

## Industrial Legislation in Australia in 2017

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### Abstract

This article examines key industrial legislation passed by federal Parliament in 2017. The main development in federal industrial legislation for this year, which passed with bipartisan support, saw a weakened Coalition government (forced from its traditional IR stance), act to improve protections for vulnerable workers. This initiative introduced extended liability provisions regulating franchisors and holding companies. However, these provisions are a narrow response to an economy-wide problem because they do not establish measures to better regulate supply chains, labour hire and gig economy arrangements for the protection of vulnerable workers. Back in more familiar territory, the Coalition government managed to implement part of its agenda to further regulate unions by establishing legislation that criminalises bargaining payments by employers to unions. A constitutional crisis over the citizenship status of federal Parliamentarians prevented the Coalition government from passing legislation designed to curtail trade union activities. The article also considers significant State legislative developments including the introduction of mandatory labour hire licencing laws in South Australia and Queensland, industrial manslaughter laws in Queensland and regulation of ridesharing arrangements in Victoria. The article concludes by contrasting federal criminal penalties against union activity with civil penalties for businesses that exploit vulnerable workers, before suggesting future directions in industrial legislation.

### Introduction

After industrial legislation occupied ‘centre stage’ in 2016, the Turnbull federal Government’s industrial legislation has been more ‘limited and piecemeal’ in 2017, as predicted in last year’s Annual Review of Industrial Legislation (Forsyth 2017: 13). This article examines key aspects of industrial legislation passed by federal Parliament in 2017 including the main development in 2017 – the *Fair Work Amendment (Protecting Vulnerable Workers) Act*. This legislation passed with bipartisan support (although, as is explained further below, not without controversy and disagreement over some aspects). The federal Labor opposition were able to amend the original Bill with the support of the Nick Xenophon team, other cross benchers and the Greens (Workplace Express, 2017a).

Although the legislation delivers on the Coalition’s 2016 election policy (Liberal and National Party, 2016) to protect vulnerable workers, protecting workers is not the Coalition’s traditional ground. Arguably, the Coalition was required to take this course due to widespread media coverage of vulnerable worker exploitation in franchises such as 7 Eleven. The new laws include extended liability provisions imposed upon franchisors and holding companies. Labor argued that these provisions were not broad enough (O’Connor 2017) because the Turnbull Government did not establish (much needed) parallel measures to address vulnerable worker

exploitation arising out of other new economy business structures and strategies including chains, phoenix activity, labour hire and gig economy arrangements.

In a return to the Coalition government's main industrial relations agenda – which has overwhelmingly focussed on further union regulation - the Coalition government established the *Fair Work Amendment (Corrupting Benefits) Act* which criminalises certain employer payments to unions. Late in the year, amidst constitutional issues over the citizenship status of Parliamentarians, the Turnbull government introduced two further bills targeting unions - the *(Registered Organisations) Amendment (Ensuring Integrity) Bill* and the *Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill*. Neither had passed the Senate at the time of writing.

The article also considers significant State legislative developments, specifically in Queensland, South Australia and Victoria. Given that reforming labour hire and gig economy arrangements at the federal level may take some time (Forsyth 2017: 12), regulation in these areas has become a concern of State Labor Governments. Notably, Queensland and South Australia both established a mandatory labour hire licencing scheme this year. The Queensland Labor Government has also introduced industrial manslaughter laws. The article concludes by contrasting laws at the federal level dictating criminal penalties against certain union activity with the civil penalties applied to businesses for vulnerable worker exploitation and suggesting future directions in industrial legislation.

## **Commonwealth**

### *Fair Work Amendment (Protecting Vulnerable Workers) Act*

Recent high profile media investigations exposed exploitation of vulnerable migrant workers at a number of well-known companies including 7-Eleven, Pizza Hut, Caltex, Domino's Pizza and United Petroleum (Parliament of the Commonwealth of Australia, 2017e:4). Such exploitation, which usually involves systematic underpayment (Hardy, 2016: 81), appears to have been intensified by temporary migrant visa programs. Its effect has been to place downward pressure on wages and conditions while undermining the legitimacy of employers who comply with Australian labour laws (Parliament of the Commonwealth of Australia, 2017e:4). Consecutive cases concerning migrant worker exploitation have occurred within franchise arrangements. In many instances, large franchisors exercise extensive control over small franchisees (Riley 2006: 564). Franchisors often reap large profits by leaving franchisees to pay key business expenses. This financial pressure on franchisees means that exploitation of franchise workers becomes a business imperative (Ferguson, Danckert and Toft 2017).

The *Fair Work Amendment (Protecting Vulnerable Workers) Act* was the Coalition Government's response to addressing vulnerable worker exploitation. The Act amended and inserted provisions into the *Fair Work Act 2009* (Cth) ('FW Act'). The new laws explicitly prohibit an employer from requiring an employee to pay back any part of their wages to their employer. They also increase penalties for contraventions of the FW Act and the investigative powers of the Fair Work Ombudsman ('FWO'). These measures will potentially benefit all employees covered by the FW Act. In addition, the legislation explicitly makes franchisors and

holding companies liable for contraventions of labour law by franchisees or subsidiaries within their networks. Each of the new measures will now be discussed.

