



Key trends and issues

Links for your further reading

Implications for employers

1. Class action claims on the rise, and accessorial liability continues to have a wide reach (s.550 of the Fair Work Act)

- There is an increasing appetite for class action law suits globally, and in the employment and industrial relations context in Australia. See our articles on the [global trend](#) and the [Australian trend](#). See here for current [class actions in the Federal Court](#).
- The [first common fund order](#) was applied to an industrial relations class action this year.
- Applicants and their representatives, and the FWO, are increasingly joining or threatening to bring proceedings against other parties to claims. For example:
 - The Full Federal Court found that a [firm of accountants](#) was “involved in” the underpayment breaches by an employer that engaged their services;
 - Last year, the FWO pursued a restaurant’s [HR manager, store manager and director](#) for being knowingly involved in award breaches; whilst this year, it pursued a [head contractor](#) for being knowingly involved in a subcontractor’s underpayments in the cleaning services industry. The FWO continues to enter into compliance deeds with [principals](#) to ensure their contractors are compliant with employment laws.
- The AWU brought a claim alleging that an [IR Manager](#) was knowingly involved in underpayments to workers.

- Employers should be aware of this trend, mitigate against similar claims against them, and ensure they are familiar with the basics of class action processes. Contact our leading class action team for advice.
- Accessorial liability provisions have the potential to bite beyond the employer, to other entities and natural persons – something to be mindful of. In particular, supply chain management is becoming increasingly important (see also item 5 below).

2. Increased scrutiny of casual and “insecure” work

- The Full Federal Court has confirmed the principles applying to **characterisation of casual** employment in [WorkPac Pty Ltd v Skene](#). The ALP’s law reform agenda includes a [review of the definition of “casual” work](#) to set an objective test for the term.
- WorkPac commenced litigation to address the ‘**double dipping**’ issue. See our article [here](#). The Federal Government has intervened in the proceedings and has introduced a [regulation](#) to address this. See the [Explanatory Note](#). Meanwhile, the ACTU has published a paper suggesting that [casual pay premium is a myth](#).
- From 1 October 2018, **modern awards** will have a [casual conversion clause](#) entitling regular casuals to request to convert to permanent employment, and requiring employers to give all casual employees a copy of the clause. The Federal government has pledged to [legislate a right to request casual conversion for all casuals covered by the Fair Work Act](#). But the ACTU [Change the Rules](#) campaign is calling for a casual conversion right after 6 months.
- A [recent report](#) by the House of Representatives Standing Committee on Industry, Innovation, Science and Resources recommended a review into the use of casualised and labour hire workforces in the mining and other sectors, legislation to prohibit the move towards replacing directly-employed workers with ‘permanent casual’ employees, and a casual conversion guarantee after a set period of time.

- With the increased focus on casual employees’ rights, employers should be aware of the legal issues and risks arising from casual employment. They should seek advice on managing those risks.
- Watch this space in the lead up to the next election, as it is a key focus of the ACTU’s Change the Rules Campaign and a key part of the ALP’s law reform agenda.

3. Continued focus on non-standard work and the gig economy

- Two unfair dismissal claims by an Uber worker have been dismissed, one in December 2017 (see our [article](#)) and one in [May 2018](#). Meanwhile, Maurice Blackburn is conducting a class action against Uber on behalf of participants in the taxi, hire-car, limousine and charter vehicle industry in Vic, NSW, Qld and WA.
- By contrast, a Foodora delivery driver was found to be an employee in an [unfair dismissal case](#). The FWO launched proceedings against Foodora alleging sham contracting, but this was discontinued when they exited Australia.
- The Federal Greens Party introduced the [Fair Work Amendment \(Making Australia More Equal\) Bill 2018](#), proposing to allow the FWC to issue “Minimum Entitlements Orders” to non-standard employees (e.g. those in the gig economy). (See the [Explanatory Memorandum](#)). The Select Committee on the Future of Work and Workers published a [report](#) with recommendations addressing the gig economy.
- In the States, the NSW Labor Party, if elected in March 2019, [will legislate](#) to protect workers in the gig economy; the Vic State Government has [announced an inquiry into the on-demand workforce](#); and in Qld, an [independent mandatory five-year review of workers’ compensation laws](#) has recommended that the laws be amended to protect workers engaged by “gig-economy” providers such as Airtasker and Uber.

- The law and legislators are struggling to keep up with how disruptive technologies are changing the world of work.
- This has seen an increased focus on the workforce arrangements that have emerged (as well as other issues in item 4 below).
- Watch this space as governments move to review and potentially regulate this area.

4. Future of work a key area of debate

- The [Senate Committee on the Future of Work and Workers](#) has published its report making a number of recommendations, including to increase consultation obligations.
- A recent Australian Industry Group [report](#) has revealed major skills gaps. Whilst AMMA’s report, [A New Horizon: Guiding Principles for the Future of Work](#) looks at regulation issues in relation to the future of work.
- This issue is also being discussed globally, with the World Economic Forum publishing its [The Future of Jobs Report 2018](#), recommending business leaders adopt a comprehensive workforce strategy to map changes, identify opportunities and re/upskill the workforce; and the Europe’s peak safety agency’s [report](#) has explored the impact of technology on work health and safety.
- With increased use of **data**, has come increased regulation of data privacy, including the General Data Protection Regulation (GDPR, UK – see our [article](#)) and the [first enforcement notice](#) to a Canadian company under it. The **Australian Competition and Consumer Commission** this week released the preliminary report of its [Digital Platform Inquiry](#). The 40th International Conference of Data Protection and Privacy Commissioners made the [Declaration on Ethics and Data Protection in Artificial Intelligence](#).

