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Industrial Legislation in Australia in 2018

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Abstract:	This article examines key industrial legislative developments occurring in the federal Parliament in 2018. It has been an even quieter year than last year for the passing of federal industrial legislation (partly due to the political turmoil of the federal coalition government including the ousting of the former Prime Minister, Malcom Turnbull). A weakened Coalition government has been forced to make minor improvements to rights for workers experiencing domestic violence. A number of bills aimed at marginally improving workers rights (including the Modern Slavery bill) are yet to pass federal Parliament. Also, although the Coalition government has attempted to continue to prosecute its case for further union governance measures, this agenda has been less successful than in previous years with a key government bill not yet passed by the Parliament. The stagnation in the federal Parliament continues to motivate State Parliaments to address worker exploitation and the article goes on to examine key State industrial legislation passed in 2018 including the Victorian labour hire licensing statute and the NSW Modern Slavery Act. The article concludes by contrasting the current federal Coalition government's industrial legislation measures with the federal Labor opposition's agenda for industrial legislation.

Introduction

Last year federal industrial legislative developments were limited and piecemeal. It has been an even quieter year in 2018 for the passing of federal industrial legislation partly due to the political turmoil of the Federal Coalition Government including the ousting of the Prime Minister Malcolm Turnbull in August 2018. Subsequently and under the leadership of Scott Morrison, a weakened Federal Government has been forced to act to protect worker's rights in the space left open by weaknesses in the Commonwealth Fair Work Act and the Coalition's own neoliberal industrial policy (ongoing since 1996) that have contributed to sidelining unions in the industrial arena. The Government's legislative action in this space over the past year has continued to replace the structural role played by trade unions with a statist labour law enforcement paradigm - exemplified by this year's Modern Slavery and Strengthening Protection for Employee Entitlements Bills. ACTU Secretary, Sally McManus, has recognised as much, commenting that '…while thousands of workers' representatives are sitting on the sidelines', due to 'broken laws prevent(ing) them from' intervening', they have been replaced by '200 FWO inspectors charged with enforcing our workplace laws for more than 12 million workers' (WE, 2018a).

This article examines industrial legislation passed by the Federal Parliament in 2018, namely the Fair Work Amendment (Family and Domestic Leave) Act as well as a number of key bills that have been introduced into federal Parliament with the aim of marginally improving workers' rights (including the Modern Slavery Bill), yet to pass the Senate. Such piecemeal reform to labour law has mostly met with bi-partisan support, with a Federal Labor opposition pushing for stronger, improved workers' rights in each case. Meanwhile, the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017, a relic from the 'Heydon' Royal Commission into Trade Union Governance and Corruption (2014-2015), continues to flounder in the Senate. Its contents, prospects and related legislation are also scrutinised here. While the Government has continued to prosecute its case for increased State control over union governance, this agenda has been less successful than in previous years. A lack of cross-bench and internal political support for the Government has frustrated measures aimed at improving workers' rights. This stagnation has continued to motivate State Parliaments to address worker exploitation. The Victorian Parliament has become the third Australian state government to enact a labour hire licensing regime, following similar developments in Queensland and South Australia last year. Accordingly, the Victorian labour hire licensing scheme is examined.. Other key industrial legislation passed by state governments is also discussed. In light of the chaos in this year's Federal Parliament, successive opinion polls indicate an electoral victory for the Federal Labor opposition in 2019. Accordingly, this article concludes by contrasting the centrist/union exclusion model of the current federal Coalition government with Labor's proposed industrial agenda.

Commonwealth

Fair Work Amendment (Family and Domestic Leave) Act

This federal amendment to the *FW Act* requires national system employers to provide five days unpaid family and domestic violence leave to employees within a 12-month period (s. 106A). It allows an employee to take leave where they are 'experiencing' domestic violence; 'need to deal' with that problem; and 'it is impractical … to deal with' that problem 'outside of work hours' (ss. 106B(1)(a)-(c)). An explanatory note (in s. 106B(1)) advises that such

situations include leave taken to ensure personal safety or that of a close relative (including relocation), attending urgent court hearings, or accessing police services. 'Family and domestic violence' is defined by the Act to include an objective assessment of 'coercion' or control', together with a subjective requirement of 'harm or 'fear' on the part of the victim (s. 106B(2)). Meanwhile, s. 106C(1) requires employers to treat any notice and information provided by an employee regarding domestic violence leave with confidentiality, as far as is reasonably practicable.