The Act makes a franchisor or holding company liable where a relevant franchisee or subsidiary contravenes any of the national employment standards, modern awards, enterprise agreements, national minimum wage orders, employee records and pay slips and sham contracting provisions in the FW Act (s558B, FW Act). Franchisors and holding companies will be held responsible where they could reasonably have been expected to have known either that a contravention by the franchisee or subsidiary would occur or a further contravention is likely to occur (s558B, FW Act). However, a franchisor can only be held responsible where it exercised a significant degree of control or influence over a franchisee (s558A, FW Act). Furthermore, a franchisor or holding company will not be held responsible if they have taken reasonable steps that ought to be taken in the circumstances to prevent a franchisee or subsidiary from committing a contravention of the same or similar character (s558B FW Act). In determining whether those reasonable measures have been taken, a court can take into account all relevant matters including: the size and resources of the franchise or holding company; the ability of franchisor or holding company to control the relevant franchisee or subsidiary conduct; any action the franchisor or holding company took to ensure the relevant organisations within their network had an understanding of certain employer requirements under the Fair Work Act (including those relating to minimum standards); and any compliance arrangements made by the franchisor or holding company regarding pay and conditions of workers within the franchise or corporate group (s558B(4) FW Act). Reasonable measures will differ for large multi-national franchisors, compared with smaller ones (those with only several franchisees) (Parliament of the Commonwealth of Australia, 2017a:9-10).

These provisions are a significant extension of franchisor/holding company liability. Under previous laws, liability for employment conditions and pay was focused on the direct employer (such as the franchisee or subsidiary). The introduction of the provisions is at odds with the Coalition's employer-oriented approach to industrial relations, exemplified by its recent 'crack-down' on unions through changes to the *Registered Organisations Act* and the re-establishment of the Australian Building and Construction Commission (ABCC). Indeed, the extension of franchisor liability stirred controversy within Government ranks (Patty 2017). Bruce Billson, small business Minister under the Abbott coalition Government, became the Executive Chairman of the Franchise Council of Australia, a key stakeholder who lobbied Parliament to oppose extending franchisor liability. Proposed amendments by Senators David Leyonhjelm and Cory Bernardi to reduce franchisor liability, gained the support of the Government (Workplace Express 2017a). These proposed changes ultimately failed, however, following Labor accusations of Government collusion with the Franchise Council (Patty 2017). The Bill was passed with the original franchisor extended liability provisions intact.

In regards to the provisions restricting franchisor liability to those with influence or control, the FWO contended that these provisions will 'facilitate compliance in franchise networks by those who have a real capacity to influence or control' (Parliament of the Commonwealth of Australia 2017e: 9-10). However, the Australian Chamber of Commerce and Industry maintained franchisors might avoid the provisions by restructuring. For example, franchisors

might simply withdraw support for franchisees where they perceive risk under the new legislation (Parliament of the Commonwealth of Australia 2017e:13). Law firm, Maurice Blackburn, submitted that the Bill may lead to ‘arms-length’ franchise arrangements that attempt to disguise franchisor influence or control (Parliament of the Commonwealth of Australia 2017e:16).

These criticisms focus on restructuring within franchises. They are perhaps overshadowed by broader concerns over the evasion of responsibility by outsourcing work and developing network structures beyond existing and recognisable franchises and corporate groups. Indeed the main criticism of the new extended liability provisions is that they only protect vulnerable franchise workers and those in corporate groups. But the reality is that there are other complex business structures or networks beyond franchises and corporate groups which frequently involve the most influential businesses shedding their role as a direct employer and creating jobs at separate, smaller businesses where vulnerable workers are often subject to violations of minimum employment standards (Weil 2014: 36-37). The provisions fail to address this broader problem of ‘fissured’ work arrangements, including labour hire arrangements and supply chains (Hardy 2016: 81). As the Franchise Council conceded, these concerns are not restricted to franchises; they are ‘an economy-wide issue’ (Parliament of the Commonwealth of Australia 2017e: 46.) Significantly, the Committee Report (Parliament of the Commonwealth of Australia 2017e:19) noted that labour hire and supply chains harbour risk of worker exploitation. In response, Labor Senators tried but failed to extend the Bill to include supply chains and labour hire hosts (Parliament of the Commonwealth of Australia 2017e: 46-47; Workplace Express, 2017a).

Pre-existing accessorial liability provisions provide that persons beyond the direct employer (such as franchisors and holding companies) will not usually be held responsible unless they know about a contravention within their network (s550, FW Act; see further Hardy and Howe 2015). According to the FWO, this ‘knowledge’ requirement means that there were limitations to existing enforcement measures used to address vulnerable worker exploitation. (Parliament of the Commonwealth of Australia 2017e: 5). The new provisions partially overcome these limitations because the knowledge requirement in the new provisions is an objective assessment of what a franchisor or holding company could reasonably be expected to have known. For example, a franchisor that is aware of a series of complaints about alleged underpayments might be held to have known that a contravention has occurred or is likely to occur. It is not necessary to prove the franchisor knew exactly who was being underpaid and on what basis.

In regards to the ‘reasonable steps’ exemption, Maurice Blackburn contended that it would produce a superficial, ‘tick-a-box’ culture of compliance among franchisors and holding companies (see Parliament of the Commonwealth of Australia 2017e:16). Moreover, they submitted that the use of the word ‘prevent’, in the provisions, meant that a franchisor could escape liability after becoming aware of a contravention as long as it had taken prior measures before the contravention (Parliament of the Commonwealth of Australia 2017e:17). Despite these concerns, the provisions in the original Bill were passed unchanged.

