



Key trends and issues

Links for your further reading

Implications for employers

1. Anti-bribery, corruption and whistleblowing

This issue generated a lot of interest in 2017 as we saw the second successful foreign bribery prosecution and law reform.

- [Treasury Laws Amendment \(Enhancing Whistleblower Protections\) Bill 2017](#). Proposed changes to whistleblowing laws.
- [Crimes Legislation Amendment \(Combating Corporate Crime\) Bill 2017](#). Proposed changes to the foreign bribery offence.
- [The Elomar case](#). The second successful prosecution for foreign bribery offences.

- The steady trend of foreign bribery investigations increasing has continued in 2017, and is likely to continue into 2018.
- With the whistle-blower and anti-bribery reforms likely to come into force some time in 2018, employers should ensure their policies and systems are in order.

2. Gig economy

This issue has been brewing for some time, and this year we have seen some employment-related cases involving operators in the gig economy.

- [Senate Economics References Committee](#) and the Association of Superannuation Funds of Australia Limited (ASFA) [discussion paper](#). Discusses the changing nature of work and that workers in the gig economy are likely to miss out on superannuation payments.
- [Inquiry into Corporate Avoidance of the Fair Work Act 2009 \(Cth\) Report](#). Recommendations to regulate the gig economy.
- [Oze-Iggehon v Uber Technology Inc \[2017\] FCA 1024](#). The applicant had no standing to seek relief in relation to or enforce applicable superannuation legislation. (This followed a previous [District Court breach of contract claim](#) regarding his removal from the Uber platform).
- [Uber B V v Commissioner of Taxation \[2017\] FCA 110](#). UberX drivers have to register for GST purposes.
- [Pirov Pty Ltd v Return to Work SA \(Schultz\) \[2017\] SAET 92 \(11 August 2017\)](#). Pirov owned vehicles it leased to drivers for a lease fee of 50% of the driver's income from driving work through Uber or hotels who had arrangements with Pirov. Based on the facts, the driver was engaged in a contract of service with Pirov and as such was a worker for workers' compensation purposes.

- Legislators are grappling with how to regulate this area.
- Watch this space as these new ways of organising work through online and technology platforms are tested against traditional models of employment and liability.
- There have recently been analogous issues before the courts in other jurisdictions, such as the [UK](#).

3. Industrial relations regulation and case law developments

There has been an increase in the regulation of industrial relations.

- [ABCC](#) and the commencement of the [Code for the Tendering and Performance of Building Work 2016](#) (Building Code).
- [Fair Work Amendment \(Corrupting Benefits\) Act 2017](#). Introduces new criminal offences involving corrupting benefits and payments and disclosure requirements for benefits in proposed enterprise agreements.
- [Fair Work Laws Amendment \(Proper Use of Worker Benefits\) Bill 2017](#). Applies governance, financial reporting and financial disclosure requirements to worker entitlement funds. Prohibits certain terms of a modern award or an enterprise agreement regarding certain contributions except to certain funds.
- [Fair Work \(Registered Organisations\) Amendment \(Ensuring Integrity\) Bill 2017](#). Regulations imposed on registered organisations and their officials.
- [Fair Work Amendments \(repeal of 4 yearly review and other measures\) Bill 2017](#). Among other things, enables the FWC to overlook minor procedural or technical errors when approving an enterprise agreement.

- Employers need to monitor and be across the relevant changes to ensure compliance, and make use of new measures (such as the ability of the FWC to overlook minor procedural and technical errors when approving an enterprise agreement, once passed).

4. Inherent requirements of the position

Two cases this year have clarified the law.

- [Shizas v Commissioner of Police \[2017\] FCA 61; \(2017\) 268 IR 71](#). In a general protections claim, the defence in s.351(2)(b) of the Fair Work Act excuses certain conduct where action is 'taken because of the inherent requirements of the particular position concerned'. This defence relates to the subjective reasons of the decision maker, and not whether the person can in fact perform the inherent requirements of the role.
- [Logan v Knoxfield Medical Centre Pty Ltd \[2017\] FWC 5378](#). In contrast, in an unfair dismissal claim, clear objective medical evidence is vital to establishing a valid reason. The medical opinions of the Directors of the practice did not meet the standard of a clear finding by an appropriate medical practitioner.

- This remains an issue many employers grapple with. These cases provide useful guidance on the law in this area.

5. Labour hire licensing

This issue is occupying a lot of attention at both the States and Territories, and Federal level.

- [Queensland](#) and [South Australia](#) have introduced labour hire licensing regimes. Victoria has introduced a [Bill](#) to establish a labour hire licensing regime.
- [Inquiry into Corporate Avoidance of the Fair Work Act 2009 \(Cth\) Report](#). Several recommendations in relation to labour hire licensing regimes across all States and Territories, extending bargaining to include the host employer, and a duty on host employers to ensure labour standards are afforded to labour hire workers.
- [The ACTU 'Change the Rules' campaign](#) lists restrictions on the use of independent contractors and labour hire as key issues.
- [The Hon Brendan O'Connor's speech to the National Press Club](#) has noted that a national labour hire licensing scheme is a key issue of concern.

- It is likely that this will continue to be a key issue into 2018 as the new State regimes begin to operate and issues emerge in practice.
- Other States may look to follow suit, but a national scheme is probably unlikely in the short term. Nevertheless the issue is likely to remain on the radar federally.
- The breadth of the scope of the initial regimes and potential consequences means affected employers need to ensure they are well advised, and monitor this area closely.



