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Industrial legislation in Australia in 2018

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Abstract
It has been a quiet year like last year for the passing of federal industrial legislation (due to a number of factors including the political turmoil of the federal coalition government and their lack of an overall labour law reform agenda). This article examines key federal industrial legislative developments including the Modern Slavery Act 2018 (Cth). The article identifies that the federal Act contains much weaker compliance measures than the counterpart NSW legislation also passed in 2018 – the Modern Slavery Act 2018 (NSW). 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 key government bills not yet passed by the Parliament. The stagnation in the federal Parliament continues to motivate certain 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. In light of the continuing dominant position of the federal Labor opposition in opinion polls and an impending federal election in 2019, the article concludes by briefly considering the federal Labor opposition’s agenda for industrial legislation.

Keywords
Fair Work Act, family and domestic violence leave, industrial relations policy, labour hire regulation, modern slavery, union governance

Introduction
Last year federal industrial legislative developments were limited and piecemeal. It has also been a quiet 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 Prime Minister Malcolm Turnbull in August 2018. The lack of
decisive legislative action did not alter with the change in both Prime Minister (and relevant Minister). What few new Acts that have emerged are generally pro-worker in their orientation (notwithstanding the government’s anti-union rhetoric). The dearth of new legislation and the failure to progress some of the measures that were introduced in 2017 has occurred because of the shortage of government numbers in the Senate, the Coalition government’s increasingly precarious position in the House of Representatives, the lack of internal political support for some measures – and perhaps, more generally, the absence of an overarching agenda for labour law reform (at least since mid-2016).

This article examines industrial legislation passed by the Federal Parliament in 2018, including a key development, namely the Modern Slavery Act 2018 (Cth). The article also examines the Modern slavery Act 2018 (NSW) and identifies a lack of effective compliance measures in the federal statute compared to the stronger compliance measures in the NSW statute. The Labor opposition efforts to introduce more robust compliance measures including civil penalties into the federal modern slavery legislation were unsuccessful.

The article also analyses other federal legislation passed in 2018 as well as a number of key bills that have been introduced into federal Parliament with the aim of increasing the efficiency of industrial relations and marginally improving workers’ rights. Such piecemeal reform to labour law has mostly been met with bi-partisan support, with a Federal Labor opposition pushing for stronger, improved workers’ rights in most cases. Meanwhile, the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017, a relic from the ‘Heydon’ Royal Commission into Trade Union Governance and Corruption (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.

The stagnation in the Commonwealth Parliament has continued to motivate some 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 Parliaments 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 briefly discussing Labor’s proposed industrial agenda.

**Modern slavery legislation**

*Modern Slavery Act 2018 (Cth)*

A conservative estimate is that over 40 million people around the world (including 4300 in Australia) are victims of slavery or slavery-like practices such as human
trafficking, forced labour, child labour and debt bondage (Parliament of the Commonwealth of Australia, 2017: ix; 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 (Parliament of the Commonwealth of Australia, 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; 2018a: 2).

This federal Modern Slavery Act follows the adoption of a Modern Slavery Act in the UK in 2015 and a bipartisan 2017 Commonwealth Senate committee report (Parliament of the Commonwealth of Australia, 2017) recommending the development of a modern slavery Act in Australia. The federal Act requires large business entities to provide to the responsible Minister a Modern Slavery Statement every year (Part 2). In this Statement a regulated entity must provide a description of the 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 Act also requires the responsible Minister to make publicly available, a register of these Modern Slavery Statements (Part 3). The Act does not define supply chains. But the Explanatory Memorandum (Parliament of the Commonwealth of Australia, 2018a: 20) states that the term supply chains is ‘not restricted to “tier one” or direct suppliers’. The Act also does not explicitly clarify whether ‘supply chains’ includes both domestic and global supply chains. Nevertheless the Act provides for extra-territorial application, extending to ‘acts, omissions, matters and things outside Australia’ (s10).

