria's fire services through legislation (currently before Parliament) which would establish a new body to replace the Metropolitan Fire Brigade, Fire Services Victoria, and retain the CFA as a volunteer-only force.[14]

Vulnerable Workers Bill

Revelations of systemic breaches of workplace laws in a number of major franchise businesses, including the widely reported underpayments at 7-Eleven, have generated significant public concern in the past two years. They have also prompted calls for Australia's workplace laws to be amended to increase the responsibility of franchisors to monitor and take action in relation to activities occurring within their business networks.

In March of this year, the Turnbull Government introduced the *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* (Vulnerable Workers Bill) into Parliament.[15] This legislation implements the Coalition's 2016 election policy to address underpayments and other forms of exploitation identified in investigations by the FWC and various parliamentary committees. The most significant changes include:

- The introduction of higher civil penalties for 'serious contraventions' of prescribed workplace laws (e.g. underpayment of award wages), to address concerns that civil penalties under the FW Act are currently too low to effectively deter employers who exploit vulnerable workers. The maximum penalties for serious contraventions will be $540,000 for corporations and $108,000 for individuals.

14. *Firefighters' Presumptive Rights Compensation and Fire Services Legislation Amendment (Reform) Bill 2017.*
15. See: http://www.corrs.com.au/publications/corrs-in-brief/new-liabilities-and-higher-penalties-on-the-way-for-franchisors-and-others-under-the-vulnerable-workers-bill/

- An increase of the applicable penalties for provisions relating to the failure by employers to maintain accurate employee records and payslips.
- An express prohibition on 'cash-back' arrangements through which employers unreasonably require their employees to make certain payments to the employer.
- A strengthening of the evidence-gathering powers of the FWO and the introduction of new offences for hindering or obstructing investigations, or providing false or misleading information to the regulator.
- Amendments to make franchisors and holding companies responsible for contraventions of certain workplace laws by their franchisees or subsidiaries, where they knew or ought reasonably to have known of the contraventions and failed to take reasonable steps to prevent them. It would also need to be shown that a franchisor had a significant degree of control over the affairs of its franchisees, and that the business of franchisees is substantially associated with the intellectual property of the franchise (see below and diagram on page 15).

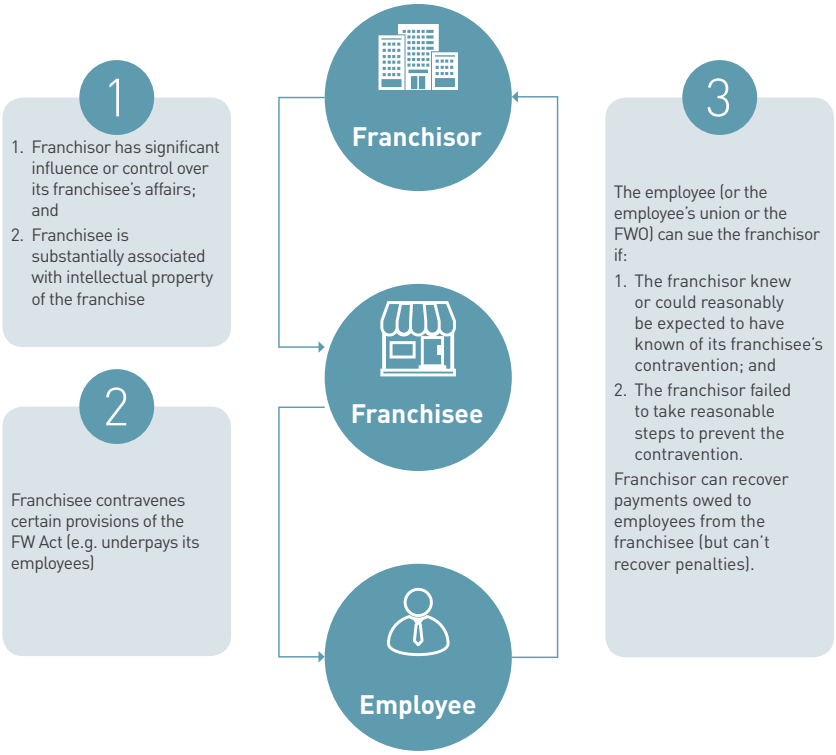
The proposals in the Vulnerable Workers Bill relating to franchisors are especially significant because currently, franchisors are only liable for franchisee breaches of awards and the FW Act where they are accessories to the contravention. Under the Bill, the bar of liability will be lowered, and franchisors will be exposed to penalties where they *could reasonably be expected to have known of the breach.*

In considering whether reasonable steps have been taken by a franchisor, a court will be able to consider factors such as:

- the extent to which the franchisor has the ability to influence or control the franchisee's conduct;
- any action taken by the franchisor to ensure that the franchisee had a reasonable understanding of its obligations under the FW Act; and
- the franchisor's arrangements for assessing the franchisee's compliance with workplace laws.

These new provisions would significantly add to the current media and brand risks faced by franchisors in dealing with non-compliance by franchisees. The Vulnerable Workers Bill will impose higher legal risks, therefore creating incentives for franchisors to develop a best practice approach within their franchise network.

WHEN WOULD FRANCHISORS BE LIABLE UNDER THE VULNERABLE WORKERS BILL?



The Vulnerable Workers Bill received bipartisan support from a Senate Committee.[16]

However, intense lobbying by the franchise sector and amendments proposed by two cross-bench senators may lead to some dilution of the franchisor liability provisions in the Bill.

Miscellaneous Bill

Also in March of this year, the Government introduced the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017* into Parliament, which addresses two recommendations of the Productivity Commission's 2015 Workplace Relations Review. The Bill proposes to:

16. Senate Education and Employment Legislation Committee, *Report on the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017.*

- Repeal, from 1 January 2018, the FW Act requirement that the FWC carry out reviews of all modern awards every four years. This is because the 4-yearly review process has placed substantial demands on all industrial relations parties, and has also proven to be very resource-intensive for the FWC. Instead, under the Bill, new provisions would apply to enable changes to a modern award to be sought by parties and made by the FWC, based on social and economic necessity. These changes would allow the 2014 review to be completed, but the next review scheduled for 2018 would not proceed.
- Allow the FWC to overlook minor procedural or technical errors that are not likely to have resulted in any disadvantage to employees when approving an enterprise agreement. For example, where technical errors have been made in the content of the Notice of Representational Rights (NERR) which must be issued to employees at the commencement of bargaining, this should not prevent the ultimate approval of an agreement by the FWC (if the defect in the NERR had no relevant effect on the information being communicated to employees). This is intended to overcome the effect of numerous FWC and court decisions in which defective NERRs (or other technical problems in the agreement-making process) have led to non-approval of agreements and the parties having to re-commence the bargaining process.[17]

A Senate Committee report endorsed this Bill, especially its proposed fix for NERRs along with a proposal by the FWC to back-date that change.[18] This would enable the Commission to correct NERR defects in respect of agreements which have already been lodged with it for approval.

Changes to the Skilled Migration Program

On 18 April 2017, the Turnbull Government announced its intention to abolish the Subclass 457 visa and to replace it with two new Temporary Skill Shortage visas from March 2018.[19] The changes affect current 457 visa applicants, prospective applicants and businesses thinking of sponsoring skilled migrants. Existing 457 visas will remain in effect: the approximately 95,000 457 visa-holders currently in Australia may continue to work under the conditions of that visa.

17. See e.g. *Uniline Australia Limited* [2016] FWCFB 4969; *MUA v MMA Offshore Logistics Pty Ltd t/a MMA Offshore Logistics and Others* [2017] FWCFB 660; and other cases discussed in: http://www.corrs.com.au/publications/corrs-in-brief/fwc-enterprise-bargaining-requires-employers-to-enter-into-the-theatre-of-the-absurd/ and http://www.corrs.com.au/publications/corrs-in-brief/representation-notices-get-them-right-or-start-bargaining-all-over-again/
18. Senate Education and Employment Legislation Committee, *Report on the Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017.*
19. See: http://www.border.gov.au/Trav/Work/457-abolition-replacement; http://www.border.gov.au/WorkinginAustralia/Documents/abolition-replacement-457.pdf; and http://www.border.gov.au/WorkinginAustralia/Documents/reforms-australia-permanent-employer-sponsored-migration-programme.pdf

Eligible occupation lists reduced

The lists of occupations eligible for a skilled migration visa, including the Subclass 457 visa, were significantly reduced with effect from 19 April 2017. Overall, 216 occupations were removed from the lists, reducing the total number of eligible occupations from 651 to 435. Commonly utilised occupations for 457 visas now removed from the lists include Human Resources Adviser, Production Manager (Manufacturing), Web Developer, Training and Development Professional and Sales Representatives (Industrial Products).[20] Further changes affecting the Subclass 457 visa, including the occupation lists and English language requirements, are being introduced between 1 July and 31 December 2017.