The Turnbull Government proposed this amendment in early 2018, following a similar Bill floated by the Greens as well as an FWC decision to implement the same provisions across modern awards - provisions that covered roughly 2.3 million workers (FWCFB 2018: 18). The amendment was eventually passed in late 2018 by the Morrison Government, extending coverage of these provisions to a further six million workers beyond those contemplated by the original FWC decision and includes casuals and part-time employees (s.106A(2)(c)) (WE, 2018b). It falls short, however, of demands by the ACTU, human rights bodies and State Labor Governments, for *ten days paid* domestic violence leave, in accordance with the Queensland Industrial Relations Act (2016) (ss. 52-54). The demands are premised on calculations by the ACTU and ALP suggest that it takes an average time of 141 hours, at an average cost of $18,250 to an employee who is a victim of domestic abuse to extricate themselves from a violent relationship (Labor Women's Budget Statement, 2018: 27).

Modern Slavery Bill Cth

In June 2018 the Coalition Government introduced a Modern Slavery Bill into Federal Parliament. The Bill has yet to pass the Senate at the time of writing. The modern slavery approach highlights that slavery and slavery-like practices such as human trafficking, forced labour, child labour and debt bondage are still prevalent around the world today, including here in Australia (Senate Committee 2017: ix). The modern slavery framework is a relatively recent one and critics argue that it tends to marginalise the collective labour law framework which is better equipped to address the underlying social and economic processes that normalise labour exploitation (including key forms of modern slavery) (Fudge 2015). The main criticism here is that labour exploitation is seen as an aberration by deviant individuals and not the routine outcome of capitalist structures (Landau and Marshall 2018b). Moreover, the modern slavery approach tends to cast exploited people as helpless victims. On the other hand, the modern slavery framework has successfully captured public attention, operating as a convenient and recognisable catchcry for addressing some of the worst forms of labour exploitation.

A conservative estimate is that over 40 million people around the world (including 4,300 in Australia) are victims of slavery or slavery-like practices (Parliament of the Commonwealth of Australia 2017: ix; EM, 2018a: 2). This includes 20.9 million people across the world who are victims of forced labour. Over half of the victims of forced labour (11.7 million) and around two thirds of modern slavery victims are in the Asia Pacific Region (Senate Committee 2017: 50, 53). Many Australian supply chains are closely linked with countries and businesses in the Asia Pacific region. Thus many products including agricultural and electronic products, bricks, coal, cocoa, coffee, cotton, floor coverings, apparel and jewellery imported into the Australian market are at high risk of being produced by modern slavery victims (Parliament of the Commonwealth of Australia 2017: 65-66; EM, 2018a: 2).

If passed, the Modern Slavery Bill would require large business entities to provide to the responsible Minister a Modern Slavery Statement every year (Part 2). This Statement would further require description of an entity's corporate structures, operations, supply chains, as well as any risks of modern slavery practices within the entity's operations, supply chains and actions taken by the entity to address those risks (including due diligence and remediation) (s16). The Bill would also require the responsible Minister to make publicly available, a register of these Modern Slavery Statements (Part 3). Although the Bill does not define supply chains to include both domestic and global supply chains it nevertheless provides for extra-territorial application, extending to "acts, omissions, matters and things outside Australia" (s10).

Business entities subject to these reporting requirements include around 3,000 Australian and foreign entities including corporations, trusts and partnerships based in or carrying on business in Australia with a consolidated annual revenue of at least $100 million (s5; WE 2018c). It also includes the Commonwealth, a corporate Commonwealth authority and a Commonwealth company which have a consolidated annual revenue of at least $100 million (s5).

The Bill defines modern slavery as conduct which would be a criminal offence under Division 270 (slavery and slavery like offences) or Division 271 (trafficking in persons and debt bondage) of the Commonwealth Criminal Code.[1] This would include servitude, forced labour, forced marriage, debt bondage and deceptive labour recruitment (s4; EM: 8). Modern slavery is defined in the Bill to include trafficking in persons and the worst forms of child labour (s4). Although these are all significant criminal offences the Bill stops short of addressing other major labour abuses which are arguably more widespread such as underpayment and freedom of association violations (occurring within the global supply chains of businesses operating in Australia e Landau and Marshall 2017).