Business entities subject to these reporting requirements include around 3000 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; Workplace Express 2018a). 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 Act 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. This would include servitude, forced labour, forced marriage, debt bondage and deceptive labour recruitment (s4; EM: 8). Modern slavery is defined in the Act to include trafficking in persons and the worst forms of child labour (s4). Although these are all significant criminal offences, the Act stops short of addressing other 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 see, Landau and Marshall, 2018a).
Perhaps the most serious shortcoming of the Act is that it does not contain any penalty for companies that breach the legislation (Workplace Express, 2018a). This may enable self-interested reporting by companies. 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 (2018). The Labor opposition proposed amendments to the Bill, in order to provide civil penalties for regulated entities that fail to comply with the requirement to provide a modern slavery statement. These Labor amendments were not adopted in the final version of the Act. Instead, the Senate accepted amendments proposed by the Morrison Coalition government to enact a series of weaker measures to address concerns about non-compliance (Workplace Express, 2018b). As a result, section 16A of the Act provides that the Minister may request an explanation from a regulated entity about the entity’s failure to comply with a modern slavery statement requirement and may also request that the entity take specified remedial action in relation to that requirement. If the entity fails to comply with the request the Minister may publish information (including the identity of the entity) about the failure to comply (s16A). The Minister must also report annually to the Parliament about the implementation of the Modern Slavery Act, including an overview of compliance by entities during the year (s23A). Also, sub-sections added to section 24 of the Act require that a three-year review of the Act consider whether civil penalties are needed.

The effectiveness of this Act is also brought into question because it does not provide for 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 (Workplace Express, 2018a)). 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-slavery commissioner and, as discussed below, NSW legislation in 2018 established such a role in that State. The Act also fails to require business to comply with the Act in order to tender for Government contracts (Workplace Express, 2018a).

The modern slavery approach 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 mere helpless victims implicitly denying their agency and capacity for resistance. 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.
Assistant home affairs Minister Alex Hawke said that the overall effect of federal Act will be to ‘foster “a race to the top” culture’ that will ensure Australia is a world leader in addressing modern slavery (Workplace Express, 2018a). However, in light of the numerous criticisms of the Act, Labor MP Ged Kearney (2018) described the Bill (before it was passed) 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 large commercial interests can use the existence of this legislation to argue that slavery is being addressed, when in reality it is an ineffective, toothless regulatory regime. To counter such criticism, supporters of the Act might argue that the Act prepares regulatees for a future of potentially more robust regulation, strengthened by penalties.

**Modern Slavery Act 2018 (NSW)**

Anti-slavery legislation (derived 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 (ss 9, 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 slavery statements for each financial year (s24; note the turnover threshold is $50 million lower than the federal legislative threshold for regulated businesses). The content of the statement is to be set by regulations but ‘may’ (not ‘must’) 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 Act discussed above, ‘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 as long the Commonwealth legislation is prescribed as corresponding law (s24(9)). This may lead 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 s29(1) (s29). 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 penalty for such a contravention is two years imprisonment or a fine of $55,000 or both (s29). In the main, 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 counterpart federal legislation.

Other federal legislation

*Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018 (Cth)*. This Act removes the requirement for the Fair Work Commission (‘FWC’) to hold four yearly reviews of modern awards (*FW Act*, Part 2-3). It also enables the FWC to overlook minor procedural or technical errors when approving an enterprise agreement, satisfied that those errors were not likely to have disadvantaged employees (Part 2-4). The Act was publicly supported by employer groups, unions and the Fair Work Commission. After having stalled in the senate because the government refused to debate a proposed Australian Labor Party (ALP) amendment on penalty rates, it was passed in the last Parliamentary sitting week of 2018 following agreement by the ALP to remove its proposal.

*Fair Work Amendment (Family and Domestic Violence Leave) Act 2018 (Cth)*. 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.
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’ (ss106B(1)(a)-(c)). An explanatory note (in s106B(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, s106C(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 Coalition 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 cover roughly 2.3 million workers (FWC Full Bench, 2018: 18). The amendment extends coverage of these provisions to a further six million workers beyond those contemplated by the original FWC decision. It includes casuals and part-time employees (s106A(2)(c); Workplace Express, 2018c) and in fact picks up the wording of the new award provision almost word for word. It falls short, however, of demands by the Australian Council of Trade Unions (‘ACTU’), human rights bodies and State Labor Governments, for 10 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 suggests 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).