One aspect of the 7-Eleven worker exploitation scandal was that vulnerable migrant workers were coerced to pay back to their employer a proportion of their wages in cash. The new legislation now expressly prohibits all direct employers covered by the Fair Work Act demanding an employee pay back any of their wages or any other unreasonable request for payment to the benefit of the employer or a related party (amended s325 FW Act). The new provision applies even where the employer request is indirect via an agent or employee or the employee has refused or failed to make the payment (Parliament of the Commonwealth of Australia 2017a:12). Where an employee makes such a payment he or she is entitled to be reimbursed by their employer (Parliament of the Commonwealth of Australia 2017a:13) Following amendments to the Bill in the senate, the provisions further impose a prohibition on prospective employers demanding payments from prospective employees in order for them to secure a job (s325(1A) FW Act).

The Act heralds a higher scale of penalties for serious contraventions. Parts of the FW Act subject to the higher penalties include the National Employment Standards, modern awards, enterprise agreements and national minimum wage orders. Sham contracting provisions under the FW Act remain excluded from the new penalties. This constitutes a significant omission given the extent to which employees are wrongly classified as contractors to avoid minimum employment standards (see, Parliament of the Commonwealth of Australia 2017e:38).

The maximum penalties for serious contraventions are ten times higher than the penalty that would otherwise apply. Fines for serious contraventions are now a maximum of \$126,000 for an individual and \$630,000 for a corporation. Serious contraventions, to which the higher penalties apply, include knowingly contravening relevant Fair Work Act provisions as part of a systematic pattern of conduct (s557A FW Act). This ‘knowledge requirement’ supplanted the use of the term, ‘deliberate’, following submissions from Andrew Stewart (see Parliament of the Commonwealth of Australia 2017e: 37). It is now the case that a defendant employer has the requisite knowledge if they knowingly do not pay the employee in full (and this was part of a systematic pattern of conduct).

A corporation breaches the new serious contraventions provisions if the corporation ‘expressly, tacitly or impliedly’ authorises the contravention (s557B FW Act). Such authorisation by the corporation may be given by an individual within the corporation or via a ‘policy, rule course of conduct or practice’ that exists within the company (Parliament of the Commonwealth of Australia 2017a: 5).

The new provisions clarify that an accessory (labelled in the Act as an ‘involved person’), beyond the direct employer, is liable for a serious contravention where the direct employer commits a serious contravention, and the accessory was knowingly involved (s557A FW Act).

The newly amended FW Act provisions also double the maximum penalties for record-keeping and pay slip failures, to \$12,600 per contravention for individuals and \$63,000 for companies (s539 FW Act), and triple existing penalties in cases where employers give false or misleading pay slips to workers, or provide false information to the FWO (Workplace Express 2017g;

Parliament of the Commonwealth of Australia 2017a, 3). These changes acknowledge the importance of reliable employee records and pay slips; without these employees may be unable to recover their minimum entitlements (Parliament of the Commonwealth of Australia 2017a, 3).

Labor also successfully moved amendments to reverse the onus of proof in unpaid wages claims where employers fail to comply with requirements to make and keep employment records and have no reasonable excuse for doing so (s557C FW Act; Workplace Express 2017a; Patty 2017).

The original Bill proposed providing the FWO broad powers to issue written notices compelling witnesses to produce information or documents and subjecting them to involuntary interrogation (Workplace Express 2017a). The Government argued that such powers were necessary where the FWO lacked evidence and parties proved uncooperative with a FWO investigation (see Parliament of the Commonwealth of Australia 2017a:14). However, a number of organisations expressed concerns about this expansion of FWO powers. The ACTU, for instance, suggested that the powers could ‘further frighten workers and stop them from reporting abuse’ (see Parliament of the Commonwealth of Australia 2017e: 25). The ACTU were particularly concerned that the questioning powers would remove a worker’s right to silence (Patty 2017). Neither did the Australian Industry Group support the new powers (Parliament of the Commonwealth of Australia 2017e: 25). Labor Senator Doug Cameron expressed concerns that the powers ‘would be used as a ‘Trojan Horse’ to attack unions’ and could be used ‘in the same way as the ABCC continually interfered in relation to the legitimate operation of the trade union movement.’ (Workplace Express 2017a).

Subsequently, the original Bill’s provisions regarding the new FWO powers were amended substantially and the Act as passed by Parliament introduced a set of safeguards. Now, the FWO must apply to the Administrative Appeals Tribunal before it can require a witness to produce information or documents and answer questions (s712AA-712AD FW Act). An FWO notice must only pertain to particular types of suspected contraventions, mainly relating to vulnerable worker exploitation (such as underpayment of wages and unreasonable requirements for employees to pay back wages) (Patty 2017). Further, the exercise of these powers are to be supervised by the Commonwealth Ombudsman, with the FWO to report to the Commonwealth Ombudsman. In turn, the Commonwealth Ombudsman is required to report quarterly to federal Parliament (s712E-712F FW Act). And where witnesses are compelled to attend to answer questions, they now have the right to be represented by a lawyer (s712AE, FW Act).

### **Union Corruption and Governance Offences**

In 2017, the Turnbull Government continued to implement the recommendations of the Heydon Royal Commission into union corruption and governance (Parliament of the Commonwealth of Australia 2017b:i). As Forsyth (2017) has explained, this has been an ongoing process, since the election of the Abbott Government in 2013. Part of this Coalition Government platform to further regulate unions has been the reform of unionism in the building industry, dating back

to the Howard Government's Cole Royal Commission in 2003. Accordingly, in 2016, as reported in last year's review of industrial legislation (Forsyth 2017), the Turnbull Government enacted legislation amending existing registered organisation laws to further criminalise and regulate certain union conduct and to resurrect the Australian Building and Construction Commission (ABCC). This year's legislative changes regarding so called 'corrupting benefits', paid between by employers to unions, also extend beyond regulation of the building and construction industry, broadly affecting the relationship between employers and unions. However, a 2017 registered organisations Bill and worker entitlement fund Bill discussed below were not passed by the senate at the time of writing.