Perhaps the most serious shortcoming of the bill is its lack of any enforcement mechanism. It does not contain any penalty for companies that breach the legislation (WE, 2018c). This would enable self-interested reporting by companies and allows the situation where a company can quite legally report slavery in its supply chains and still be in compliance with the regime. Labor MP Ged Kearney argued in Parliament that the risk of non-compliance with the requirements to provide a modern slavery statement is 'real and high' especially given the evidence that only 30% of entities with reporting obligations complied with a similar scheme in the UK where there were no penalties (Kearney 2018). Thus, the Labor opposition has proposed amendments to the Bill, to provide civil penalties for regulated entities that fail to comply with the requirement to provide a modern slavery statement (proposed s16A).

The effectiveness of this Bill is also brought into question where it lacks institutional enforcement, such as through an independent anti-slavery commissioner. (Instead the government plans for a modern slavery 'business engagement unit', within the Department of Home Affairs, to support businesses)(WE, 2018c). The appointment of such an anti-slavery commissioner was proposed in the federal parliament's joint standing committee report on modern slavery (Parliament of the Commonwealth of Australia 2017). The UK has an anti-

[1] The commonwealth criminal code is contained in this Act [ ]

slavery commissioner and, as discussed below, NSW legislation in 2018 established such a role in that State. The Bill also fails to require business to comply with the Bill in order to tender for Government contracts (WE, 2018c).

Assistant home affairs Minister Alex Hawke said that the overall effect of federal Bill will be to "foster 'a race to the top' culture" that will ensure Australia is a world leader in addressing modern slavery (WE, 2018c). However, in light of the numerous criticisms of the bill, Labor MP Ged Kearney (2018) described the Bill as "watered-down, less effective" potential legislation. Indeed, there is an argument that victims of slavery in the long-run would be better off without this legislation given that, if the original Bill is passed without being strengthened, large commercial interests can use the existence of this legislation to argue slavery is being addressed by them when in reality it is an ineffective, toothless regulatory regime. Alternatively, if the Bill is passed it may prepare regulatees for a future of potentially more robust regulation, strengthened by penalties.

The Corporations Amendment (Strengthening Protection for Employee Entitlements) Bill 2018 (CAUTION – BILL NOT YET PASSED BUT EXPECTED TO PASS WITHIN THE NEXT FORTNIGHT)

The Corporations Amendment (Strengthening Protection for Employee Entitlements) Bill 2018 (Cth) seeks to amend the Corporations Act 2001 (Cth) to enhance protection of employee entitlements while deterring employers from accessing the Gillard Government's, Fair Entitlement Guarantee (FEG) scheme (under the Fair Entitlements Guarantee Act 2012 (Cth)). Introduced in 2012, the FEG scheme allows workers to claim unpaid wages (up to 13 weeks), payment in lieu of notice, redundancy pay, as well as annual and long service leave from the Australian Government, in the event of the bankruptcy or liquidation of their employer. The scheme has recently encountered largescale costs where employers have used it to escape liability for their debts, often while engaging in illegal phoenixing operations (liquidating a debt-laden company after transferring its assets to a new company), company asset-stripping, corporate restructures or the deployment of third-party labour hire firms employee entitlements. Pre-existing employee entitlements provisions under Part 5.8A of the Corporations Act 2001 (Cth) criminalise the making of an employment contract intended to prevent or reduce the recovery of employee entitlements while permitting civil recovery of these entitlement by a liquidator. They have failed to secure any prosecutions against employers since their implementation in 2001 (Parliament of the Commonwealth of Australia, 2018b: 9). The proposed laws extend these criminal and civil penalty provisions while simplifying the debt recovery process on unpaid entitlements (mostly for Government agencies).