New Temporary Skill Shortage Visas from March 2018

The new Temporary Skill Shortage visas will be comprised of:

- a short-term visa that can be issued for two years, with the ability to be extended for a further two years; and
- a medium-term visa that can be issued for up to four years, but only in relation to a narrower range of 'high skill' and 'critical need' occupations.

Stricter eligibility criteria will apply when the new short-term and medium-term Temporary Skill Shortage visas come into effect in March 2018. In particular:

- applicants will need to demonstrate at least two years' relevant work experience in their nominated occupation before they are eligible for a visa;
- applicants will need to pass an International English Language Testing System (IELTS) test and obtain an overall score of 5 with a minimum of 4.5 in each test component (for a short-term visa) or a minimum score of 5 in each test component (for a medium-term visa);
- eligibility will be subject to mandatory labour market testing, unless an international obligation applies;
- employers will be required to pay applicants at or above the Australian market salary rate for the relevant occupation, and meet the Temporary Skilled Migration Income Threshold (currently set at $53,900);
- applicants will be required to provide mandatory penal clearance certificates as part of their criminal history checks;
- a non-discriminatory workforce test will apply to ensure that employers are not actively discriminating against Australian workers; and
- training requirements for employers will be strengthened to ensure that they contribute towards training Australian workers.

20. See: http://www.border.gov.au/Trav/Work/Work/Skills-assessment-and-assessing-authorities/skilled-occupations-lists

Further Workplace Reform

Just prior to the 2016 election, the Coalition Government indicated that it would not be seeking any mandate to implement recommendations of the 2015 final report of the Productivity Commission (PC) review of the workplace relations framework. In the report, the PC had made a number of reform proposals, including:

- a revamp of the FWC (splitting off its award and minimum wage-setting functions to a separate new agency);
- the introduction of the 'enterprise contract' (a new industrial instrument to enable small-medium businesses to access enterprise bargaining); and
- a process for reducing penalty rates for weekend work in the hospitality, entertainment, retail, restaurant and café sectors.[21]

The last of these proposals was largely overtaken, in any case, by the FWC's landmark decision in February 2017 to reduce award penalty rates in those sectors.[22]

In the 2017 Federal Budget, the Government indicated it would no longer be seeking to restrict access to the federal Paid Parental Leave (PPL) Scheme, something it had been seeking to legislate since 2015.[23] The proposed changes would have limited eligibility for payments under the federal PPL Scheme, where an employee also obtains parental leave payments under an employer-provided scheme. The Government's announcement removed considerable uncertainty for employers, who may continue to offer their employees 'top-ups' on the basic entitlement under the PPL Scheme to 18 weeks' paid leave at the minimum wage.

Employer Priorities

Over the past year, business groups such as the Australian Mines and Metals Association (AMMA) and Australian Industry Group have continued to push for the Government to implement the PC's recommendations. AMMA is concerned at the 'over-bureaucratic and complex' system of enterprise bargaining, with employers simply seeking to roll-over existing agreements without industrial action – rather than obtaining genuine productivity outcomes through bargaining.[24]

The Business Council of Australia shares these concerns about enterprise bargaining. It has also highlighted the inclusion of provisions in enterprise agreements which constrain managerial decisions, and the FWC's application of the better off overall test, refusing to approve agreements that benefit the vast

21. See: http://www.corrs.com.au/publications/corrs-in-brief/reports-of-the-productivity-commission-and-trade-unions-royal-commission-will-set-the-workplace-reform-agenda-in-2016/
22. *4-Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001; see the section on 2016-17 Court and Tribunal decisions beginning on page 22.
23. See, most recently, *Social Services Legislation (Omnibus Savings and Child Care Reform) Bill 2017*. For background see: http://www.corrs.com.au/publications/corrs-in-brief/managing-uncertainty-update-on-proposed-changes-to-paid-parental-leave/.
24. David Marin-Guzman, 'Turnbull government under pressure to respond to workplace relations inquiry', *Australian Financial Review*, 15 January 2017.

majority of employees because some employees are disadvantaged (such as last year's decision relating to Coles Supermarkets).[25]

ALP and Unions' Agenda

The FWC's decision to reduce award penalty rates triggered intense political campaigning by the Australian Council of Trade Unions (ACTU), which has sharpened its focus under new Secretary, Sally McManus. The ACTU wants to see changes to the FW Act to enable workers and unions to bargain, not just at the enterprise level, but also across industries, supply chains and other corporate structures such as franchises.[26]

The Labor Opposition lined up with the ACTU in vigorous opposition to the penalty rate cuts, introducing a Bill to overturn the effect of the FWC's decision and to ensure that awards cannot be varied in future to reduce take-home pay.[27] The Bill was passed by the Senate in late March 2017, and is now before the House of Representatives. In late June, a Labor amendment to the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017*, which would also have overridden the FWC penalty rates decision, was narrowly defeated. Coalition Government member George Christensen crossed the floor to vote with Labor on that amendment.[28]

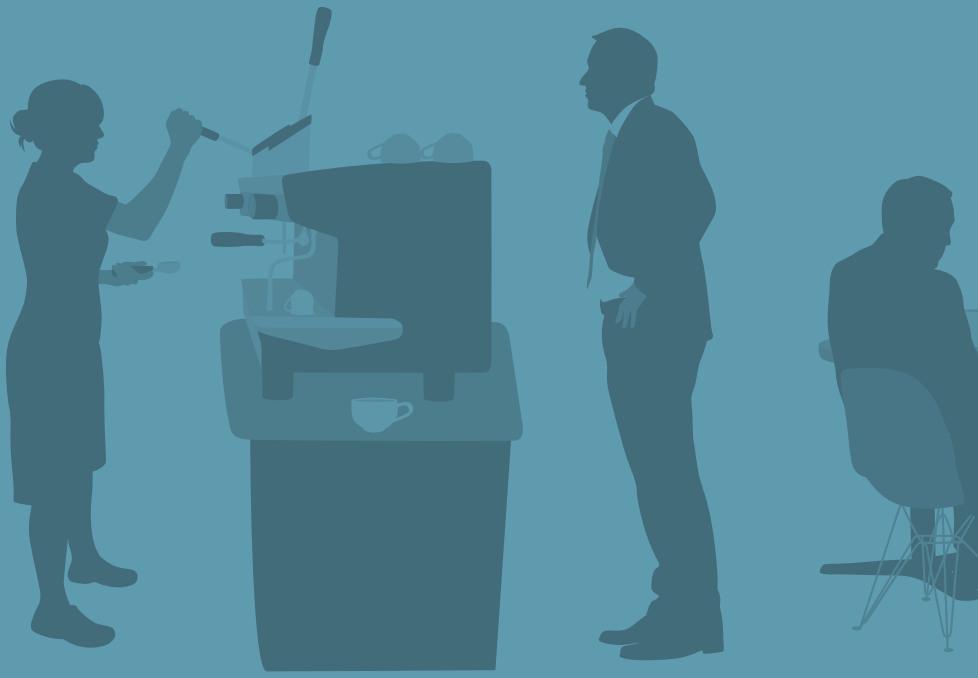
Unions and the ALP also sought to use the Senate Inquiry into Corporate Avoidance of the FW Act to highlight various features of the current system, which (they argue) enable employers to reduce wages and other entitlements. In particular, they highlighted:

- increasing attempts by employers to seek termination of 'in term' enterprise agreements on public interest grounds (the Department of Employment's submission to the Inquiry confirms that the number of agreement termination applications has risen, along with the FWC's willingness to grant those applications – to allow termination particularly of small, union agreements in construction and manufacturing[29]); and
- the approval of enterprise agreements by small employee cohorts based closely on minimum award standards.

In its submission to the Senate Committee, the Department of Employment made the point that the use of these various strategies by employers does not constitute 'avoidance' of the FW Act, but rather the exercise of rights provided under that legislation or other laws.

25. Jennifer Westacott, 'Enterprise bargaining on brink of failure', *Australian Financial Review*, 1 February 2017. On the decision in *Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Ltd* [2016] FWCFB 2887 (31 May 2016), see: http://www.corrs.com.au/publications/corrs-in-brief/the-coles-agreement-decision-and-what-it-means-for-enterprise-bargaining/
26. 'Wages fix about bargaining "where the power is": ACTU', *Workplace Express*, 7 June 2017.
27. *Fair Work Amendment (Protecting Take-Home Pay) Bill 2017.*
28. 'Opposition to penalty rates cut moving inexorably to the courts', *Workplace Express*, 21 June 2017.
29. 'Government data shows big rise in agreement terminations', *Workplace Express*, 3 February 2017.

