### FWD THINKING

What are your top workplace priorities for 2018?

**JANUARY 2018**

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### Editorial

2018 is shaping up to be a year of significant social and legislative change, both of which will make workplace issues a key priority for senior management.

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### Our top 10 workplace issues for 2018 are:

1. **#MeToo and managing sexual harassment in the workplace**

2. **Worker status and the extent of union involvement in setting conditions in the sharing economy**

3. **Labour hire industry regulation**

4. **Greater scrutiny of EBA approvals**

5. **The five yearly National Review of Model WHS Laws**

6. **Managing whistle-blowing complaints and the treatment of whistle-blowers**

7. **Accessorial liability for HR and third parties**

8. **Increased calls for casual conversion**

9. **Increased vulnerable worker protections, including a possible Modern Slavery Act**

10. **Increased Federal Government regulation over unions**

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### OTHER DEVELOPMENTS

In 2018, we also expect to see ongoing union and interest group calls for domestic violence leave and family friendly work arrangements, continued testing of the scope of the bullying and unfair dismissal regimes under the *Fair Work Act 2009*, and changes to immigration and citizenship laws affecting worker mobility.

In relation to the awards system, we don’t expect to see significant movement on penalty rates, or another four yearly modern award review.

With the introduction of further proposed new anti-bribery laws, employers will also need to review their anti-bribery policies and procedures.

On the safety front, changes to the chain of responsibility provisions in the *Heavy Vehicle National Law* commence in mid-2018. These changes will be relevant to entities who use heavy vehicles as part of their supply chain, including through the engagement of contractors.

Globally, Brexit will remain an issue for global employers. The introduction of the European General Data Protection Regulation from 25 May 2018 will also have significant implications for employers who process data relating to people (including employees) who are within the EU, and builds on obligations for Australian businesses who will also face the start of the Notifiable Data Breaches scheme in Australia on 22 February 2018.

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TREND 1

#MeToo and managing sexual harassment in the workplace

The world was taken aback in 2017 by allegations against senior figures in the business, entertainment and political worlds of sexual harassment and inappropriate conduct.

The #metoo and #timesup movements stemmed from the initial allegations made against Harvey Weinstein, and inspired people across the world to come forward to share their experiences of sexual assault and harassment. The momentum took many by surprise but it was no surprise that so many experiences related to working relationships, particularly conduct of senior employees towards more junior workers. The public has come to expect swift and severe action against perpetrators of sexual harassment, particularly senior executives.

The momentum built by this movement shows no sign of abating, and in 2018 employers should expect a continued focus on, and interest in, allegations made by employees, as well as the responses of employers to those allegations.

A recent Australian Human Rights Commission report has highlighted similar issues arising in Australian universities. After surveying 30,000 students in 39 universities, the AHRC reported that one in five students were sexually harassed in a university setting in 2016. The AHRC also found that students face a range of barriers to reporting or seeking support from their university after experiencing sexual assault or harassment. Students who did report were often unsatisfied with the response received. In December 2017, the Sex Discrimination Commissioner, Kate Jenkins, issued a report card on the steps universities have taken in response to the report to prevent sexual harassment and discrimination.

Now is the time to ensure that employers have proper policies and procedures in place to deal with reports of sexual harassment. The holding of “compliance” sexual harassment training will not be sufficient, as the public expects board-led changes to the workplace culture and the treatment of women in particular. Employers need to identify and resolve cultural issues within their organisations and be prepared to defend their responses to complaints in front of shareholders, customers and the public.
TREND 2

Worker status and the extent of union involvement in setting conditions in the sharing economy

The status of workers (particularly in non-traditional work arrangements) continues to attract the attention of employers, unions and governments.

In 2017, jurisdictions took different approaches to the treatment of such workers, both in terms of regulatory responses and judicial decisions. In the UK, Uber lost its appeal against a finding that its drivers must be paid the national minimum wage. In Australia, a former Uber driver recently had his unfair dismissal application dismissed on the basis that he was not an employee for the purposes of the FW Act.

Unions in many jurisdictions are also stepping up efforts to assist workers in non-traditional arrangements, not just through challenges to their non-employee status, but also by providing career support and assistance (such as the training grants and insurance provided by the UFE (Freelancers and Self-Employed) division of the NTUC in Singapore). The status of such workers will likely only be resolved by dramatic legislative reform, which seems unlikely to happen in 2018, but it is certainly on the radar.