In extending criminal liability, the laws would also lower the fault element required to prove an offence of 'entering into a transaction to avoid, prevent or significantly reduce the recovery of employee entitlements' (ss. 596AB(1), 596AB(1A), 596AB(1B) and 596AB(1C)). The fault element for these offences has been reduced from 'intention' to 'recklessness'. Offences under these provisions would apply to individual directors (ss. 596AB(1B) and 596AB(1C)), as well as companies (ss. 596AB(1), 596AB(1A)), and include accessorial liability provisions to capture third-party labour-hire providers (Parliament of the Commonwealth of Australia, 2018b: 25). For individual directors, offences are punishable by ten years

imprisonment, a fine of up to $945,000 or three times the value of the benefits obtained (Corporations Act 2001, Schedule 3). For companies, penalties include fines of up to $9,450,000, or three times the value of the benefits obtained, or 10% of the value of the annual turnover of the company in any 12 month period in which the offending occurred (Corporations Act 2001, Schedule 3). New civil penalty provisions would allow civil prosecution of individual directors and accomplices for the same offence, albeit at a lower civil standard: on the basis of what 'a reasonable person in the position of' the director 'would know' about whether a company transaction was designed to avoid paying entitlements (s. 596AC(1)). Convictions result in fines of up to $200,000 under the existing table of civil penalties in the Corporations Act (s. 1317E(1)). Courts and ASIC would further be empowered to disqualify directors who have contravened a (broad spectrum of) obligations under the Corporations Act while involved with two or more separate companies on multiple occasions within a seven-year period before relying on the FEG scheme (s. 206EAB). Examples of contraventions are listed at s. 206EAB(2)(d) and include acts as minor as failing to keep records to the appropriate standard.

These provisions also provide for extended liability, in a similar way to last year's Fair Work Amendment (Protecting Vulnerable Workers) Act 2017, requiring parent and associated companies to pay entitlements to workers left unpaid by insolvent subsidiary companies (s. 588ZA; Rawling and Schofield-Georgeson, 2018: 380). The Bill extends this form of liability to other closely associated companies and entities such as trusts (s. 588ZA(1)(c)). The process of determining whether a corporate entity is associated with the insolvent entity is legally complex. But it is assisted by six tests, outlined within the legislation, which are determinative of the proximity between the entities, premised on established principles of corporate control, tax and financial obligations (Parliament of the Commonwealth of Australia, 2018b: 43). A Court need only apply one of these tests. If satisfied of this relationship, a Court must also be satisfied of two additional requirements: that (i) payment is 'just and equitable'; and (ii) the parent or associated 'entity has benefited, directly or indirectly, from the labour of the employees of the insolvent company on other than arms-length terms' (s. 588ZA). A Court may then impose an 'employee entitlements contribution order', requiring the parent or associated entity to contribute to the payment of entitlements left unpaid by the insolvent entity.

Under the Bill, only liquidators, as well as regulators (the ATO, FWO and DJSB) have authority to apply for these orders (s. 588ZB). In keeping with the Government's tack toward (relatively minor) interventions in industrial relations, sidelining unions in the process, trade unions have been excluded from significant recovery processes under these laws. Unions are restricted to apply for recovery of unpaid entitlements via the civil penalty provisions, which are limited to the prosecution of individuals (not companies), capped at an amount of $200,000 per prosecution.

The key provisions in the Bill, particularly those relating to phoenixing activity were originally proposed by the ALP in May 2017 (O'Toole 2018). The version of these laws, implemented by the Coalition Government, however, has slightly different motivations. It is a curious mix of enhanced state protection of worker's rights – in keeping with the Government's recent 'vulnerable workers' legislation – and traditional conservative values surrounding 'self-reliance', in this case, for employers as well as neoliberal austerity

measures. As ALP MPs noted, 'it's more about trying to save money for the Commonwealth' (Chesters 2018; Gosling 2018).

While the Bill is supported by the ALP, some ALP politicians have suggested that it 'could be improved by giving registered organisations, such as trade unions, standing to commence civil proceedings on behalf of their members under the new provisions for compensation and the recovery of unpaid entitlements' (McBride 2018; Gosling 2018). Others have observed that the original ALP scheme went further by imposing surveillance and tracking mechanisms on company directors, as recommended by research from Melbourne Law School and Monash Business School (Milton 2018; Ramsay et al, 2017).