Despite its success in obtaining passage of key workplace reform bills over the last 12 months, the Turnbull Government's program for further legislative change is quite limited. It seems unlikely that the Coalition Government will satisfy business demands by focusing on the Productivity Commission's 2015 reform recommendations. In the meantime, the union movement is occupying much of the public debate with its position regarding employees' conditions (such as penalty rates) and proposals to re-orient the workplace relations framework to address the challenges on workers from the new economy.



3 Major Court and Tribunal Decisions

The Full Court upheld (by a 2:1 majority) an earlier decision ordering the Maritime Union of Australia to pay $120,000 in compensation to five workers who were the subject of a derogatory workplace poster describing them as 'scabs'.

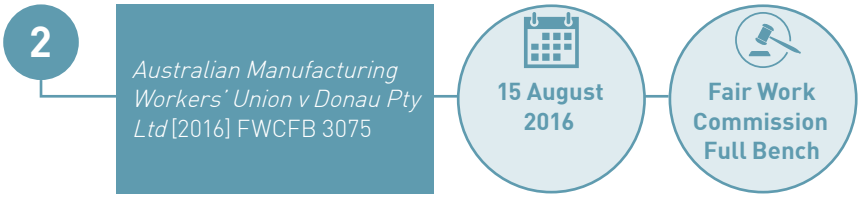
The union had disseminated the poster in the context of enterprise agreement negotiations with the Fremantle Port Authority, and the taking of industrial action in support of its bargaining claims. Several employees voted against the union's proposed industrial action, and a number of them resigned from the union then continued to work when the strike took place. As a result, the strike did not shut down the port's operation as the union intended.

The union subsequently posted material at several locations around the port, naming the individuals who had worked through the strike and describing them as 'scabs' using highly critical language. It was found, at first instance, that this conduct on the union's part constituted unlawful adverse action against the relevant workers in breach of section 346(c) of the FW Act, on the prohibited ground of their exercise of the right not to engage in industrial activity.

On appeal, the Full Court majority agreed that the conduct prejudiced the non-striking workers in their employment (adopting a broad view of what constitutes 'employment'). The union's posting of the material severely diminished the standing of the targets with their fellow employees, as well as engendering fear for their own personal safety and that of their families/property. Further, the compensation amounts awarded were not manifestly excessive.

This ruling is consistent with several other decisions in which it has been determined, in various statutory contexts, that use of the term 'scab' is no longer acceptable in the workplace. For example, during the 2016 CUB dispute (see page 6), the FWC made interim orders under the anti-bullying provisions (Part 6-4B) of the FW Act, preventing unionists on the picket line from directing insults including 'scab' at members of the replacement labour hire workforce engaged at the Abbotsford brewery.[30] In another case, a union official who had used the terms 'scabby' and 'scab' to describe two construction site supervisors was ruled ineligible to obtain a right of entry permit under Part 3-4 of the FW Act.[31] More recently, the Federal Court granted an injunction requiring the removal of 'Scabby the Rat' (a large inflatable rat which the union movement has been deploying on picket lines around Australia) from the worksite.[32]

30. *Worker A, Worker B, Worker C, Worker D and Worker E v AMWU; CEPU and Ors* [2016] FWC 5848.
31. *CFMEU V Director of the Fair Work Building Industry Inspectorate* [2016] FWCFB 5067; see also *MUA, WA Branch* [2017] FWC 182.
32. Order, *MTCT Services Pty Ltd (ACN 070 140 251) v AWU & Ors.*



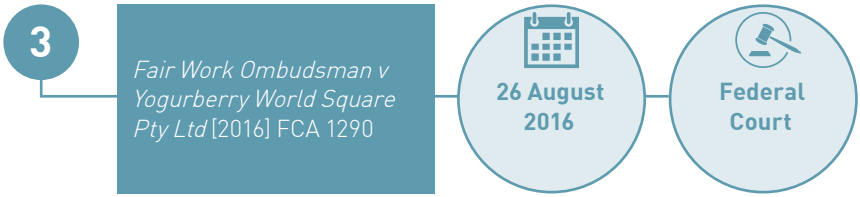
The Full Bench held (by a 2:1 majority) that, when calculating the 'period of continuous service' for the purposes of determining an employee's entitlement to redundancy pay, employers need to include any regular and systematic service as a casual employee.

Under the NES provisions of the FW Act, employers must pay employees certain amounts of severance pay when their position is made redundant, based on their length of continuous service with the employer. However, the legislation precludes casual employees from accruing redundancy pay entitlements.

In this case, the employer, Donau, had an enterprise agreement in place which required redundancy payments to be made as per the FW Act. Several employees had worked for the employer as casuals before obtaining ongoing positions. Their union, the AMWU, then sought recognition of the casual periods of service in the calculation of entitlements upon redundancy.

The Full Bench majority determined that under the relevant statutory provisions, a period of regular and systematic casual employment (contiguous with the commencement of permanent employment) is not excluded from the calculation of an employee's service for redundancy pay purposes. To be included in that calculation, there must have been no break between an employee's casual employment and their transition to permanent employment.

In light of this decision, many employees formerly engaged as regular and systematic casuals will be able to establish the right to recognition of the casual period in calculating redundancy payments, and possibly other entitlements which are linked to periods of continuous service with an employer (e.g. notice of termination, parental leave and unfair dismissal protection). This is despite the fact that casuals receive a loading of 20-25% on their hourly pay rates, which is meant to compensate for not receiving the leave and redundancy entitlements attached to permanent employment.



Justice Flick ordered four respondents to pay penalties totalling $146,000 for their involvement in contraventions of the FW Act (including underpayments and breaches of other provisions relating to minimum shifts, record-keeping and pay slips) in respect of four employees at the Yogurberry World Square store in Sydney's CBD.

The respondents included the direct employer (franchisee), the master franchisor and an associated company, and the sole director/company secretary of the company which owned the franchisee.

The Court found that in addition to the direct employer being liable for the breaches, the other respondents were liable as accessories under s 550 of the FW Act. Accessorial liability was established on the basis of, for example:

- the franchisor's knowledge in setting rates of pay and working hours for the employees;
- the franchisor's responsibility for accounting, payroll and operational functions for Yogurberry stores in Australia; and
- the director/company secretary's provision of instructions to the franchisee store manager and (on occasions) directions to the employees.

As well as the monetary penalties, the franchisor and associated company were ordered to engage a third party with qualifications in accounting or workplace relations to undertake an audit of compliance with the FW Act and the Fast Food Award.

This case is one of several recent examples in which the FWO has succeeded in establishing liability for workplace breaches of other parties including payroll/HR managers and external accountants, along with the direct employers of affected employees.[33]

33. See further the section What Lies Ahead for Australian Employers in 2017-18? Our 'Top 5' Issues on page 48.

4

Jurecek v Director, Transport Safety Victoria [2016] VSC 285

11 October 2016

Supreme Court of Victoria

The Court clarified the application of the Information Privacy Principles (IPPs) under Victorian privacy legislation to an investigation of employee misconduct on social media.

Ms Jurecek was the subject of an investigation and the issuing of a formal warning in relation to alleged misconduct in the form of abusive posts and exchanges with a colleague on Facebook. She alleged that her employer, Transport Safety Victoria, breached the IPPs in the conduct of the investigation, by (among other things) collecting personal information from her Facebook account without her consent.

However, the Court found that the information had been collected for a legitimate purpose and through authorised means which were not unreasonably intrusive. Further, the information could not have been obtained from Ms Jurecek directly without jeopardising the investigation. The employer had not, therefore, breached the IPPs.

It should be noted, though, that because privacy laws differ around Australia, employers need to be mindful of the requirements of the applicable legislation when carrying out misconduct investigations involving employees' personal information.