#### *Fair Work Amendment (Corrupting Benefits) Act*

This Act implements Recommendations 39-41 of the TURC, which proposed the criminalisation of 'corrupting benefits' or payments by employers to unions, along with disclosure requirements for unions and officials. In addressing these recommendations, the Act bans payments designed to secure 'industrial peace' and prevents conduct that harms the employer or confers a benefit on them at the expense of the employer's workers or competitors (Explanatory Memorandum, 2017b, v). However, following concerns raised by the Australian Industry Group that small payments of 'nominal value' might be ensnared by the legislation, the Act was amended to exclude such payments including gifts, travel and expenses worth less than \$420 (Workplace Express, 2017e; ss 536F(3)(ca) - (cb)). Other exempted payments include: union dues, deducted from workers' wages by an employer; payments to unions that exclusively benefit workers of the employer; payments for specific goods and services to be used by the union; and payments authorised by s. 30-15 of the *Income Tax Assessment Act 1997* (i.e. payments to charitable organisations that are not unions) (ss. 536F(3)(a)-(d)).

In so doing, the Act is drafted in a broad manner, which constricts funding to unions while affording their opponents a further measure to police union activity. This approach counteracts a substantial body of scholarship indicating that productivity is not necessarily enhanced by regulation that minimises the influence of unions (Crouch et al, 2005; Peetz, 2012; Bogg, et al 2014). Indeed, the practice of prohibiting, let alone criminalising payments between employers and unions, stems from a narrow, adversarial approach to industrial relations which stifles workplace co-operation, along with the prospect of achieving greater productivity by putting aside industrial differences. For instance, employers in the construction industry can no longer support unions by donations and receive enhanced productivity in return. A good example of the kind of conduct the legislation is designed to capture (but may or may not), is the prior payment (which was lawful at the time) by the employer, Theiss John Holland, of \$134,500 to the AWU. The donation undoubtedly enhanced the operational capabilities of the union to act on behalf of workers. In return, the union agreed to change non-essential contractual terms involved in a project with Theiss, by converting the compulsory rostered days off (RDOs) of its workers into flexible RDOs (Hannan, 2015).

To prevent payments from employers to unions, the Act creates two serious criminal offences associated with giving and receiving 'corrupting benefits', as well as two similar summary offences. The summary offences are designed as 'back-up' charges. The summary offences

streamline the prosecution process by deploying strict liability provisions which dispense with the requirement to prove intention or a ‘fault’ element of the offence. These charges will presumably be used in the event of a lack of evidence to prove one of the serious criminal offences.

The first serious criminal offence involves giving a ‘corrupting benefit’ to a union (s 536D(1)) while the second criminalises a union or union official who receives or solicits a ‘corrupting benefit’(s. 536D(2)). Proof of each of these offences requires a defendant to have given or received a benefit ‘dishonestly’, with the further understanding that a union official would afford some advantage to the person giving the payment or benefit (ss. 536CA and 536D). These offences are punishable by up to 10 years imprisonment or a fine of \$1,050,000 or both. Up to \$5,250,000 may be imposed against a company or union.

The summary offences specifically target relationships between employers and unions. They make it an offence for an employer to offer or provide payment to a union or its officials (s. 536F(1)) and for a union or an official to solicit, receive, obtain or agree to obtain a prohibited payment from an employer (s. 536G(1)). As strict liability offences, the prosecution is not required to prove a fault element. Rather, the burden of proof is reversed such that a defendant must assert why its payment or promised benefit fell within a range of exceptions (s. 536F(3)). Offences are punishable by 2 years imprisonment or a fine of \$105,000, or \$525,000 for a corporation.

The Parliamentary (Human Rights) Scrutiny Committee (Parliamentary of the Commonwealth of Australia 2017d) required the Minister to justify and explain why the criminal provisions of the Bill:

- reversed the burden of proof;
- relied on defence provisions to ‘carve-out’ excuses for legitimate transactions;
- were drafted so broadly as to place elements of the offence in subordinate legislation or regulation;
- imposed strict liability for offences where penalties included imprisonment and fines over 60 penalty units (in contravention of the Attorney-General’s, Guide to Framing Commonwealth Offences).

Subsequent responses from the Minister have clarified little in respect to these issues, aside from asserting the Government’s objective that this legislation should have a ‘deterrent effect’ (Parliament of the Commonwealth of Australia 2017d (No 5): 92). Peculiarly, the strict liability provisions fail to explicitly state that these offences are ‘strict liability’ offences – despite statements from the Minister, the Explanatory Memorandum and the Parliamentary Scrutiny Digest, advising that they are. Such a failing might prove fatal to charges laid under these provisions because the *Criminal Code 1995 (Cth)* provides that strict liability offences must expressly state that they create ‘an offence of strict liability’ (s. 6.1) and that if they do not, they will be presumed to contain a fault element (s. 5.6). (Other strict liability provisions under the *Fair Work Act 2009* (such as s. 675) clearly state that they create an offence of strict liability.) Federal legislation that failed to specify how the elements of a federal offence (in this



case, involving social security fraud) were to be proven, was found to be defective by the High Court in *DPP(Cth) v Poniatowska* [2011] HCA 43. In this case, the High Court quashed a conviction made pursuant to the faulty legislation and the Commonwealth scrambled to redraft its key social security fraud offence. In addition, the Act imposes a disclosure regime requiring all institutional parties to an enterprise agreement to record all financial benefits derived from the agreement (Schedule 2). Employers and union officials must create an itemised list of all beneficial terms and other benefits provided during the course of bargaining, as well as the identities of the entities or officials to whom a benefit will be provided (ss179-179A). A copy of the list must be provided to workers within the employer company (s180(4)). These provisions are enforceable through civil penalty provisions (s 539(2)).