On 19 October 2017, the Senate established the Select Committee on the Future of Work and Workers to examine the impact of technological and other changes on the future of work and workers in Australia. The Committee will report on issues including the future employment status and working patterns of Australians, the wider effects of change on the economy and society, and the adequacy of current laws, policies and institutions to prepare for and respond to change.

Based on international consideration of this issue, such as the recent UK Taylor Report into modern work practices, we can expect the Committee to turn its attention to:

• the adequacy of the longstanding employee-independent contractor distinction
• the role of legislative intervention to statutorily define and provide greater clarity around the types of working relationships that exist; and
• how to ensure rights and protections while maintaining the innovation and flexibility that the share economy offers workers, businesses and consumers.

Submissions are open until 30 January 2018, with the Committee due to report back by June 2018.

In the meantime, employers continue to balance the need to innovate and increase flexibility with the need to comply with legislation and case law based on the traditional “master/servant” idea of employment.
TREND 3

Labour hire industry regulation

2017 saw the introduction of bills in Queensland, Victoria and South Australia to implement mandatory schemes for the licensing of labour hire providers.

Following some high profile scandals and various State inquiries into labour hire practices, the mandatory licensing schemes seek to increase protections for labour hire workers and promote the integrity of the labour hire industry.

Queensland is the first out of the blocks with its Labour Hire Licensing Act 2017 to commence operation on 16 April 2018. South Australia’s Labour Hire Licensing Act 2017 has been passed by both houses and is awaiting assent, whilst Victoria’s Labour Hire Licensing Bill 2017 was introduced on 13 December 2017 and is still before Parliament.

Broadly speaking, the Queensland, Victorian and South Australian regimes all provide:

• labour hire providers must be licensed to operate
• labour hire providers and their senior officers must be ‘fit and proper’ persons in order to be licensed
• companies are prohibited from obtaining services from unlicensed labour hire providers
• broad monitoring and enforcement powers to ensure compliance with the schemes
• extraterritorial application; and
• penalties for breach of obligations.

The regimes differ as follows:
### QUEENSLAND | SOUTH AUSTRALIA | VICTORIA
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**Maximum licence length** | Up to one year | Indefinite | Up to three years
**Maximum penalty for providing labour hire services without a licence or entering into an arrangement with an unlicensed provider** | For an individual: 1,034 penalty units ($130,439.10) or 3 years imprisonment  For a corporation: 3,000 penalty units ($378,450) | For an individual: $140,000  For a body corporate: $400,000 | For an individual: $126,856  For a company: $507,424
**Relevant factors for the 'fit and proper person' test** | The person’s character, history of compliance with relevant laws and prior convictions. Regard may also be had to any other matters which are considered relevant to whether a person is fit and proper to provide labour hire services. | The reputation, honesty and integrity of the person, demonstrated compliance with relevant laws, and whether the business knowledge held by the person (or directors in the case of a body corporate) is sufficient for the purpose of properly directing the business. A person is deemed to not be fit and proper in certain circumstances, including where the person has been found guilty or convicted of a prescribed offence. | A person is presumed to be fit and proper, unless certain criteria is fulfilled, for example if the person has been found guilty of certain criminal offences.
**Bases to object** | No express provision. An interested person may apply for a review of a decision to grant or suspend a licence, or in relation to the conditions attaching to a licence. | A designated entity may object to an application for a licence on certain grounds, e.g. where the applicant is not fit and proper. An interested person may object to an application for a licence on the basis that a person is not fit and proper. |  
**Reporting period** | 6 monthly | 12 monthly | 12 monthly

Support for the introduction of the regimes has not been universal, with the Australian Industry Group describing the Queensland legislation as “problematic” and expressing concern about the broad definitions of ‘provider’ and ‘labour hire services’.

In 2018 we can expect to see a continued push for a national labour licensing scheme and possibly the introduction of similar bills in other jurisdictions.

Other jurisdictions in the Asia-Pacific have traditionally had strict legislation to regulate both labour hire operators, outsourcing arrangements and the benefits provided to these so-called “indirect workers”. For example, in South Korea, the Ministry of Employment and Labor’s 2017 policy objectives saw a focus on the promotion of “regular” working arrangements (i.e. non-labour hire and outsourced arrangements) and enforcement of the prohibition on providing different terms and conditions to labour hire and outsourced employees.
TREND 4

Greater scrutiny of EBA approvals

We expect to continue to see increased scrutiny of enterprise agreements by the Fair Work Commission and Federal Court this year.