5

Just Group Ltd v Peck [2016] VSC 614 (upheld in *Just Group Limited v Peck* [2016] VSCA 334)

17 October 2016

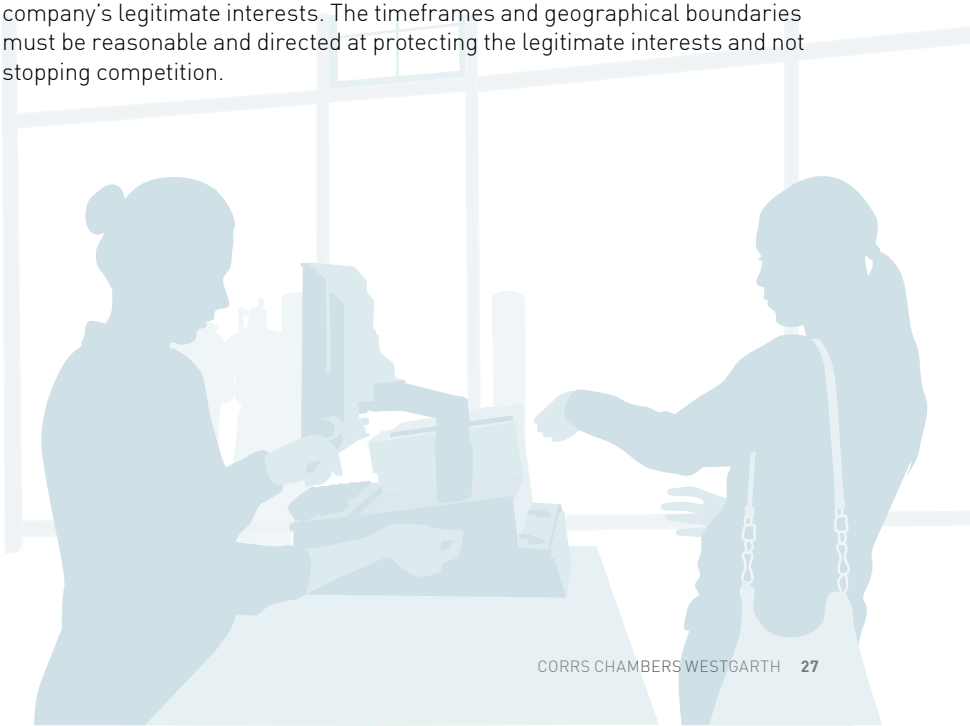
Victorian Supreme Court

Just Group Ltd (JGL) was denied an injunction and declaratory relief against its former CFO, because the express restraints in her employment contract were considered to be unreasonable and unenforceable.

The CFO commenced working for JGL in January 2016, and tendered her resignation on 2 May 2016. Before her last day at work, she informed JGL that she would be starting work with its competitor Cotton On. JGL immediately sought to enforce a restraint clause in the CFO's employment contract to prevent her from commencing work for Cotton On for a period of two years.

JGL claimed that the restraint was necessary to protect its confidential information, which it alleged the CFO had been exposed to during her employment. McDonald J refused to enforce the restraint clause because it was too broad and the restraint period was too long. In particular, the restraints sought to prevent her from taking up a position with a competitor, even though the information she had acquired during her time with JGL would be irrelevant in the context of her new employment.

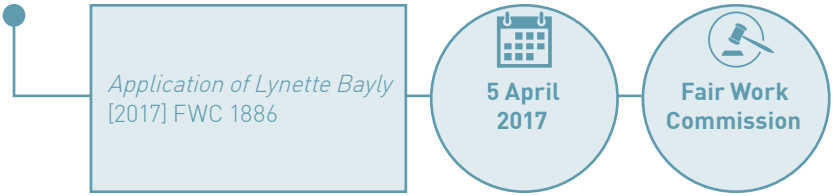
The decision is a reminder that restraints need to be drafted only to protect a company's legitimate interests. The timeframes and geographical boundaries must be reasonable and directed at protecting the legitimate interests and not stopping competition.



The Full Bench determined that a Queensland Government agency, Trade and Investment Queensland (TIC), was a constitutional corporation and therefore a constitutionally-covered business for the purposes of an employee's application for stop-bullying orders under Part 6-4B of the FW Act.

This required consideration of the extent to which TIC engaged in trading activity, which it was found to have done on the basis of receiving rental income from sub-tenancy arrangements as well as income from processing visa applications.

The decision is a reminder that while most State government employees are excluded from the federal anti-bullying jurisdiction, it is necessary to consider the character of some agencies and government business enterprises to determine whether they are covered by Part 6-4B.



The FWC made an interim order, under s 589(2) of the FW Act, preventing the dismissal of an executive director at Bendigo TAFE pending the determination of her anti-bullying application under Part 6-4B.

The interim order was granted on the basis that if action was taken to dismiss the employee, there would no longer be any jurisdiction to decide on her application for stop-bullying orders (arising from a dispute over alleged misconduct and performance management).

With the employee absent from work due to a medical condition, the interim order required the employer not to further investigate, take disciplinary action or dismiss her.

The decision adds to the complexity of managing ill or injured workers in the context of disciplinary processes or investigations. The Commission did express caution when making the orders, but nevertheless this is unlikely to be the last such application.

7

Shop, Distributive & Allied Employees Association v ALDI Foods Pty Ltd [2016] FCAFC 161

A majority of the Full Court found that the FWC should not have approved an enterprise agreement to cover an Aldi distribution centre in South Australia.

The majority judges determined that two statutory requirements for the approval of an agreement had not been satisfied in this case:

1. There were no employees 'covered' by the agreement at the time it was made who could have genuinely agreed to it, as the relevant employees were already employed in other parts of Aldi's business and covered by other agreements; and
2. The FWC had not properly considered whether the agreement passed the better off overall (BOOT) test on the basis of the required comparison of benefits and detriments with all relevant awards.

The Court was also expected to, but did not finally, determine the important question raised in numerous previous court and FWC decisions: whether non-compliance with the prescribed form of the notice of representational rights (issued to employees at the commencement of bargaining) will prove fatal to the later approval of the resulting agreement.

Katzmann J expressed the view that strict compliance with the notice requirements is necessary, while the dissenting judge (Jessup J) felt that the issue had not properly been put before the FWC in the approval proceedings. The third judge (White J) did not express a concluded view on the issue.

On 9 March 2017, the High Court of Australia granted special leave to Aldi to appeal against the Full Federal Court majority's decision and the decision was reserved following the hearing as of August 2017.

8

Director of Public Prosecutions v Toll Transport Pty Ltd [2016] VCC 1975

Toll Transport Pty Ltd (Toll) was prosecuted for breaching its duties under the *Occupational Health and Safety Act 2004* (Vic), following the fatality of a stevedore on 20 May 2014. The Court imposed a record fine of $1 million on the company, finding that the system of work for loading and unloading shipping containers on board a vessel was not safe so far as was reasonably practicable, because Toll did not eliminate or adequately control the risk of collision between prime movers and pedestrian workers in the vicinity.

In the Judge's view, Toll's offending was 'most serious and deserving of strong punishment and denunciation', and the ship loading process 'involved hazards to people working in the vicinity of mobile plant, as being of the most serious kind, and the risk identified was high. … [T]his was a tragedy waiting to happen.'

The Judge was critical of Toll for not acting on its knowledge about the risks of the loading process (earlier reviews of its process had informed Toll of the relevant risks).

The maximum penalty of $1,299,240 was reduced to $1 million due to mitigating circumstances including Toll's guilty plea, its safety improvements post-incident, its contrition and the support it provided to the deceased employee's family.

The case highlights the importance of competent risk assessments and timely actions that are critical to safety and legal compliance.

9

4-Yearly Review of Modern Awards – Penalty Rates [2017] FWCFB 1001

23 February 2017

Fair Work Commission Full Bench

The Full Bench decided to reduce Sunday and public holiday penalty rates in the following modern awards:

- *Fast Food Industry Award 2010;*
- *General Retail Industry Award 2010;*
- *Hospitality Industry (General) Award 2010;*
- *Pharmacy Industry Award 2010;*
- *Registered and Licensed Clubs Award 2010; and*
- *Restaurant Industry Award 2010.*

The Sunday and public holiday penalty rates for the affected awards, as adjusted by the FWC's decision, are set out in the tables below.

Changes to Sunday penalty rates

Award	Full-time / part-time		Casual	
	Previous Rate	New Rate	Previous Rate	New Rate
Hospitality Award	175%	150%	175%	Unchanged
Fast Food Award (Level 1 employees only)	150%	125%	175%	150%
Retail Award	200%	150%	200%	175%
Pharmacy Award (7.00am – 9.00pm only)	200%	150%	200%	175%

Changes to public holiday penalty rates

Award	Full-time / part-time		Casual	
	Previous Rate	New Rate	Previous Rate	New Rate
Hospitality Award	250%	225%	275%	250%
Restaurant Award	250%	225%	250%	Unchanged
Clubs Award	250%	Unchanged	250%	Unchanged
Retail Award	250%	225%	275%	250%
Fast Food Award	250%	225%	275%	250%
Pharmacy Award	250%	225%	275%	250%

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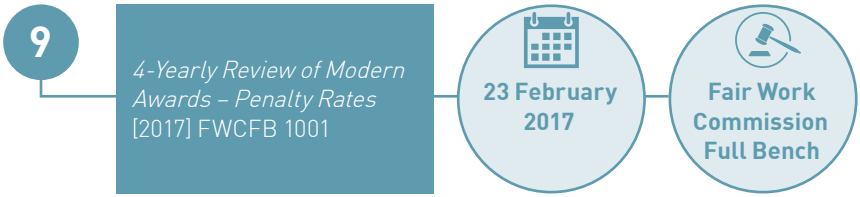
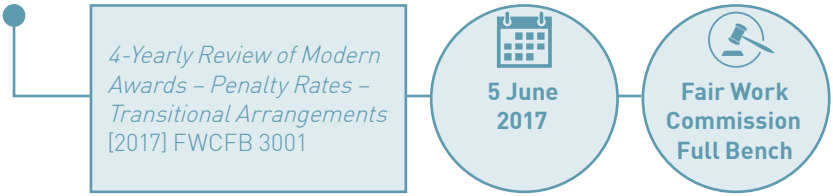


The Full Bench also decided to alter the hours during which late night penalties apply in the Fast Food and Restaurants Awards. The 15% late night loading in both awards will only apply between midnight and 6.00 am (instead of until 7.00 am), and the 10% loading for evening work in the Fast Food Award will only apply from 10.00 pm to midnight (instead of from 9.00 pm).