#### *Building and Construction Industry (Improving Productivity) Amendment Act 2017*

The substantive ‘Improving Productivity’ Act was passed last year and formed part of the Government’s anti-union corruption package, recommended by the TURC. This minor amendment to the Act, brought forward the implementation of requirements for tenderers for Commonwealth-funded building work under the Government’s new construction Code (see *Building and Construction Industry (Improving Productivity) Act 2017*, s. 34(2E)). This is important because the Government was able to secure Senator Hinch’s support for a reversal of the position that had been settled and passed in late 2016.

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

Dogged by the constitutional citizenship scandal that has compromised the Government’s majority in both houses, the Turnbull Government did notto amend the *Fair Work (Registered Organisations) Act 2009* (‘RO Act’) due to its failure to passing this Bill toward the end of 2017. The Bill is worthy of mention because it was a key part of the Turnbull Government’s proposed industrial reforms in 2017 which sought to implement Recommendations 36-38 of the TURC Royal Commission, regulating the conduct of union officials. The Bill sought to impose a range of ‘law and order’ sanctions on ‘registered’ industrial ‘organisations’, both unions and employer associations, as well as their officials, in respect of a range of misconduct by officials. If passed, the Bill would reinforce changes to the ‘Registered Organisations Act’ from 2016. The Bill’s provisions propose to lower the threshold for union misconduct and add a range of new circumstances whereby an organisation’s registration may be cancelled or an officer may be disqualified. These circumstances include criminal behaviour such as violence or dishonesty offences (proposed s. 223(6), RO Act), summary offences such as contempt of court (proposed s. 223(2), RO Act), civil findings of failing to perform due diligence (proposed s. 223(4), RO Act) and being refused entry to a worksite (proposed s. 223(6), RO Act), as well as the discretionary ground that an official is not a ‘fit and proper person to hold office’ (proposed s. 223(5), RO Act). The Bill further proposed to extend the number of criminal offences under the existing Act, creating a range of serious criminal and strict liability offences (proposed s 226, RO Act) followed by automatic disqualification from bargaining if convicted (proposed ss. 323G-H, RO Act).

Concerningly, the Bill would have provided for disqualification of union officials where they are found merely to have been employed with a union at the time of two or more designated findings against a union, made by the Registered Organisation Commission (proposed s. 223(3), RO Act). This effectively created a ‘status offence’ - a law that penalises a person for the circumstances in which they find themselves. Such legislation was discouraged in the 1980s after it was found to have unfair and punitive consequences on defendants. Similar concerns were raised by the Parliamentary Scrutiny Committee (Parliament of Commonwealth of Australia 2017d: 14).

In addition, the legislation requires the Fair Work Commission to regulate union amalgamations by requiring the FWC to decide a public interest test determined by an assessment of the impact of amalgamation on both employees and employers in the industry (proposed s. 72D, RO Act) as well as the ‘compliance record’ of the amalgamating organisations (proposed s. 72E RO Act). This part of the proposed Bill appears to exceed the recommendations of the TURC and could prove a significant hindrance for unions planning amalgamation to ensure their survival.

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

This contentious Bill aims to amend a range of legislation (including the FW Act and the RO Act) to implement Recommendations 42, 45, 47-51 of the TURC, relating to the regulation of financial services products purchased by unions and their members, as well as funds (including so called ‘slush’ funds) managed by unions. If passed, the Bill would further regulate and limit the use of union-related worker entitlement and training funds (Schedule 2). The Bill requires employees to choose the fund to which their entitlements are paid, rather than being specified by an award or agreement, union or employer (proposed s 151A, FW Act). In a move to further scrutinise union financing and spending, the Bill applies governance, financial reporting and disclosure requirements and restrictions to these type of worker funds (Schedule 1 and Schedule 5)). It also prohibits employee contributions to union election funds (Schedule 3). Industry funds like Incolink have complained that the Bill jeopardises their provision of free ambulance and funeral cover to workers as well as its subsidisation of 21 OHS officer roles in Victoria after public funding was withdrawn (Workplace Express, 2017d). This may be due to the fact that current registration requirements under the Bill are restricted to the ‘worker benefit funds’ as defined by the RO Act (proposed amendment to s. 12, FW Act). Such a definition does not cover funds such as Incolink which operate as co-operative or co-determined employer/employee assistance organisations ( ss 18A-C, RO Act). Opening registration to organisations like Incolink under the Bill may prevent the difficulties that Incolink has complained about.

#### *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017*

This Bill implements Productivity Commission recommendations to abolish four-yearly reviews of modern awards (proposed amendments to ss. 582, 616, FW Act) while ensuring that technical errors in enterprise bargaining agreements do not slow the bargaining process (proposed amendments to s188, FW Act). While the Bill is uncontentious and has bi-partisan support (Workplace Express, 2017f), its progress was slowed earlier in the year due to an ALP

amendment designed to restore penalty rates to workers covered by enterprise agreements. The Bill is now very close to being passed.

## **Queensland and South Australia**

### *Labour Hire Licensing Act Qld and Labour Hire Licensing Act South Australia*

These Acts aim to address vulnerable worker exploitation within Queensland and South Australian labour hire arrangements. Queensland was the first State Parliament to pass labour hire licencing laws in September 2017, with South Australia passing labour hire laws soon after in November 2017. This legislation follows inquiries into the labour hire industry in Queensland (Parliament of Queensland, 2016), South Australia (Parliament of South Australia 2016) and Victoria (Forsyth 2016), as well as bipartisan support for labour hire licencing schemes from two federal parliamentary committees and a recent Labor party proposal for a national licensing scheme (Stewart, Forsyth and Irving, et al 2016:263).