Commonwealth Bills The Corporations Amendment (Strengthening Protection for Employee Entitlements) Bill 2018 (Cth). The Corporations Amendment (Strengthening Protection for Employee Entitlements) Bill 2018 (Cth) seeks to amend the Corporations Act 2001 (Cth) to deter employers from accessing the Gillard Labor Government’s, Fair Entitlement Guarantee (FEG) scheme (under the Fair Entitlements Guarantee Act 2012 (Cth)), primarily in order to save money. 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. 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 entitlements by a liquidator – this includes phoenixing activity. However, 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 offences associated with phoenixing activity or ‘entering into a transaction to avoid, prevent or significantly reduce the recovery of employee entitlements’ (ss596AB(1), 596AB(1A), 596AB(1B) and 596AB(1C), Parliament of the Commonwealth of Australia, 2018b: 11 and 13). The fault element for these offences has been reduced from ‘intention’ to ‘recklessness’. Offences under these provisions would apply to individual directors (ss596AB(1B) and 596AB(1C)), as well as companies (ss596AB(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 10 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 (ss596AC(1)). Convictions would result in fines of up to $200,000 under the existing table of civil penalties in the Corporations Act (s1317E(1)). Courts and the Australian Securities and Investment Commission 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 (s206EAB). Examples of contraventions are listed at s206EAB(2)(d) and include acts as minor as failing to keep records to the appropriate standard. Further criminalisation measures relating to illegal phoenixing has been proposed by the Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2018 (Cth), so far released only in draft form and yet to be tabled in parliament.

These provisions also provide for extended liability, in a similar way to last year’s Fair Work Amendment (Protecting Vulnerable Workers) Act 2017 (Cth), requiring parent and associated companies to pay entitlements to workers left unpaid by insolvent subsidiary companies (s588ZA; Rawling and Schofield-Georgeson, 2018: 380). The Bill extends this form of liability to other closely associated companies and entities such as trusts (s58Z(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’ (s588ZA). 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 Australian Taxation Office, Fair Work Ombudsman and Department of Jobs and Small Business) have authority to apply for these orders (s588ZB). 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’ (Gosling, 2018; McBride, 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).
Commission. Meanwhile, the first three of these 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 practices 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. Scrutinised again in the Royal Commission into Misconduct in the Banking and Finance Industry, industry super funds appear to have emerged without criticism. Counsel Assisting the Royal Commission has instead recommended thousands of criminal charges against ‘for-profit’ funds managed mostly by banks (Workplace Express, 2018d). The Proper Use of Worker Benefits Bill proposes to further prohibit award and agreement provisions from requiring or permitting employee contributions to be paid to any source (such as a union or election fund), other than a superannuation fund. 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 10 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.

The Enhancing Whistleblower Protections Bill is another Government initiative that failed due to a narrow Government majority and a hostile senate. This Bill aimed to protect corporate whistleblowers by rendering disclosure of their identity subject to civil penalty provisions (ss. 1317AAE, 1317AB(1)). In opposing the Bill, ALP Senators and Xenophon Party Senator, Rex Patrick, criticised the Bill for its weakness and ‘minimalist approach’ in the face of corporate power (Parliament of the Commonwealth of Australia, 2018c: 29, 43–47).

The Treasury Laws Amendment (2018 Measures No 4) Bill was a further and significant piece of legislation that also failed to pass the Senate. It was primarily designed to enforce the superannuation guarantee scheme – a set of rules
accompanying the Keating Labor Government’s superannuation scheme requiring employers to contribute a minimum amount to an employee’s superannuation fund and taxing more highly, those employers that failed to do so. The Bill provides for the Commissioner of Taxation to direct an employer to pay any unpaid superannuation as well as require the employer to undertake an approved training course relating to their superannuation liabilities (Taxation Administration Act 1953 (Cth) (TAA), s.65-C and Div. 384, Schedule 1). Under another provision, tax officers may also disclose information about a breach of the superannuation scheme by an employer to an employee affected by the breach (TAA, Item 7 to the table in subsection 355-65(3) in Schedule 1). Schedule 3 of the Bill amends single touch payroll reporting requirements for small employers. The single touch payroll reporting system allows employers to provide information about their payroll and superannuation liabilities to the Commissioner, upon paying an employee. Previously, the single touch payroll reporting system was restricted to employers with over 20 employees but the Bill proposes to extend the single touch system to all employers (Schedule 1, Div. 389).