Following its 23 February decision, the Full Bench clarified the phase-in arrangements for reductions to Sunday penalty rates. These cuts are being implemented gradually over a four-year period from 1 July 2017.

For example, for a full-time employee covered by the Retail Award, the Sunday penalty rate was reduced from 200% to 195% on 1 July 2017; then it will fall to 180% on 1 July 2018; then to 165% on 1 July 2019; and finally to 150% on 1 July 2020.

The full schedule of Sunday penalty rate reductions across all relevant awards can be viewed on the FWC website.[34]

However, a judicial review application has been brought by United Voice and the Shop, Distributive and Allied Employees Association, seeking to challenge the FWC Full Bench's original February decision. The case will be heard by a five-member bench of the Full Federal Court from 26 September 2017, and if successful, would jeopardise the legality of any penalty rate reductions implemented by employers from 1 July 2017.

34. See: https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/2017fwcfb3001-summary.pdf

10

Construction, Forestry, Mining and Energy Union v Glendell Mining Pty Limited [2017] FCAFC 35

The Full Court (by a 2:1 majority) confirmed that provisions in the National Employment Standards (NES) under the FW Act regarding the taking of annual and personal/carer's leave on public holidays, are concerned only with employees' entitlements to such leave arising under the NES.

Specifically, the Court was required to consider whether an employer has the right to make a deduction from an employee's annual or personal/carer's leave entitlement when the relevant leave occurs on a public holiday. An employer does not have such a right when the leave entitlement derives from the NES, which provides employees with a minimum of four weeks' paid annual leave and 10 days' personal/carer's leave per year.

However, according to the majority of the Full Court, that restriction does not apply in respect of any additional leave the employer may provide (for example, under an applicable award or enterprise agreement). In this case, where the employer provided up to six weeks' annual leave and 15 days' personal carer's leave, it was entitled to make deductions from the additional period of leave where it coincided with a public holiday.

The decision means that any additional paid annual leave or personal/carer's leave provided under an agreement or award can be treated as 'cream' that is not subject to the NES restriction.

11

Grant v BHP Coal Pty Ltd [2017] FCAFC 42

10 March 2017

Full Court of the Federal Court

The Full Court upheld earlier decisions of the FWC and a single judge of the Federal Court, which had concluded that BHP Coal was entitled to dismiss a boilermaker who refused to attend a medical examination to assess his fitness to return to work.

The employee had injured his shoulder at work in October 2011, re-injured it and then had surgery. By April 2013, he provided medical certificates indicating he was fit to return to work, but refused directions to undergo assessment by the company's chosen doctor. BHP Coal stood the employee down and, following an investigation, terminated his employment for refusal to comply with lawful and reasonable directions.

In the judgment of the Full Court, BHP Coal was entitled to rely on s 39(1)(c) of the *Coal Mining Safety and Health Act 1999* (Qld) – the obligation of a coal mine worker to take reasonable action to ensure no one is exposed to an unacceptable safety risk – to require the employee to undergo medical assessment (in order to reduce the risk presented by the employee returning to work before he was fit to do so). While this might involve some intrusion on personal liberty, this was necessary to prevent danger to large groups of people in the event that safety standards are not met in hazardous industries.

The decision highlights an important common law right that an employer has to give a reasonable direction to an employee to attend a medical assessment where it relates to the employee's fitness for work.

12

Shop, Distributive and Allied Employees Association v Beechworth Bakery Employee Co Pty Ltd t/a Beechworth Bakery [2017] FWCFB 1664

6 April 2017

Fair Work Commission Full Bench

The Full Bench upheld the union's appeal against approval of an enterprise agreement. The overturning of the decision centred on an undertaking given by the employer to ensure reconciliation of any shortfall in payment under the agreement compared with the underpinning award.

The Full Bench's concern was that the undertaking did not sufficiently address the failure of the agreement to comply with the BOOT, which measures terms and conditions under a proposed agreement with those in the applicable award. In particular, the Full Bench considered that the undertaking relied upon an employee taking issue with the employer about any potential discrepancy in payment, and sought to implement an uncertain and possibly lengthy process for resolving such a discrepancy.

This decision highlights the ongoing difficulties for employers in ensuring that enterprise agreements are approved by the FWC, where pay rates and other terms and conditions are at or close to the relevant award (as highlighted in last year's *Coles Supermarkets* decision, see page 19).

13

Esso Australia Pty Ltd v AWU, AMWU, CEPU [2017] FWCFB 2200

In the context of FWC proceedings relating to the making of a workplace determination under s 266 of the FW Act, the union parties sought the production of financial and related documents by the employer and a number of other corporate entities. The unions argued that the documents sought were necessary to test, for example, Esso's rejection of the unions' claims in the bargaining process on grounds of poor profitability and the excessiveness of the claims.

The FWC Full Bench granted the unions' request for financial documents showing income, expenses, profit and loss, assets and liabilities of each of the relevant entities, but limited the requirement to disclosure of these documents only from the previous two years. In addition, the Full Bench required disclosure of documents relating to the predicted production of oil and gas from the relevant joint venture vehicle until 2021, and expected prices/profits. However, the production of certain documents was considered to be irrelevant or oppressive (including details of a $17.5 billion loan from a related party and the business case for investment in the project put forward some years earlier).

While the decision involved consideration of the FWC's general discretion to order the provision of documents in proceedings under s 590(2)(c), it may also have some application in relation to the obligation of bargaining representatives to provide information relevant to agreement negotiations under s 228(1)(b) of the FW Act.

14

Tasmanian Ports Corporation Pty Ltd t/a Tasports v Gee [2017] FWCFB 1714

The Full Bench clarified that when determining whether to dismiss an employee, labour hire companies cannot simply rely on the process adopted by a host business.

Tasports, a labour hire provider, assigned an employee to work for a host business (Grange Resources Ltd) from 2009 until his dismissal in August 2015. This followed advice from Grange to Tasports that it would be terminating the employee's access to its premises due to his failure to follow a reasonable direction, his posting of unauthorised photos of Grange's assets and work sites, and his being in unauthorised possession of a mobile phone.

Grange had investigated these matters but without informing the employee or giving him an opportunity to respond. Tasports then did so, but later informed the employee that he could not fulfil the inherent requirements of his position (as he had been excluded from Grange), and Tasports had no alternative duties for him to perform.

The Full Bench determined that, at first instance, the FWC member had been correct to find that the employee had been unfairly dismissed. Applying the decision in *Kool v Adecco Industrial Pty Ltd T/A Adecco* [2016] FWCFB 5243, the Full Bench found that Tasports:

- had not formed its own independent view as to whether Mr Gee had committed misconduct, but instead essentially adopted the outcome of Grange's procedurally flawed investigation; and
- failed to adequately investigate options for the employee's redeployment (especially given that Tasports employs workers in its own ports).

The Full Court determined that a union official who was called onto a construction site to assist a health and safety representative under Victorian OHS legislation was required to comply with the conditions attaching to right of entry under federal law. In particular, the official needed to have and produce a federal right of entry permit.

Overturning the decision of Bromberg J at first instance, the Full Court found that attending the worksite to assist the safety representative under the Victorian legislation was a form of 'entry' to which the strict requirements of Part 3-4 of the FW Act attached.

For employers, the decision means that if a health and safety representative seeks the assistance of a union official under state OHS legislation (other than in WA), the official can be refused entry onto the site if he/she does not have a federal entry permit.

The CFMEU has made an application to the High Court for special leave to appeal against the Full Federal Court's decision.

4 Focus on Work Health & Safety

Rising Penalties for WHS Contraventions

One of the most striking features of the Model Work Health and Safety Act (Model WHS Act), which has been adopted in all jurisdictions except Victoria and Western Australia, is the concept of Category 1 Offences. These are particularly serious breaches of the legislation, and carry maximum penalties of up to $3 million for a body corporate.