Superannuation Laws Amendment (Strengthening Trustee Arrangements) Bill 2017; Treasury Legislation Amendment (Improving Accountability and Member Outcomes in Superannuation) Bill 2017; Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017

These Bills were introduced in late 2017 as part of a suite of measures aimed to 'crack-down' on unions in the wake of the Heydon Royal Commission. The first and second of this trio of longstanding Bills respond to the Royal Commission's criticisms of the practice by trade unions, of deriving benefits from certain fees and sponsorships from industry super funds. Commissioner Heydon suggested that such practises were sinister and dishonest (Final Report, 2015: 10, 35, 38, 40, 94). Accordingly, to ensure against unions receiving these financial benefits, the Strengthening Trustee Arrangements Bill seeks to require that one-third of the board of directors of industry super funds are independent from 'industry' (or trade union) affiliations. Meanwhile, the Improving Accountability Bill would require superannuation trustees to annually assess whether their products are benefiting superannuants. It provides power to the Australian Prudential Regulation Authority (APRA) to cancel the registration of any superannuation fund that fails to comply with reporting conditions. Under examination again in the latest Royal Commission into Misconduct in the Banking and Finance Industry, industry super funds appear to have emerged without criticism, while counsel assisting has recommended thousands of criminal charges against 'for-profit' funds managed mostly by banks (WE, 2018d). It is likely that these Bills will be shelved until a 'whole-of-industry' approach can be taken to superannuation funds (one that does not specifically target industry super funds) at the conclusion of the current Royal Commission. Recent ALP superannuation policy contemplates providing APRA with power to sack trustees of underperforming bank-managed funds (Benson, 2018).

Meanwhile, the Ensuring Integrity Bill remains before the Senate after failing to pass on two separate occasions. Discussed at length by the authors in last year's annual coverage of industrial legislation (Rawling and Schofield-Georgeson, 2018: 387-388), the Bill seeks to regulate trade union governance by introducing a range of heavy-handed penalties and criminal processes. The Government requires the support of eight of the ten cross-bench senators for the Bill to pass. While six senators support the Bill and one (SA Independent, Tim Storer) is opposed, the Government will attempt to lobby Derryn Hinch and former Xenophon Team Senators, Stirling Griff and Rex Patrick to support the Bill.

NSW

Modern Slavery Act

Anti-slavery legislation (deriving from a private member's bill of Paul Green, a Christian Democrat) was passed by the NSW Parliament in 2018. The Modern Slavery Act 2018 (NSW) establishes an independent anti-slavery commissioner. The commissioner is tasked with combatting modern slavery, providing assistance to victims of slavery, raising public awareness of modern slavery and its effect on victims, maintaining a public register of modern slavery statements, reporting annually to the NSW Parliament, co-operating with other government and non-government agencies and monitoring the effectiveness of the Act (s9, 12, 14.15, 19, 26). The commissioner must also regularly consult with the auditor-general and the NSW procurement board to ensure that NSW agencies do not procure goods and services that are the product of modern slavery (s25).

The Act also requires commercial entities with a total annual turnover of not less than $50 million that supply goods or services and have employees in NSW, to prepare annual public modern slavey statements for each financial year (s24). (Note the turnover threshold is $50 million lower than the proposed federal legislative threshold for regulated businesses.) The content of the statement is to be set by regulations but *may* include: information about the organisation's structure, its business and supply chains; its business and supply chain due diligence process in relation to modern slavery; the parts of its business where risks of modern slavery exist and the steps taken to manage those risks; and training about modern slavery available to its employees. (s24).

Slavery conduct which is the subject of these reporting obligations is defined to include any conduct constituting a modern slavery offence, including offences under ss. 270 and 271 of the Commonwealth Criminal Code, as well as offences under the NSW Crimes Act, including causing sexual servitude, conducting a business involving sexual servitude and a range of slavery or slavery like offences (s5; Schedule 2). The Act also includes amendments to the NSW Crimes Act that create new slavery offences (Schedule 4).

Like the federal bill discussed above in this article, 'supply chain' is not defined to include both the domestic and global supply chains of regulated commercial entities. However, the Act is stated to have extraterritorial application to the full extent of the legislative capacity of the NSW Parliament. The Act is intended to operate in relation to things, acts, transactions and matters done outside the territorial limits of the state (s4).