The Queensland government inquiry report into labour hire (Parliament of Queensland 2016, 25) found that ‘vulnerable overseas workers are often exploited by labour hire companies’ especially in the horticulture and other low paid industries such as meat processing and cleaning. The South Australian inquiry reported that some labour hire industry participants ‘are willing and able to exploit vulnerable workers’ (Parliament of South Australia 2016, 4), noting that exploitation is more prevalent in regions reliant on seasonal workers and workers on temporary migrant visas (Parliament of South Australia 2016, 59). The Queensland report (Parliament of Queensland 2016, 25) stated that there was evidence of sexual harassment, workers being required to reside in overcrowded and sub-standard accommodation, underpayment and unauthorised deductions from pay, lack of proper safety equipment and appropriate training. The South Australian Report recommended that the South Australian government should establish a labour hire licensing scheme in the absence of a federal scheme (Parliament of South Australia 2016, 68). Whilst the Queensland parliamentary committee into labour hire did not produce bipartisan recommendations for a mandatory licencing scheme in Queensland (Buchanan and McConchie 2017), the Queensland Government nevertheless established labour hire legislation.

The main requirements of both the Queensland and South Australian legislation are that all labour hire providers operating in the relevant State must be licenced (Queensland Act, s10; South Australian Act, s11) and businesses who engage labour hire providers must only engage licensed providers (Queensland Act, s11; South Australian Act s12).

In both Queensland and South Australia significant penalties apply for operating as a labour hire provider without a licence and for entering into labour hire arrangements with an unlicensed provider. In Queensland, the maximum penalties for breach of these provisions is \$126,044.60 or three years imprisonment for an individual and \$365,700 for a corporation. In South Australia, the maximum penalties for breach of these provisions is \$140,000 or three years imprisonment for an individual and \$400,000 for a corporation.

The Queensland Act is intended to cover circumstances where labour hire workers perform work in Queensland even if the provider of labour hire services is not based there (s5; EM Parliament of Queensland 2017:8). The South Australian Act also applies to conduct outside the State that is connected to labour hire services supplied within South Australia (s4). Under the Queensland Act, a provider of labour hire services is a person who, in the course of carrying on a business, supplies to another person, a worker to do work (s 7). This broad definition applies despite industry concerns that it might capture some non-labour hire arrangements such as secondments. The original South Australian Bill defined labour hire services in a similarly broad way. Amendments to that Bill, however, have seen ‘labour hire services’ defined more narrowly as involving a provider who, in the course of conducting a business, supplies a worker to do work in, and as part of, a business or commercial undertaking of another person (s7). This section, although it is mainly directed at labour hire arrangements, could still include other engagements or arrangements where a worker works in another business but is paid by the labour hire provider. (South Australia Act, Note 2 to s7(1)). In both Queensland and South Australia labour hire providers are subject to the Act regardless of: (i) who controls the work; (ii) whether the worker is an employee; (iii) whether the worker is supplied directly or indirectly; or (iv) whether a contract is entered into by the worker and the labour hire company, or the labour hire company and the business to whom the worker is supplied (Queensland Act s7(2); South Australian Act s7(3)).

In both Queensland and South Australia labour hire licensees are subject to a fit and proper person test and a requirement that the relevant business is financially viable (Queensland Act, s15, s27, s44; South Australian Act s10, s17). In Queensland an application for a labour hire licence must state whether any disciplinary action has been taken against the applicant under workplace laws including the FW Act in the prior five year period (s13; Schedule 1). Also, in Queensland it is an explicit condition of holding a licence that a labour hire company complies with those workplace laws (s28, Schedule 1). In South Australia, it is left to the Commissioner for Consumer Affairs to determine licence conditions and information to be included in the application for a labour hire licence (s15, s18). In any case, in both Queensland and South Australia, licences can be suspended or cancelled if the licensee has contravened those workplace laws (Queensland Act s22,24; South Australia s23) and licensees must report on their compliance with workplace laws and any disciplinary action taken against them under those laws (Queensland Act s31; South Australian Act, s20). These provisions are critical to the legislation’s purpose of protecting workers from exploitation by labour hire providers (Queensland Act, s3; South Australian Act, s3).

Under both the Queensland and South Australian schemes, labour hire providers must pay annual licence fees. In Queensland the fee is \$1,000 for a small labour hire provider, \$3,000 for a medium labour hire provider and \$5,000 for a large labour hire provider (Grace 2017: 1446). The Queensland Act also establishes a public register of licenced labour hire providers. This is designed to allow businesses who use labour hire and workers engaged by labour hire to ensure they are dealing with a licenced labour hire provider (Grace 2017: 1446).

Both the Queensland Act and the South Australian Acts also allow the respective State Governments to appoint inspectors to monitor and enforce compliance with the labour hire

legislation. Queensland and South Australian governmental inspectors are provided with rights of entry and broad powers to question and seize documents (Queensland Act, Part 6; South Australian Act s34-36).

#### *Work Health and Safety and Other Legislation Amendment Act Queensland*

Fatalities at Dreamworld and Eagle Farm in late 2016 prompted the Queensland Government to review its work health and safety (WHS) regulation, culminating in this latest amending legislation. Changes include:

- A new offence of industrial manslaughter (ss. 34C and 34D);
- Establishing an independent office for WHS prosecutions (similar to Worksafe Victoria and Safework NSW);
- Expanding the role of the Queensland Industrial Relations Commission to hear WHS matters;
- Restoring provisions of the WHS Act from 1995; and
- Enhancing the role of WHS officials to notify, educate, consult and require the compliance of business with WHS regulation.