Although the legislation became operative in most harmonised jurisdictions on 1 January 2012, and in the others on 1 January 2013, there have not yet been any completed Category 1 prosecutions in any jurisdiction. However, over the last 12-18 months, a Category 1 prosecution has been initiated in each of NSW, Queensland and South Australia.[35]

Notably, there has also been a marked increase in the levels of fines which have been imposed in respect of Category 2 offences over the last 12-18 months. For example, there have been at least nine cases in the harmonised jurisdictions where fines totalling $200,000 or more have been imposed in Category 2 cases. Of these nine cases, seven were in NSW and two in South Australia. There have also been a further two cases in Victoria in the last 12 months where courts have imposed record fines.

The principal sentencing consideration when imposing higher fines under the Model WHS Act is that of general deterrence. This reflects the fact that the courts appear to be increasingly intolerant of offenders who have failed to implement simple safety measures, particularly where there is evidence of actual knowledge of both the risk and the necessary steps to contain it. Significantly, failure to adequately communicate the risk to workers is a common theme among these cases.

The courts have also noted the following factors, which they have taken into account at sentencing:

- lack of remorse;
- non-attendance by the offender or its officers at trial or sentencing;
- failure to give a statement of apology;
- failure to provide assistance to the victim and the victim's family; and
- failure to take responsibility for the harm caused.

By way of illustration, in April 2017, a South Australian court fined an employer $650,000 for breaching s 32 of the *Work Health and Safety Act 2012* (SA) when it had failed to equip workers with adequate technical and product information while they were conducting a trial of the company's new chemical waste processing plant.[36] After applying a $200,000 discount for an early guilty plea, the judge emphasised the level of culpability of the employer for a fire that injured workers during the plant trial as a result of the breach.

35. 'Category 1 WHS charges upheld', *OHS Alert*, 15 May 2017; Planning & Environment – Resources & Energy (NSW), 'Resources Regulator announces prosecution proceedings against Cudal Lime Products' (Media Release, 30 August 2016), at: http://www.resourcesandenergy.nsw.gov.au/about-us/news/2016/resources-regulator-announces-prosecution-proceedings-against-cudal-lime-products; WorkCover Queensland, 'Milestone workplace prosecution in Queensland continues' (Media Release, 7 June 2017), at: https://www.worksafe.qld.gov.au/news/2017/milestone-workplace-prosecution-in-queensland-continues
36. 'Cleanaway fined over Adelaide chemical fire', *Comcare*, Media Release, 20 April 2017, at: http://www.comcare.gov.au/news__and__media/media_centre/cleanaway_fined_over_adelaide_chemical_fire

Seven weeks later, a NSW court fined a construction company $1 million in respect of a Category 2 offence under the *Work Health and Safety Act 2011* (NSW).[37] In that instance, the court was strongly influenced by:

- the objective seriousness of the offence;
- the offender's moral culpability in light of its knowledge of both the risk and the necessary steps to eliminate it;[38]
- the severity of the injury suffered by the worker;[39] and
- the failure of the offender to appear in court.

This all led the judge to award the $1 million penalty, despite the company having had no previous convictions.[40]

Meanwhile, in Victoria, a company was fined $800,000 in July 2016 in circumstances where the court found that it showed no remorse at the plea. There had also been an attempt to avoid penalties by taking steps to place the company into liquidation and deregister it.[41] In December 2016, also in Victoria, a WHS offender was fined a record $1 million in a case involving a fatality in which the offender had a relevant prior criminal history.[42]

Proposed Changes to Victorian OHS Laws

The *WorkSafe Legislation Amendment Bill 2017* (Bill) proposes extensive amendments to three pieces of legislation in Victoria, including the *Occupational Health and Safety Act 2004* (Vic) (OHS Act).

One of the significant changes proposed by this Bill is the creation of a separate offence under section 16 of the OHS Act where a person contravenes an enforceable undertaking. A breach of this provision would incur a maximum fine of 500 penalty units ($79,285) for a natural person and 2500 penalty units ($396,425) for a body corporate.[43]

The proposed amendments will also create an exception for employers when exercising their duties in relation to incidents, pursuant to sections 38 and 39 of the OHS Act. Employers may rely upon a 'reasonable excuse' exception to the duty to preserve an incident site or notify WorkSafe Victoria of a serious incident. However, the Bill significantly increases the corresponding penalties and reclassifies these provisions as indictable offences.

Further, an inspector's power upon entry to a workplace pursuant to section 100 of the OHS Act will be extended to require a person to answer any question the inspector may have. An inspector may also require the production of any document, wherever it is located – no longer requiring it to be in the person's possession or control.

37. *Safe Work (NSW) v WGA Pty Ltd* [2017] NSWDC 92.
38. Ibid [11], [17], [18].
39. Ibid [21].
40. Ibid [22], [28].
41. *DPP v Australian Box Recycling Proprietary Limited* [2016] VCC 1056.
42. *DPP v Toll Transport Pty Ltd* [2016] VCC 1975; see the section on 2016-17 Court and Tribunal decisions beginning on page 22.
43. We note, however, the restrictions for maximum fines imposed in the Magistrate's Court pursuant to section 112A of the *Sentencing Act 1991* (Vic).

Also of significance is the proposed extension of limitation periods for prosecution of an offence as outlined in section 132 of the OHS Act. It should be noted that prosecution of an indictable offence may be brought at any time if fresh evidence is discovered. For evidence to be considered 'fresh', the court must be satisfied that it could not have been reasonably discovered within the relevant limitation periods.

Other changes to the OHS Act proposed by the Bill include:

- expanding sections 64 and 115 to state that a provisional improvement notice (and certain other notices given by an inspector) may be served electronically;
- clarifying that an employer cannot discriminate against a person raising a health and safety issue directly with WorkSafe Victoria;[44]
- expanding the definition of 'medical treatment' (in relation to the duty to notify WorkSafe Victoria of a serious incident) to include treatment administered by nurses;[45] and
- amending section 153 to make the offence of giving false or misleading information in complying or purportedly complying with the OHS Act an indictable offence.

Following the Bill's introduction to Parliament on 21 March 2017, the Victorian State Government put forward further amendments in June which would curtail the extension of limitation dates for prosecution to only indictable offences and for breaches of the OHS Act, but not the corresponding regulations.

Amendments circulated by the Liberal Opposition, which sought to remove the proposed amendments to increasing penalty units for certain offences, have not been accepted.

The Bill passed the Legislative Assembly on 22 June 2017. It had not been passed by the Legislative Council at the time of writing.

New Victorian OHS Regulations

On 18 June 2017, the *Occupational Health and Safety Regulations 2017* came into effect in Victoria.

Although largely based on the expired 2007 OHS regulations, the new regulations seek further alignment with the national Model WHS Act and adopt consistent terminology from the Globally Harmonised System of Classification and Labelling of Chemicals.

In certain high risk areas, such as asbestos removal work or manufacturing of hazardous substances, the new regulations improve standards. For example, the regulations will now extend to workplaces where asbestos is present in the soil or dust, rather than just 'fixed' or 'installed' asbestos.

The updated *Equipment (Public Safety) Regulations 2017*, which regulate use of plant in non-workplaces such as amusement rides, also came into effect in Victoria on 18 June 2017.

44. *Occupational Health and Safety Act 2004* (Vic), section 76.
45. *Occupational Health and Safety Act 2004* (Vic), section 37(4).

On 21 July 2017, a series of additional Victorian safety regulations also commenced, including:

- **Road Safety (General) Amendment Regulations 2017** – these amend the Road Safety (General) Regulations 2009 and, amongst other things, provide:
  - a new definition of 'testing officer'; and
  - that infringement notices may be served with respect to offences such as failing to keep clear of or give way to emergency vehicles and unlawfully approaching or passing stationary or slow-moving emergency vehicles or emergency workers.
- **Rail Safety (Local Operations) (Accreditation and Safety) Regulations 2017** – these promote safe local rail operations in Victoria by prescribing requirements for:
  - accreditation of rail infrastructure managers and rolling stock operators;
  - emergency plans;
  - safety management systems;
  - the health, fitness and competence of rail safety workers;
  - reporting of accidents, incidents and inquiries; and
  - fees for services.
- **Rail Safety (Local Operations) (Drug and Alcohol Controls) Regulations 2017** – these promote safe rail operations in Victoria by prescribing requirements for drug and alcohol controls for rail safety workers.
- **Drugs, Poisons and Controlled Substances (Precursor Chemicals) Regulations 2017** – these prescribe precursor chemicals and the quantities of precursor chemicals for purposes of section 71D of the *Drugs, Poisons and Controlled Substances Act 1981*.

WHS Legislative Changes in Other States

In May 2009, the former Workplace Relations Ministers' Council agreed that the proposed *Model WHS Act* should be reviewed at a national level at least every five years.