There are penalties of up to $1.1 million for not providing a statement and for providing a statement "which they ought reasonably to know, is false or misleading" (s24). Nevertheless, commercial organisations will be exempt from reporting under the NSW Act if they are required to report under the anticipated, weaker Commonwealth modern slavery legislation (when or if it is passed) as long the Commonwealth legislation is prescribed as corresponding law (s24(9)). This leads to the unsatisfactory situation in which businesses with a turnover of $100 million or more operating in NSW will only be covered by the federal regime (under which they will not be subject to penalties), whereas businesses operating in NSW with a turnover of between $50 million and $100 million may be subject to penalties under the NSW regime.

Under the NSW Act, a court that convicts a person of certain modern slavery offences is provided with the power to make a 'modern slavery risk order' prohibiting the person from engaging in conduct described in the order if it is satisfied of the matters specified in s 29(1) (s29; Explanatory Note to the Bill). Without limiting the range of matters that can be subject to such an order the court may prohibit the convicted person from contacting any victim or relative of a victim (s29(2). A person who is subject to a modern slavery risk order "must not, without reasonable excuse, contravene the order". The maximum penalties for such a contravention is 2 years imprisonment or a fine of $55,000 or both (s29). The existence of court orders, penalties for contraventions and the presence of a commissioner to co-ordinate anti-slavery measures, renders the NSW legislation a stronger piece of legislation than the proposed federal legislation.

Electoral Funding Act

The *Electoral Funding Act 2018* (NSW) is the second iteration in a series of NSW Coalition Government legislation, ongoing since 2013, that has attempted to hinder 'third-party' political campaigners (trade unions and other 'grass-roots' community organisations) from waging State election campaigns. The Act reduces the spending-cap for 'third-party' campaigners from $1.3 million (the level set by legislation at the past two State elections) to $500,000 (s. 29). 'Acting in concert' with others to evade this cap is punishable by 10 years imprisonment (s. 35). Meanwhile, the Act allows direct donations to individual political candidates and parties in amounts that are 22 times as high as the limits placed on third-party campaigners (WE, 2018e).

These laws by a State Coalition Government are consistent with those of Federal Coalition Governments, that have sought to exclude trade unions from having political influence. In doing so, they seek to divert political power to discrete institutional forces – (their own) political party– embedded within the State. Indeed, it is through third-party campaigning that parties of the political 'left' have traditionally conducted election campaigns, while it is through direct donations to individual politicians that parties of the political 'right' have traditionally conducted political campaigns. Accordingly, unions NSW and others are currently challenging the Act in the High Court on the basis that these laws infringe the implied constitutional freedom of political communication. They argue that these laws have an unfair and discriminatory effect on the participation of unions and other third-party organisations in election campaigns (WE, 2018e). The substantive challenge will be heard on 5 December 2018, with a judgment expected in mid-December, in the lead-up to the March 2019 State election. (THIS WILL REQUIRE UPDATING FOLLOWING THE DECISION).

Victoria

Labour Hire Licensing Act and Labour Hire Licensing Regulations

As reported in last year's industrial legislation article in this journal, Queensland and South Australia passed labour hire licensing laws in 2017. In June 2018 Victoria followed suit with the passing of the Labour Hire Licensing Act 2018 (Victoria), followed shortly after by (in October 2018) the Labour Hire Licensing Regulations 2018 (Victoria)("Victorian Regulations"). The Victorian legislation gives effect to recommendations (including the establishment of a Victorian labour hire licensing scheme) made by the Victorian Inquiry into

Labour Hire and Insecure Work which found significant evidence of exploitation of labour hire workers (Parliament of Victoria: 1).

Like similar legislation in Queensland and South Australia, the Victorian Act is designed to protect labour hire workers from being exploited (s4). The underlying rationale is to disallow rogue labour hire operators from entering the market and engaging in blatantly exploitative practices (Forsyth 2018). The main requirements of the Victorian Act follow the Queensland and South Australian schemes by requiring that labour hire providers hold a licence while prohibiting businesses from engaging a provider subject to the provider holding a licence (s13, s15).