Queensland is only the second jurisdiction in Australia to create an industrial manslaughter offence, after the Australian Capital Territory (ACT). Like the ACT legislation, the Queensland Act provides that where a worker dies while carrying out work for a business or undertaking, that the business, as well as ‘senior officers’ and those who ‘conduct’ it, will be guilty of manslaughter if their conduct both: (i) ‘causes’ death (ss. 34C(1)(b) and 34D(1)(b); and (ii) does so ‘negligently’(ss. 34C(1)(c) and 34D(1)(c)). Those convicted under either provision face up to 20 years imprisonment. The Queensland legislation goes further than the ACT legislation by imposing fines of up to \$12,615,000 compared with fines in the ACT of up to \$300,000 for individuals or \$1,500,000 for corporations. In this sense, the Queensland legislation is consistent with calls from Hall and Johnson (2005: 81-82), that, ‘OHS policy makers ... should reassert that such offences are truly criminal’, rather than ‘quasi-criminal’ or ‘regulatory’.

Hopkins (2006) has expressed scepticism at the possibility of reducing corporate homicide by increasing deterrent laws, pointing instead to the importance of safety management systems, education and cultures within workplaces which may be undermined by the threat of criminal liability. In the case of the Queensland Act, however, these side-effects appear to have been overcome by tethering the legislation to extensive compliance provisions, corporate education and regulatory oversight (see new Parts, 2B, 2A, 4, 5 div 7A, 5A). In this respect, the Queensland Act might be thought of as a model code for industrial manslaughter legislation.

In addition, the Palaszczuk Government was successful in passing with bipartisan support the *Strong and Sustainable Resource Communities Act*, which was first introduced in November 2016. This legislation aims to limit ‘fly in, fly out’ workers on large resources projects by giving ‘fair opportunities’ to local workers to be engaged instead (Workplace Express 2017b).

## **Victoria**

### *Commercial Passenger Vehicle Act*

This Act implements a selection of recommendations from a 2017 Victorian senate ‘Inquiry into the Commercial Passenger Vehicle Industry’. It is designed to create parity between taxi and hire-car services and competitors in the new (and previously unregulated) ‘ridesharing’ industry, by requiring all commercial passenger services to comply with similar regulation. Such a move represents a Victorian Government response to what Pollman and Barry (2017), have termed, ‘regulatory entrepreneurship’ – a form of business in which deregulating the marketplace is part of the business plan.

Existing transport regulation has been replaced with a scheme covering all commercial passenger services, including ridesharing – now known collectively as, ‘booking services’ (s. 5). Every trip conducted by a booking service is now subject to a \$2 levy, while taxi licence fees have been abolished. Meanwhile, an existing accreditation process for taxi drivers has been extended to ‘ridesharing’ services.

Enforcement of levies and regulation of driver pay is enforced by creating a new work relationship, known as an ‘affiliation agreement’ (a phrase borrowed from advertising and marketing contracts) between booking service providers and drivers (s. 4). These agreements require service providers to specify driver pay, while directing drivers to maintain trip records and account for levies on unbooked taxi services (levies for booked services are to be collected by the service provider). Overall, the Act appears to deregulate existing taxi services to some extent, while subjecting hitherto unregulated ‘ridesharing’ services to light regulatory treatment. More robust protections such as provisions deeming drivers to be employees of booking service providers such as Uber were overlooked (see Stewart and Stanford 2017).

The Victorian Government has undertaken to improve owner driver laws in Victoria in the wake of the abolition by the Turnbull Government of the road safety remuneration tribunal. However, at the time of writing, a Victorian Government review of the *Owner Drivers and Forestry Contractors Act* had not been completed so no substantial new owner driver legislation was passed in 2017.

The Victorian government introduced a labour hire licensing bill into Parliament in December but it was not passed in 2017.

## **Conclusion**

In 2017, whilst unions continued to bear the brunt of further restrictions on what used to be legitimate bargaining payments, the federal Parliament has improved the protections for vulnerable workers. Passage of federal legislation imposing the new payment restrictions upon unions, is representative of a widespread criminalisation of various collective conduct in the federal industrial arena. But whereas laws against union misconduct come with lengthy gaol sentences attached, federal laws against corporate maltreatment of workers are punishable by mere civil penalties or fines. Restoration of some small amount of balance to this conservative industrial landscape, has been left to the State Labor Governments with the Queensland and

South Australian Governments introducing labour hire licencing laws and the Queensland government establishing industrial manslaughter laws.

The piecemeal approach at the federal level to establishing extended liability provisions (which currently target some types of business structures but not others) may be all that is possible in the current political environment. Moreover, there is some sense in treating the different business structures separately as regulation may need to be tailored to the different issues that arise in, for example, franchises compared to labour hire arrangements. However, this leaves the task of better regulating business networks more generally and the gig economy unaddressed. It remains to be seen whether, in the medium term, an integrated, economy-wide approach to addressing the abuse of pay and conditions standards in all types of business networks including supply chains and gig economy structures can be attained. With this in mind, the extended liability provisions introduced by the Fair Work Amendment (Protecting Vulnerable Workers) Act can be seen as a narrow response to an economy wide problem. Yet, the very introduction of these extended liability provisions covering franchisors and holding companies, paves the way for a future federal Labor Government to introduce more comprehensive provisions designed to regulate all types of business network structures in order to protect and empower all vulnerable workers in Australia.