Following the adoption of the model laws in seven jurisdictions in 2012[46] and 2013,[47] a national review will be conducted in 2018. However, independent State reviews of their respective WHS statutes have commenced, with New South Wales and South Australia requiring a mandatory review to be undertaken after a certain period of time from the date of commencement.[48]

46. Commonwealth, New South Wales, Northern Territory, Australian Capital Territory and Queensland.
47. Tasmania and South Australia.
48. Section 277 of the *Work Health and Safety Act 2012* (SA) requires a review as soon as practicable after 1 year from the date of commencement. Following this, a second review must be conducted as soon as practicable after 3 years from the date of commencement. Section 276B of the *Work Health and Safety Act 2011* (NSW) provides for a review every 5 years from the date of assent.

South Australia

In November 2016, SafeWork SA launched its second review into the *Work Health and Safety Act 2012* (SA) (SA WHS Act), which focuses predominantly on the unique South Australian provisions and whether they continue to be effective in conjunction with the harmonised model laws.

In particular, the review called for stakeholders' views on the provisions in the SA WHS Act which:

- provide protection against self-incrimination;
- limit a person's duty to eliminate or minimise health and safety risks to only those matters which are within the person's influence and control;
- limit the category of persons whom a health and safety representative may seek assistance from; and
- require entry permit holders to notify SafeWork SA before entering a site to investigate suspected safety contraventions where practicable, in order to provide an opportunity for an inspector to attend the workplace at the same time. If the permit holder is not accompanied by an inspector, however, he or she must provide a written report on the outcome of the inquiries to SafeWork SA.

At present, submissions have closed and SafeWork SA is preparing a written report to the State Minister for Industrial Relations. It is expected that the submissions and feedback received will inform the national review to be conducted in 2018.

New South Wales

Similarly, in New South Wales, a statutory review of the *Work Health and Safety Act 2011* (NSW) (NSW WHS Act) was launched in November 2016.

The *Work Health and Safety Act 2011 Statutory Review Report* was tabled in Parliament in June 2017, with SafeWork NSW making 11 recommendations.

The key recommendations made by SafeWork NSW include:

- authorising extraterritorial application of the NSW WHS Act to the extent that the State's legislative power allows, including to obtain records and issue notices outside of NSW;
- permitting the recording of interviews by the regulators without consent, subject to the interviewee being given notice that the interview is being recorded;
- clarifying that penalty notices may be served electronically;
- addressing concerns raised by regulators about technical arguments regarding the validity of appointments and delegations in criminal proceedings;
- undertaking a review of the manner and form of stakeholder consultative mechanisms and, in consultation with key stakeholder organisations, developing a model for tripartite consultation;
- amending the *Work Health and Safety Regulation 2011* (NSW) (NSW WHS Regulation) to clarify

the identity of duty holders for the storage and handling of dangerous goods, or for the operation or use of specified high risk plant affecting public safety, when not at a workplace or not used in carrying out work;

- amending the NSW WHS Regulation to authorise regulators to issue penalty notices for breaches of section 43 of the NSW WHS Act which deals with 'requirements for authorisation of work';
- reviewing the adequacy of the penalty notice amounts specified in the NSW WHS Regulation and considering whether any other penalty notice offences should be introduced; and
- amending the NSW WHS Regulation to allow for a new penalty notice offence for breaches of Part 4,4 of Chapter 4 which deals with 'falls'.

SafeWork NSW has indicated that a public information campaign will be conducted prior to commencement of the proposed amendments, most of which are expected to be finalised by the end of 2017.

Queensland

In April 2017, the Queensland Minister for Employment and Industrial Relations announced a 'Best practice review of Workplace Health and Safety Queensland (WHSQ).' Former ACTU Assistant Secretary Tim Lyons was requested to conduct an independent review as to the effectiveness of the *Work Health and Safety Act 2011* (QLD) (QLD WHS Act) in light of contemporary regulatory practice.

Mr Lyons' review and subsequent recommendations specifically considered:

- the appropriateness of WHSQ's Compliance and Enforcement Policy;
- the effectiveness of WHSQ's compliance regime, enforcement activities, and dispute resolution processes;
- WHSQ's effectiveness in providing compliance information and promoting WHS awareness and education;
- the appropriateness and effectiveness of the administration of public safety matters by WHSQ; and
- any further measures that could be taken to discourage unsafe work practices, including introducing a new offence of gross negligence causing death and increasing existing penalties for work-related deaths and serious injuries.

The Queensland Government has received the report from Mr Lyons and on 22 August introduced into State Parliament the *Work Health and Safety and Other Legislation Amendment Bill*, based on the review findings. The Bill proposes, among other things, the introduction of a new offence of industrial manslaughter. This offence will carry a maximum fine of $10 million for a corporate offender and 20 years' imprisonment for an individual.

Western Australia

In July 2017, the newly elected State Labor Government in Western Australia announced the development of a modernised Work Health and Safety Bill for WA, to be based on the national Model WHS Act.

It is envisaged that this new legislation will replace WA's current *Occupational Safety and Health Act 1984*, as well as the *Mines Safety and Inspection Act 1994* and the *Petroleum and Geothermal Energy Safety Levies Act 2011*.

The new Bill will require extensive consultation with stakeholders and the community, and is expected to be introduced into Parliament in mid-2019.

5 What Lies Ahead for Australian Employers in 2017-18? **Our 'Top 5' Issues**

1. Tackling Modern Slavery and Ensuring Compliance across the Supply Chain

Over the last few years, there has been a heightened focus on compliance with minimum labour standards. This is set to continue, if not increase further, over the next 12 months.

Australian businesses will need to address these issues on multiple fronts, considering the following:

- **Greater union and FWO vigilance**. There is likely to be greater vigilance in this space on the part of unions, and more enforcement activity by the FWO, especially once its powers are enhanced (assuming the Vulnerable Workers Bill is passed by Parliament).
- **Labour hire licensing requirements**. Labour hire providers, and end users of their services, will most likely face new licensing requirements in Queensland, SA and Victoria, with significant penalties for non-compliance (e.g. $126,000 or three years' imprisonment for an individual, and $365,700 for a corporation under the *Labour Hire Licensing Bill* now before the Queensland Parliament).
- **Modern slavery legislation**. An Australian equivalent to the UK's *Modern Slavery Act* is likely to be brought forward by the Turnbull Government, following the recent Joint Standing Parliamentary Committee Inquiry which has received around 200 submissions.[49]

The UK legislation, introduced in 2015, requires businesses with an annual turnover of over £36 million to provide a statement of the steps taken to ensure that slavery and human trafficking are not taking place in any of their supply chains.[50] In the UK, an Independent Anti-Slavery Commissioner was also established to promote best practice and investigate and prosecute slavery and human trafficking offences under UK law.[51] The ALP has released a policy commitment to replicate the UK's *Modern Slavery Act*, to increase transparency in the global supply chains of Australian businesses not only through mandatory reporting but also with penalties for non-compliance.[52]

Employers should also keep in mind that the media's attentiveness to the employment practices within major brands is only set to continue. In some recent instances, this attentiveness has seen the media scrutinise not just a business's compliance with applicable workplace laws, but also the notion of whether or not they are a 'good employer'. For example, in the wake of the FWC decision reducing penalty rates in certain sectors, the ACTU has been 'naming and shaming' businesses that have implemented award penalty rate cuts, despite the fact that this is completely lawful.

49. See: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/ModernSlavery
50. See: http://www.corrs.com.au/thinking/insights/how-should-australia-combat-modern-slavery-video/
51. See: http://www.antislaverycommissioner.co.uk/
52. ALP, *Labor to Fight Modern Slavery* (Policy released on 5 June 2017).