**Other NSW legislation**

*Electoral Funding Act.* The Electoral Funding Act 2018 (NSW) was the second iteration in a series of NSW Coalition Government legislation, ongoing since 2013, attempting to hinder ‘third-party’ political campaigners (trade unions and other ‘grass-roots’ community organisations) from waging State election campaigns. The Act reduced 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 was punishable by 10 years imprisonment (s35). Meanwhile, the Act allowed direct donations to individual political candidates and parties in amounts that are 22 times as high as the limits placed on third-party campaigners (Workplace Express, 2018e).

These laws sought to exclude trade unions from having political influence. In doing so, they sought to divert political power to the governing NSW Liberal Party. 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’ (such as that of the incumbent NSW government) have traditionally conducted political campaigns. Accordingly, Unions NSW and others challenged the Act in the High Court on the basis that the laws infringed the implied constitutional freedom of political communication. They argued that these laws have an unfair and discriminatory effect on the participation of unions and other third-party organisations in election campaigns (Workplace Express, 2018e). In January 2019, the High Court unanimously upheld the challenge by Unions, declaring invalid s.29 of the Act and thereby excluding the operation of s35. The Court accepted that ‘prevent(ing) the drowning out of voices in the political process by the distorting influence of money’ was the ‘legitimate purpose’ of the NSW Act, but that, ‘the reduction in the cap
applicable to third-party campaigners was not demonstrated to be reasonably necessary to achieve that purpose’ (Unions NSW & Ors v The State of New South Wales, [2019], HCA 1, per Chief Justice Kiefel, Bell and Keane 2019).

**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 (Rawling and Schofield-Georgeson, 2018: 391–392). In June 2018 Victoria followed suit, passing the *Labour Hire Licensing Act 2018* (VIC), followed shortly after (in October 2018) by the *Labour Hire Licensing Regulations 2018* (VIC; ‘Victorian Regulations’). At the time of writing, the Victorian labour hire legislation has not come into effect. It comes into force on a date to be proclaimed (before 1 November 2019) (s2).

The Victorian labour hire inquiry identified that exploitative practices were particularly evident in the cleaning, horticulture and meat industries. It recommended that Victoria target these industries through a sector specific labour hire licensing scheme that maintains capacity to expand to other sectors (Forsyth, 2016: 26). As enacted, however, the Victorian Act is not a sector specific regime but a scheme applicable to *all* Victorian labour hire arrangements generally. It has been left to the regulations to clarify that work in problematic industries is covered by the scheme, even if those industries do not fall neatly into the Act’s definition of ‘providing labour hire services’ (Regulation 5; Workplace Express, 2018f).

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 an unlicensed provider (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 within and outside Victoria to the full extent of the extraterritorial power of the Victorian Parliament (s6). This may mean that the
Victorian Act applies to labour hire work conducted in Victoria even if the labour hire provider is not based there and that the Victorian Act applies to conduct outside Victoria as long as it is connected to labour hire services supplied within Victoria. Under the Victorian Labour Hire Licensing 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 that 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 (Forsyth, 2018; Workplace Express, 2018f).

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 workers provided by the labour hire company have been recruited or placed there directly or indirectly through one or more intermediaries; and (c) whether the work is controlled by the host or the labour hire provider (s7). Overall, the Victorian Act provides a reasonable balance in categorising labour hire services captured by the legislation (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 (ss39, 40). 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 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 $5000 (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 (ss72-84). 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 (ss67-69). Compliance with this legislation is monitored by a government inspector, empowered to apply to the Victorian Magistrate’s court for an order requiring a person to answer questions and provide information (s70).

The Victorian government says that its labour hire licensing scheme, which is broadly similar to the schemes in Queensland and South Australia, will add momentum towards the achievement of a national scheme. However, the South Australian Coalition government elected in March 2018 has announced not only that it will seek to repeal the South Australian legislation (enacted by the previous Labor government in 2017) but that, in light of the government’s intentions, the Act will not be enforced (Workplace Express, 2018g, 2018h). In effect, a dispensation has been granted, without legislative authority, to commit criminal offences. At the time of writing, a repeal bill has been introduced into the South Australian Parliament but is not yet passed.