However, there are some differences between the Victorian labour hire legislation and the parallel Queensland and South Australian legislation. On the one hand, the regulatory regime set up by the Victorian legislation is more robust, with Victoria being the first State to establish a separate Labour Hire Licensing Commissioner and Authority (Part 4). On the other hand, the Victorian Act does not provide imprisonment for individuals who breach its main requirements. (Both the Queensland and South Australian schemes prescribe a maximum three-year gaol term for individuals who provide labour hire services without a licence.) Instead, the Victorian Act relies solely on civil penalties of almost $129,000 maximum for an individual, and almost $516,000 maximum for a corporation, for a breach of one of its key requirements.

The Victorian Act applies outside Victoria to the full extent of the extraterritorial power of the Victorian Parliament (s6). Under the Victorian Labour Hire Licensing Act for the purposes of determining who is captured by the Act, a provider of labour hire services is defined as a person whom, in the course of conducting a business, supplies a worker to a host to perform work as part of the host's business (s7). This is similar to the parallel South Australian provision (s7 South Australian Labour Hire Licensing Act) which defined labour hire services more narrowly than the Queensland provision and arose from stakeholder concerns that a broader definition might capture some non-labour hire arrangements. Under the Victorian provision a person does not provide labour hire services if the person supplies labour to an individual who is not conducting a business. (Parliament of Victoria 2018: 3) For example, a plumbing company who supplies a plumber to an individual at a domestic residence to fix a dishwasher does not provide labour hire services, as the individual at the domestic residence is not conducting a business (Parliament of Victoria 2018: 3). The regulations have also explicitly clarified that the labour hire licensing scheme will not extend to secondments, transfer of employees within a corporate group or work experience type placements (regulation 4; WE, 2018f; Forsyth 2018).

An individual may be a worker for the purpose of the definition of providing labour hire services regardless of whether they are an employee of the labour hire provider (s9). Furthermore, the Victorian Act provides that labour hire providers are subject to the Act regardless of (a) whether the labour hire provider and host employer have entered into a contract, (b) whether the workers provided by the labour hire company are recruited or placed directly or indirectly through one or more intermediaries and (c) whether the work is controlled by the host or the labour hire provider (s7). Fittingly, after the Victorian labour hire inquiry identified that exploitative practices were particularly evident in the commercial cleaning, horticulture, meat manufacturing and meat processing industries, the Victorian

regulations now clarify that work in those industries is covered by the scheme, even if it does not fall neatly into the definition of providing labour hire services (Regulation 5; WE, 2018f). Overall the Victorian Act provides a reasonable balance of what labour hire services are captured by the legislation and what services are not covered (Forsyth 2018).

As in Queensland and South Australia, labour hire licensees to which the Victorian Act applies are subject to a fit and proper person test (s22). When applying for or renewing a licence, a labour hire provider or person intending to provide labour hire services must make a declaration that they comply with workplace laws (and other laws listed in s23) so far as they relate to the labour hire business to be licensed (s23). The Victorian labour hire authority also has the power to suspend or cancel licences on a number of grounds including that it is not satisfied that the labour hire provider is compliant with workplace laws (s39, s40). These provisions providing for powers of cancellation and suspension (of which there are parallel provisions in the South Australian and Queensland legislation) are crucial to achieving the legislation's purpose of protecting labour hire workers from exploitation (s4).

Also, like in Queensland and South Australia, annual fees are also payable under the Victorian legislation (s35). In Victoria, a labour hire provider with turnover of less than $2 million will be liable for a fee of over $1,000; a labour hire provider with a turnover of between $2 million and $10 million dollars will pay a fee of over $2,800; and a business with a turnover of $10 million or more will pay more than $5,000 (clause 3, clause 19 Victorian Regulations). Under the Victorian legislation there are also substantial fees (based on business turnover) for the application for a labour hire licence (clause 8, Victorian Regulations) and application for a renewal of a labour hire licence (clause 16 Victorian Regulations).

Finally, the Victorian Act allows the licensing authority to appoint inspectors to monitor compliance with the legislation (s64). Those governmental inspectors are provided with rights of entry to search for and seize relevant documents (s72-84). The holder of a labour hire licence must keep relevant documents relating to the business available for inspection and can be required to produce such documents (s67-69). For the purpose of monitoring compliance with the legislation, a governmental inspector can also apply to the Victorian Magistrate's court for an order requiring a person to answer questions and provide information (s70).