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## References

Australian Attorney-General's Department (2011) *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, online 15 October 2017, <https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx>

Bogg A, Forsyth A, and Novitz, T (2013) 'Worker Voice in Australia and New Zealand: The role of the State reconfigured?' *Adelaide Law Review* 34: 1-20.

Buchanan K, McConchie R (2017) 'Labour hire licensing Bill pushed ahead by Queensland Government' ABC online, 26 July, <http://www.abc.net.au/news/rural/2017-07-26/qld-push-for-labour-hire-licensing/8744142>

Crouch C, and Streeck W, et al (2005) 'Dialogue on "Institutional complementarity and political economy"', *Socio-Economic Review* 3(2): 359-382. Ferguson A, Danckert S, and Toft K (2015) '7-Eleven: Allen Fels says Model Dooms Franchisees and Workers' Sydney Morning Herald online, 31 August, <http://www.smh.com.au/business/workplace-relations/7eleven-allan-fels-says-model-dooms-franchisees-and-workers-20150830-gjb0pu.html>

Forsyth A (2016) *Victorian Inquiry into the labour hire industry and insecure work: Final Report*. Melbourne: Victorian Government.

Forsyth A (2017) Industrial Legislation in Australia in 2016. *Journal of Industrial Relations* 58(3): 372-387.

Grace G The Hon (2017) First Reading Speech – Labour Hire Licensing Bill. *Queensland Parliament, Hansard*, 25 May.

Hall A, and Johnston R, (2005) ‘Exploring the re-criminalising of OHS breaches in the context of industrial death’ *Flinders Journal of Law Reform* 8(1): 57-92.

Hannan E (2015) ‘Australian Workers Union received \$134,500 ‘donation’ under Bill Shorten’, *Australian Financial Review*, 17 June 2015.

Hardy T (2016) Who should be held liable for workplace contraventions and on what basis? *Australian Journal of Labour Law* 29(1): 78-109.

Hardy T and Howe J (2015) Chain reaction: A strategic approach to addressing employment noncompliance in complex supply chains *Journal of Industrial Relations* 57(4): 563-584.

Hopkins, A (2006) ‘A corporate dilemma: to be a learning organisation or to minimise liability’ *Journal of Occupational Health and Safety, Australia and New Zealand*, 22(2): 251-259.

Liberal and National Parties (2016) *The Coalition’s Policy to Protect Vulnerable Workers*.

O’Connor B The Hon (2017) Second Reading Speech – Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017. *Commonwealth Parliament, House of Representatives Hansard*, 9 May.

Parliament of the Commonwealth of Australia (2017a) *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017: Explanatory Memorandum*.

Parliament of the Commonwealth of Australia (2017b) *Fair Work (Corrupting Benefits) Bill 2017: Explanatory Memorandum*.

Parliament of the Commonwealth of Australia (2017c) *Fair Work Laws Amendment (Proper Use of Workers Benefits) Bill 2017: Explanatory Memorandum*.

Parliament of the Commonwealth of Australia (2017d) *Scrutiny Digest(s) 4, 5, 9 & 10*. Canberra: Senate Standing Committee for the Scrutiny of Bills.

Parliament of the Commonwealth of Australia (2017e) Senate Report on the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017. Canberra: Education and Employment Legislation Committee.

Parliament of Queensland (2016) *Inquiry into the Practices of the Labour Hire Industry in Queensland*. Brisbane: Finance and Administration Committee.

Parliament of Queensland (2017) *Labour Hire Licensing Bill 2017: Explanatory Notes*.



Parliament of South Australia (2016) *Final Report: Inquiry into the Labour Hire Industry*. Adelaide: Economic and Finance Committee.

Patty A (2017) Sydney morning herald 'vulnerable workers Bill passed with some compromise' Sydney Morning Herald online, <http://www.smh.com.au/business/workplace-relations/vulnerable-workers-Bill-passed-with-some-compromise-20170904-gyaqy7.html>

Riley J (2006) Regulating Unequal Relationships for Fairness and Efficiency: A Study of Business Format Franchising. In: Arup C, Gahan P, Howe J, et al. *Labour Law and Labour Market Regulation* Sydney: Federation Press, pp. 561-578.

Stewart A, Forsyth A, Irving M, et al. (2016) *Creighton & Stewart's Labour Law*. Annandale: The Federation Press.

Stewart A and Stanford J (2017) Regulating work in the gig economy: What are the options?. *The Economic and Labour Relations Review* 28(3): 420–437.

Weil D (2014) Fissured Employment: Implications for Achieving Decent Work. In McCann D, Lee S, Belser P, et al. *Creative Labour Regulation* London: Palgrave MacMillan, pp.35-62.

Peetz, D (2012) 'Does Industrial Relations Policy Affect Productivity?' *Australian Bulletin of Labour*, 38(4) pp. 268-292.

Pollman, E, and Barry, JM, 'Regulatory Entrepreneurship' *Southern California Law Review* 90: 383-448.

Workplace Express (2017a) 'Sharper teeth for FWO, but workers protected from bite, 5 September.

Workplace Express (2017b) 'Queensland introduces 100% FIFO ban', 25 August.

Workplace Express, (2017d) 'Industry bodies call for pause on "benefits" bill', 30 October.

Workplace Express, (2017e) 'Cash raises threshold for corrupting benefits', 10 August.

Workplace Express, (2017f) 'Park "controversial" bills until MP citizenship dramas sorted, says ACTU', 9 November.

Workplace Express (2017g) 'FWO welcomes expanded powers', 6 September.