**Long Service Leave Act 2018 (Vic)**

This Act was passed in 2018 and has commenced. This Act repeals the prior *Long Service Leave Act 1992 (Vic)*. Thus the Act replaces the prior Victorian long service leave legislation in its entirety. Section 6 of the 2018 Act sets out the new Victorian entitlement to long service leave as follows: ‘After completing 7 years of continuous employment with the one employer, an employee is entitled to an amount of long service leave on ordinary pay equal to one sixtieth of the employee’s total period of continuous employment’ less any period of long service leave taken in that time (s 6). This is comparable to the length of required service for long service leave eligibility in the ACT and is three years less than all other Australian jurisdictions (Stewart et al., 2016: 475).

Some other key aspects of the new long service leave arrangements under the Act include:

- An employer and an employee may also agree that the employee can take long service leave prior to seven years’ continuous employment (s 8);
- Continuous employment (for the purposes of calculating long service leave entitlements) includes any paid or unpaid parental leave for continuing employees and periods of regular and systematic casual or seasonal employment (s 12).
Employees are entitled to be paid out any long service leave entitlements if the employment ends (s9).

**Long Service Benefits Portability Act 2018 (Vic)**

This Victorian legislation provides portable long service leave (transferrable between employers) to 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) fund the scheme (Workplace Express, 2018h).

**Western Australia**

**Industrial Relations Amendment Act 2018 (WA)**

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 Liberal National Party (LNP) WA Government. With the retirement of the former LNP appointed Acting President, Justice John Chaney, and the promotion of ALP-appointed 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 federal Act and Bills regarding family and domestic violence leave, slavery and phoenix activity. Nonetheless, the legislation is piecemeal. It is the result of a weakened Federal Coalition Government left without an overarching labour law reform agenda (aside from sidelining unions).

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 ACTU and The Greens 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 (McManus, 2018; The Greens, 2018). The ALP’s industrial platform, unveiled at its National Conference in December 2018, pledges to facilitate ‘multi-employer collective bargaining’ (Labor National Platform – Final Draft, 2018: 86). This policy followed an announcement by Shadow Workplace Relations Minister, Brendan O’Connor, earlier in the year signalling a limited return to industry bargaining in low-paid industries (Karp, 2018). Such a policy corresponds with the latest data and findings of the Organisation for Economic Co-Operation and Development (‘OECD’) on wage stagnation (OECD, 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.

Other key ALP industrial policy announcements included commitments to:

- as a matter of urgency legislate for a national system of safe rates for the transport industry including gig economy arrangements in that industry. This system would cover all parties in the transport supply chain/contractual network and transport workers regardless of how they are labelled. It would be designed to eliminate economic and contractual practices that place undue pressure on transport supply chains and contract networks (Marin-Gerzmann, 2018).
- restore Sunday penalty rates (Labor National Platform – Final Draft, 2018: 82);
- introduce laws to more squarely address the exploitation of labour hire workers (Shorten 2018a and 2018b);
- close the gender pay gap (Shorten, 2018) and ban pay secrecy clauses, requiring large employers to reveal their gender pay gaps (O’Connor, 2018);
- require companies to publish pay ratios between the highest and median-paid workers (Leigh, 2018);
- introduce 26 weeks paid parental leave at full pay (Labor National Platform – Final Draft, 2018: 79);
- adopt a national minimum standard for long service leave within the National Employment Standards (Labor National Platform – Final Draft, 2018: 81);
- prohibit sham contracting by implementing an objective test for determination of casual employment (Labor National Platform – Final Draft, 2018: 82);
- abolish the Australian Building and Construction and Registered Organisations Commissions (Labor National Platform – Final Draft, 2018: 87);
- increase this year’s legislative guarantee of five days domestic violence leave per annum (discussed above) to 10 days per annum (Labor National Platform – Final Draft, 2018: 84).

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 the recent re-election of an ALP Government in Victoria, likely to deliver further reform to labour law ‘around the fringes’ of the federal industrial framework. That Government, together with an ALP Government in Queensland and the Labor Opposition in NSW, have raised the prospect of the implementation of criminal ‘wage theft’ laws in those jurisdictions.

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Note
1. The commonwealth criminal code is a schedule in the Criminal Code Act 1995 (Cth).

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