- Recruitment and retraining are a key issue for many businesses as work is reorganised in the new world of work. See our [article](#) on this issue in the pharma industry, which has broader application to other sectors.
- See our [article](#) on data use and protection of data (the “new oil”) in the digital economy.



Key trends and issues

Links for your further reading

Implications for employers

5. Continued legislative reform regarding vulnerable workers

- NSW and the Commonwealth have each introduced **Modern Slavery legislation**. See our commentary on the Cth legislation [here](#) and on the NSW legislation [here](#).
- Legislation passed on 6 December 2018 enshrining **family and domestic violence leave** in the NES. See our analysis [here](#).
- New terms in modern awards require employers to make a genuine attempt to reach agreement on requests for **flexible work arrangements** and provide detailed reasons for refusals (from 1 December 2018); and to make **termination payments within 7 days**.
- The AHRC launched a national **inquiry into sexual harassment in Australian workplaces**. Meanwhile, the ALP has promised that if it wins the next election it will set up an **independent university sexual harassment taskforce**. In the UK, the House of Commons Women and Equalities Committee has published its report on sexual harassment at work (see our analysis of the recommendations [here](#)).
- The Federal Government **announced an extension** to the Migrant Workers' Taskforce that seeks to **protect migrant workers** in Australia from workplace exploitation.

- **Employers should be aware of these new legislative changes and developments as applicable to them.**
- **Contact one of our team to learn more or seek advice.**

6. Labour hire licensing continues to be in the spotlight

- **Cth:** the ALP has **pledged**, if elected, to introduce a national labour hire licensing scheme and to ensure labour hire workers receive the same pay and conditions as host employers' direct employees. It has also **announced** 'in principle' support for bargaining rights for independent contractors; whilst the ACTU has **proposed** the removal of restrictions on independent contractors accessing union representation and bargaining.
- **Qld:** the licensing regime under the **Labour Hire Licensing Act 2017** came into force on **16 April 2018**.
- **SA:** the newly elected State Liberal Government has introduced the **Labour Hire Licensing Repeal Bill 2018** to repeal the **Labour Hire Licensing Act 2017**, however this legislation has not yet passed through parliament.
- **Vic:** the **Labour Hire Licensing Act 2018** and **Labour Hire Licensing Regulations 2018** were introduced. For more details on the legislation see the **Explanatory Memorandum**.
- For further information, see our **overview** of labour hire licencing in Australia.

- **Labour hire entities and those utilising labour hire providers should be on top of the new regulatory regimes.**
- **Watch this space in the lead up to the next Federal election and other State elections.**

7. Key industrial action, IR and enterprise bargaining cases and developments

- Legislation has passed allowing the FWC to overlook certain minor procedural/technical errors when approving an enterprise agreement. See our analysis [here](#).
- The **High Court** held that personal payment orders could be made against union officials, and the first such order was **made**.
- The **Full Federal Court** upheld Flick J's decision in **One Key** to quash an enterprise agreement. The **Form F17** has recently been updated and the FWC is more closely scrutinising employer explanations of enterprise agreement terms.
- Following the High Court decision in **Esso** last year (see our [article](#)), the FWC refused a union's application to **vary** an order, so it would not be in breach of it, to enable it to organise protected industrial action.
- The Full Bench of the FWC has upheld a decision that employees **did not accrue annual leave during lock outs**; clarified **when an enterprise agreement is "made"**; and **upheld the refusal to approve an enterprise agreement** with a scope clause that excluded from coverage employees engaged at a site with a future 'project-specific' enterprise agreement.
- Representation before the FWC continues to be an area of concern. The FWC is **proposing changes to the FWC Rules**. Comments are due by 20 December 2018.
- The CFMEU and MUA continued their amalgamation process, and the MUA and AWU signed an offshore alliance.

- **Industrial relations will likely be in focus in the upcoming Federal election - see our analysis [here](#) on key issues.**
- **There has been an ongoing debate this year on whether enterprise bargaining is dead. An attempt to revive it may come through the ALP's and ACTU's proposed industry-wide bargaining. This is a key area to watch in the lead up to the next Federal election.**
- **Employers should be aware of key cases in this area, including the potential opportunities and challenges they bring.**

8. Right of entry case law developments

- The Full Federal Court has confirmed that there is **no right** to enter premises to hold discussions before or after an employee's shift; permit holders are **liable** for hindering if they refuse to show their permits upon request.
- Meanwhile Justice Flick has held that **strict requirements apply** to notices for entry to investigate a suspected industrial law/instrument breach, including providing particulars and documents sought must be directly relevant. Whilst in Qld, minor technical errors on a notice for entry for a suspected safety breach **did not invalidate** the entry.

- **Employers should be aware of their obligations and rights. Seek advice if unsure.**

9. Increased scrutiny of superannuation

- The Minister for Revenue and Financial Services has announced a proposed 12 month Superannuation Guarantee (SG) amnesty to incentivise employers to voluntarily address past SG non-compliance. See our article [here](#).
- The superannuation industry has been heavily criticised by the **Hayne Royal Commission**.
- **The ALP platform** from April 2018 contains proposals regarding default funds in modern awards, and more superannuation proposals are likely following the ALP conference (with Bill Shorten proposing superannuation be enshrined in the NES).

- **It is timely to review superannuation compliance in light of these developments.**

10. Anti-bribery, corruption & whistleblowing

- A revised Bill strengthening **whistle-blower protections** in the private sector has passed through the Senate and is to be heard in the House of Representatives in February 2019, with a potential commencement date of 1 July 2019 at the earliest.
- See [here](#) for our recent update on key developments in this space, including corporate crime.

- **This area continues to be an area of interest for legislators and regulators in Australia and overseas. More reform is likely on the horizon in 2019.**