The Victorian government says its labour hire licensing scheme which is broadly similar to the schemes in Queensland and South Australian will add momentum towards the achievement of a national scheme. However, the South Australian coalition government elected in March 2018 has announced it will repeal the South Australian legislation (enacted by the previous Labor government in 2017) (WE, 2018g; 2018h). Yet, at the time of writing a repeal Bill has not been passed.

Long Service Benefits Portability Act

This Victorian legislation provides for portable long service leave for contract cleaners, security workers and community service workers in Victoria following the successful operation of portable long service leave for construction industry contractors. The Act provides these contractors with long service leave after working seven years in their industry

regardless of how many times their employer changes. Employer contributions (capped at 3% of ordinary pay) funds the scheme. (WE, 2018h).

Western Australia

Industrial Relations Amendment Act

The position of President of Western Australian Industrial Relations Commission (WAIRC) has been performed on a temporary or 'acting' basis since 2005, throughout the term of the former LNP WA Government. With the retirement of the former LNP appointed Acting President, Justice John Chaney, and the promotion of ALP Acting President, Justice Jennifer Smith, to the WA Supreme Court, the recently elected WA Labor Government has seized the opportunity to bring greater transparency to the stewardship of the WA IRC. In doing so, the role of 'President' (and 'Acting President') has been abolished, replaced by a full bench of three interchangeable but tenured Chief and Senior Commissioners. As Justice Michael Kirby once found, the appointment of temporary judicial officers at times most convenient to an incumbent Government, threatens the impartiality and independence of decision-makers (*Forge v ASIC* (2006) 228 CLR 45; 80 ALJR 1606; 229 ALR 223). This return toward a more permanent staff within the Commission should be a welcome change for WA industrial litigants.

Concluding Remarks

All quarters of Australian politics have welcomed this year's key federal Act and Bills regarding family and domestic violence leave, slavery and phoenix activity. Nonetheless, the legislation is piecemeal and, in the latter two examples, is premised upon a statist industrial framework excluding trade unions. It is the result of a weakened Federal Coalition Government, forced to act in a space left vacant by its own derailing of the trade union movement.

If opinion polls are correct, however, the current federal government may give way to a new Labor government in a 2019 election. By contrast to the industrial platform of the Coalition Government, the Labor opposition and ACTU have articulated a plan to protect workers' rights and increase their pay by reinvigorating the power of trade unions to collectively bargain and enforce labour law against employers.

Pronounced inaction within the federal legislative arena, has created fertile ground for visions of an alternative industrial framework, building steadily over the past year. Talk of an alternative framework has occupied policy proposals announced by Labor leader, Bill Shorten, ACTU head, Sally MacManus and The Greens. The key change contemplated by leaders of the labour movement is to replace enterprise with industry-wide bargaining (McManus, 2018; Shorten, 2018; The Greens, 2018). This change corresponds with the latest data and findings of the OECD on wage stagnation (OECD Employment Outlook 2018), as well as the research of Isaac (2018). This literature confirms a direct correlation between increasing social inequality and liberal labour markets (Mitchell and Arup, 2006), corresponding with relatively stable rates of inequality within societies that have maintained stricter labour laws such as those associated with industry bargaining.

Policy announcements by Australian political leaders about these changes have been relatively light on detail but probable changes include:

- the introduction of industry bargaining either to certain sectors or more generally across the economy (McManus, 2018);
- restoration of Sunday penalty rates;
- a crack-down on the exploitation of labour hire; and
- closing the gender pay gap (Shorten 2018).

These proposals - industry bargaining in particular - seek to reverse the statist trend towards industrial relations without trade unions. A full draft of the ALP's industrial platform will be unveiled at its national conference in December 2018.

It must be borne in mind, however, that any ensuing Labor Government will likely be hampered in their reformist agenda by a similarly fraught and unsupportive cross-bench in the Senate, namely due to half-Senate elections, anticipated to only mildly affect its current political composition. Meanwhile, industrial legislation in the states continues to promise more concrete legislative change, with expected Labor victories in impending elections in both NSW and Victoria, likely to deliver further reform to labour law 'around the fringes' of the federal industrial framework.

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