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6. Protected industrial action and enterprise agreement case law developments

A number of cases have clarified the law in this area.

- [Esso Australia Pty Ltd v The Australian Workers' Union \[2017\] HCA 54](#). Clarifies the law in relation to protected industrial action and coercion: see [our analysis](#).
- [United Voice v Castlemaine Perkins Pty Limited T/A Lion \[2017\] FWC 4951](#). Seeking to include non-permitted matters meant United Voice was not genuinely trying to seek agreement and not entitled to a protected action ballot order.
- [ALDI Foods Pty Limited v Shop, Distributive & Allied Employees Association \[2017\] HCA 53](#). Clarifies who can vote for an enterprise agreement for a new enterprise: see [our analysis](#).
- [Construction, Forestry, Mining and Energy Union v One Key Workforce Pty Ltd \[2017\] FCA 1266](#). Struck down an enterprise agreement agreed to by 3 employees in part on the basis that they could not 'genuinely agree' having regard to the coverage.
- [The Hon Brendan O'Connor's speech to the National Press Club](#) has spoken of requiring workers voting for an EA to be broadly representative of the workers who may ultimately be covered by that agreement and industrial wide bargaining.

- Planning for bargaining is critical. Employers should be aware of the opportunities and challenges that these cases present.

7. Right of entry

A number of cases have clarified the law in this area.

- [Australian Building and Construction Commissioner v Powell \[2017\] FCAFC 89](#). Union officials must have a federal right of entry permit when entering a site as an assistant to a HSR under OHS legislation in harmonised jurisdictions (not WA).
- [Construction, Forestry, Mining and Energy Union v BHP Billiton Nickel West Pty Ltd \[2017\] FCA 991](#). Right of entry for the purposes of holding discussions is only available during mealtimes and other breaks during an employee's shift, and not before or after their shift.

- Employers should review their right of entry procedures to ensure they are consistent with this latest guidance, and ensure they are aware of their rights and obligations in relation to right of entry. Seek advice if unsure.

8. Technology

We continue to see the disrupting effects of technology.

- [Select Committee on the Future of Work and Workers](#) will inquire and report on the impact of technological and other change on the future of work and workers in Australia. The committee is to report on or before 21 June 2018.

- Cyber security remains a key issue for employers, and they should ensure their policies and IT systems have appropriate safeguards, as well as regular training of employees.
- Big data and technology present opportunities for business, but also pose challenges in terms of the implications on privacy and employment considerations arising out of changes to the way work is performed or redundancies from automation.

9. Termination of enterprise agreements

As employers and employees look to this option for various reasons, including as part of a bargaining strategy, legislators are concerned and looking to tighten the ability to use this option.

- [Construction, Forestry, Mining and Energy Union v AGL Loy Yang Pty Ltd t/a AGL Loy Yang \[2017\] FWCFB 1019](#) ; [AGL Loy Yang Pty Ltd T/A AGL Loy Yang Re Loy Yan Power Enterprise Agreement 2012 \[2017\] FWCA 226](#). Successful application to terminate an enterprise agreement.
- [NQR Pty Ltd and National Union of Workers Warehouse Enterprise Agreement 2015 \[2017\] FWCA 2746](#). Unsuccessful application to terminate an enterprise agreement.
- [Murdoch University re Murdoch University Enterprise Agreement 2014 \[2017\] FWCA 4472](#). Successful application to terminate an enterprise agreement.
- [Fair Work Amendment \(Terminating Enterprise Agreements\) Bill 2017](#). Proposed reforms to tighten the ability to terminate an enterprise agreement and invalidate previous decisions.
- [Inquiry into Corporate Avoidance of the Fair Work Act 2009 \(Cth\) Report](#). Recommendations made to tighten the ability to terminate an enterprise agreement.
- [The Hon Brendan O'Connor's speech to the National Press Club](#) has noted that employers utilising the termination option is a key issue of concern.

- As always, pre-bargaining planning is vital as well as regularly reviewing your industrial relations strategy and business requirements. Since the [Aurizon](#) decision, employers have increasingly considered this option as an alternative to further their bargaining and business objectives. However, employers must be well prepared, and if this option is considered, must have strong evidence about the business' case for change before making such an application.
- Watch this space to see if the rules are changed by the legislature.

10. Vulnerable workers

We have seen increased media attention and community concern regarding worker exploitation, legislative reform, and an increased focus on this issue by regulators and unions.

- [Fair Work Amendment \(Protecting Vulnerable Workers\) Act 2017](#). Extending the reach of the Fair Work Act in terms of franchisees and holding companies, extending the FWO's powers, and increasing penalties.
- [Modern slavery and global supply chain reporting reforms](#). Report and recommendation to establish an Australian Modern Slavery Act, including an Independent Anti-Slavery Commissioner.
- Increased focus by the [FWO](#) on cases involving underpayments of overseas workers in particular.
- [The ACTU 'Change the Rules' campaign](#) lists inequality, wage theft and workers' rights, and temporary visa workers' rights as key issues.
- [The Hon Brendan O'Connor's speech to the National Press Club](#) has noted that further measures regarding sham contracting and increased penalties for systematic underpayments are key issues of concern.

- With the increased focus on this issue, employers should review their own arrangements, as well as making sure their procurement and supply chain processes do not put them at risk.