2. The Future of Enterprise Bargaining

There are a number of competing tensions within the existing enterprise bargaining framework that will take further shape in the build-up to the next federal election:

- On the one hand, many employers find the current system of bargaining highly frustrating and complex, especially the technical requirements around bargaining notices and meeting the better off overall test (BOOT) in respect of all relevant employees.[53] In addition, some businesses are experiencing 'bargaining fatigue', having now negotiated up to nine or ten rounds of agreements since the 1990s. A considerable number of employers are now asking 'why bother with enterprise bargaining?' and 'what productivity improvements can realistically be achieved?'[54]
- Conversely, unions are arguing that over the eight years of operation of the FW Act, employers have found numerous ways to circumvent the supposed promotion of collective bargaining under the Fair Work system. These include the 'small agreement scope' strategy which lay at the heart of the 2016 CUB dispute (see page 6), and the increasing tendency of employers to seek termination of an enterprise agreement to gain the upper hand in protracted agreement negotiations.[55] As mentioned earlier, the ACTU is elevating these concerns (and others such as the current inability to bargain at industry level or across labour hire agencies, franchises and other entities) as priority areas for an incoming Labor Government to address.[56]

3. The Debate over 'One-Sided Flexibility'

Driven to a large extent by the union movement, momentum is building for measures to address what the UK's *Taylor Review of Modern Working Practices* recently described as 'one-sided flexibility' in the workplace.[57]

In the Australian context, this phenomenon has been described in terms of various kinds of 'insecure work' such as casual, fixed-term, and self-employment.[58]

Employers will have to respond to the use of various avenues to challenge the flexible engagement of labour, including:

- the implementation of the FWC's decision in July 2017 to insert casual conversion clauses in most federal awards.[59] Once these clauses become operative, businesses will need processes in place for considering and resolving casual employee requests to obtain full-time or part-time status; and

53. See e.g. '"Perfect storm" inhibiting bargaining: Woolworths', *Workplace Express*, 8 August 2017.
54. See e.g. Jennifer Hewett, 'What happened to enterprise bargaining', *Australian Financial Review*, 11 July 2017.
55. The FWC is showing greater preparedness to accept employer arguments that termination of an expired agreement is not contrary to the public interest: see e.g. *Murdoch University* [2017] FWCA 4472.
56. See e.g. 'ACTU compiling list of laws earmarked for change: McManus', *Workforce*, No 20662, 25 July 2017; and Brendan O'Connor MP, Shadow Minister for Industrial Relations, *The Changing Face of the Labour Market: Where to from Here?* (Speech to the Sydney Institute, 3 August 2017).
57. *Good Work: The Taylor Review of Modern Working Practices*, July 2017, at:. https://www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices
58. See: http://www.corrs.com.au/thinking/insights/one-sided-flexibility-in-the-workplace-australian-and-uk-responses/
59. *4-Yearly Review of Modern Awards – Casual Employment and Part-Time Employment* [2017] FWCFB 3541.

- potential litigation, even class actions, testing the employment status of businesses in the gig economy. A clear indication of this likely trend is the proceeding being pursued on behalf of around 900 charity fundraisers engaged by Appco Australia. The Federal Court is currently considering whether the matter, alleging sham contracting, can proceed as a class action.[60]

4. WHS Inspection Blitzes

WHS regulators across Australia are increasingly using 'inspection blitzes' to promote and monitor compliance with safety legislation. They often target specific industries and focus on a certain type of hazard or risk, sometimes in response to a rise in injuries or fatalities.

Recent examples of 'inspection blitzes' conducted in Australia include:

- WorkCover Queensland's blitz at theme parks,[61] following the fatalities of four people on a water ride at Dreamworld in October 2016.
- WorkSafe Victoria's three week inspection blitz in February 2017 targeting falling objects at construction sites.[62] The blitz covered nearly 1000 commercial, industrial and residential construction sites.
- WorkSafe Victoria's ongoing 'Safe Towns' safety program which includes concentrated inspection blitzes at targeted locations around three times per year.[63] During the visits, inspectors provide practical advice on how to comply with OHS laws.
- Worksafe Victoria's focus on blitzes in the construction industry following a spate of structural collapse incidents.[64]
- Worksafe WA's inspection blitz at waste recycling workplaces in late 2016 following multiple serious incidents.[65] This follows similar blitzes in the last two years, with the current blitz to have priority focus on guarding of machinery as well as mobile plant and vehicle movement.
- SafeWork NSW's inspection blitz on construction sites across Sydney in the second half of 2017, in response to 13 construction workers being killed or seriously injured in falls during the first half of the year.[66] The blitz will focus on managing the risks of falls on a construction site, in particular by ensuring that scaffolding and edge-protection systems are properly installed and maintained, and to ensure that fragile and brittle rooves have suitable controls.

60. 'Court considering whether sham contracting class action test case can proceed', *Workplace Express*, 17 May 2017.
61. Queensland Cabinet and Ministerial Directory, http://statements.qld.gov.au/Statement/2016/10/29/theme-park-safety-blitz-kicks-off-today, 29 October 2016.
62. WorkSafe Victoria, http://www.worksafenews.com.au/news/item/545-inspection-blitz-targets-falling-objects-at-construction-sites.html, 3 February 2017.
63. WorkSafe Victoria, http://www.worksafe.vic.gov.au/pages/safety-and-prevention/making-your-workplace-safer/safe-towns.
64. WorkSafe Victoria, http://worksafenews.com.au/news/item/580-inspectors-target-structural-collapse-after-spate-of-incidents.html, 21 August 2017.
65. Government of Western Australia, *Serious concerns with recycling industry after multiple incidents*, https://www.commerce.wa.gov.au/announcements/serious-concerns-recycling-industry-after-multiple-incidents, 25 November 2016.
66. SafeWork NSW, *SafeWork announces construction industry safety crackdown*, http://www.safework.nsw.gov.au/news/media-release/safework-announces-construction-industry-safety-crackdown, 28 June 2017.

- In July 2017, a two-day blitz in an opal field was carried out by officers from the NSW Department of Planning and Environment which specifically focused on mine shaft safety in addition to mechanical and electrical safety.[67]

SafeWork NSW is particularly active in this space, launching a *Construction Safety Team* as part of a $2.5 million boost to safety on major infrastructure projects (announced in the 2017-18 State Budget). This new body will focus on injury prevention programs, compliance monitoring and safety partnerships. Another $2.5 was allocated for a WHS centre to develop evidence-based injury and illness monitoring systems and assist with creating improved policy and practices.

As an employer, officer and worker, it is important never to become complacent when it comes to workplace health and safety - workplaces constantly change. To ensure that you are meeting your obligations under WHS laws, a good starting point is to ensure that appropriate systems are in place and that they are working effectively. This can be achieved by regularly conducting your own internal audits. When doing this, ensure that your systems are well documented and available for production at short notice.

5. Broadening the Net of Accessorial Liability

Trends emerging from a number of recent cases have indicated that the role of HR managers, and even external advisers to businesses, will increasingly come under scrutiny from regulators and plaintiff lawyers.

The FWO is bringing more cases seeking to establish the liability of these kinds of parties for workplace law breaches based on the accessorial liability provision in s 550 of the FW Act (in addition to the primary liability of the direct employer).[68] Under s 550, a person is involved in a contravention of the FW Act or an award, if they have (for example) aided, abetted, counselled or procured that breach, induced it or been knowingly concerned in it in any way. The FWO's Annual Report for 2015–16 indicates that it sought orders against accessories in more than 90% of the cases which it brought before the courts.

Liability for corporate contraventions of awards and the FW Act record-keeping requirements has been extended to payroll personnel[69] and HR managers[70] within the business – and even to an accounting firm engaged to provide payroll services.[71]

67. Planning & Environment NSW Government, *Over a hundred opal mines targeting in audit blitz*, http://www.resourcesandenergy.nsw.gov.au/about-us/news/2017/over-a-hundred-opal-mines-targeted-in-audit-blitz, 24 July 2017.
68. See e.g. *Fair Work Ombudsman v Yogurberry World Square Pty Ltd* [2016] FCA 1290 (in the section on 2016-17 Court and Tribunal decisions on page 25).
69. *FWO v WY Pty Ltd* ACN 140 944 369 & Ors [2016] FCCA 3432.
70. *FWO v Oz Staff Career Services Pty Ltd & Ors* [2016] FCCA 105 & [2016] FCCA 2594. See also *FWO v OzStaff Career Services Pty Ltd & Ors* [2016] FCCA 105 (company director and HR manager liable for knowingly falsifying employment records and making unlawful deductions from employees' wages); and *Director of the Fair Work Building Industry Inspectorate v Baulderstone Pty Ltd & Ors* (No 2) [2015] FCCA 2129 (HR manager jointly liable for unlawful adverse action).
71. *FWO v Blue Impression Pty Ltd and Ors* [2017] FCCA 810.

The critical issue in each of these cases is the extent to which HR professionals and external advisers are 'knowingly concerned' in the workplace law violations occurring within their businesses. The courts are showing greater willingness to accept that such knowledge might arise by virtue of the position that an HR manager, for example, holds – and the access they have to information from which it should be clear that underpayments or other breaches may be occurring.

In other cases, the conduct of HR advisers in resolving workplace issues such as bullying, discipline and dismissal of employees has been the subject of adverse comments or findings by tribunals.[72]

As a result, employers may need to:

- explore providing additional support, education and training to their people management teams and leaders;
- take steps to review their own compliance processes; and
- enter into appropriate arrangements with external service providers.

72. See e.g. *Phim v Somerville Retail Services Pty Ltd* [2016] FWC 2267; *Duarte v The Paraplegic & Quadriplegic Association of NSW* [2017] FWC 175; *Ramsey v The Trustee for the Roman Catholic Church for the Diocese of Parramatta* [2017] FWC 223.

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