In 2017, the Full Bench of the FWC and the Federal Court quashed a number of decisions granting the approval of enterprise agreements, for reasons including that:

• the employer had failed to take all reasonable steps to notify the employees of the time and place at which the vote to approve the agreement would occur and of the voting method which would be used (eg CFMEU v Australian Mining Supplies Company Pty Ltd [2017] FWCFB 2236)

• the agreement did not pass the BOOT (eg CFMEU v Kaefer Integrated Services Pty Ltd [2017] FWCFB 5630, CFMEU v TR Construction Services Pty Ltd [2017] FWCFB 1928, CFMEU v Concrete Constructions (WA) Pty Ltd [2017] FWCFB 3912 and United Voice - Queensland Branch v MSS Security Pty Limited T/A MSS Security Pty Limited [2017] FWCFB 651). In CFMEU v Concrete Constructions (WA) Pty Ltd, the employer sought to address the BOOT deficiencies by way of undertakings. This attempt was rejected by the Full Bench, which stated that an undertaking accepted after an agreement has been approved is not given any legal effect by the FW Act

• the undertaking proffered by the employer was not capable of addressing the FWC’s concern that the agreement did not pass the BOOT (eg SDA v Beechworth Bakery [2017] FWCFB 1664)
in breach of section 55 of the FW Act, the enterprise agreement contained provisions which contravened the National Employment Standards (CFMEU v CSRP Pty Ltd [2017] FWCFB 2101). In this case, whilst the Full Bench noted it would be open for it to do nothing and allow section 56 of the FW Act, which states that a term of an enterprise agreement has no effect to the extent that it contravenes section 55, to have operational effect, the Full Bench asserted that it was not desirable "to allow an agreement to continue operating with provisions of doubtful legal efficacy" and that employees "deserve to understand their rights and obligations under the Agreement without recourse to a lawyer or the legal niceties of s. 56"

- the employer failed to serve a copy of the application for approval of the agreement and the employer’s statutory declaration on each employee organisation that was, at any time, a bargaining representative in relation to the enterprise agreement (NUW v Sigma Company Limited T/A Sigma Healthcare [2017] FWCFB 3892)

- the two-year old agreement covering more than 1,000 mine services workers was not adequately explained to the three workers who agreed to it (see CFMEU v One Key Workforce Pty Ltd [2017] FCA 1266, which quashed the approval granted by the FWC on 30 October 2015. The employer is appealing this decision); and

- a union was denied procedural fairness. Communications between the FWC and the employer on material facts in dispute were not disclosed to a union that was not a bargaining representative for the proposed agreement but had opposed the approval of the agreement and had been invited to make submissions on substantive issues (see United Voice v Broadspectrum (Australia) Pty Ltd T/A Broadspectrum [2017] FWCFB 871. The matter was remitted to Deputy President Kovacic, who declined to approve the agreement in March 2017 on the basis that it was not genuinely agreed. In August 2017, the Full Bench declined to grant the employer permission to appeal. The Federal Court is set to review the Full Bench decision in March 2018).

The tendency of the Full Bench or the Federal Court to quash historical decisions to approve enterprise agreements increases uncertainty for all parties.

In 2017, we saw greater scrutiny of enterprise agreements which had otherwise been agreed to by employees and unions. This manifested in a number of ways, including employers being forced back to the bargaining table because of minor procedural defects in Notices of Employee Representational Rights, as well as employers being asked to give undertakings in respect of matters which had been included in predecessor agreements.

This theme will continue in 2018, and employers will need to ensure they keep up to date with any amendments to the relevant modern award arising from the four yearly review.

Most employers will now have the Notice issue well in check. However, it is other requirements for approval, such as ensuring the agreement and the effect of it are adequately explained to employees, which may present a new frontier of challenge. Is it sufficient to simply issue a Memo explaining the changes, or is something more required?

We also recommend that employers focus more attention on what is included in the forms for approval of an enterprise agreement. We are seeing a trend in the FWC of it requesting additional information after the agreement is lodged for approval. Including more information upfront in support of why the proposed agreement passes the BOOT may help secure quicker approval.

Employers with loaded up rates in their enterprise agreements should also be aware that a Full Bench of the FWC has been appointed to consider how the BOOT should be applied. The FWC invited submissions and a hearing was held on 15 November 2017. The matter has been adjourned, so watch this space.

What the bargaining scene might look like in five years’ time

The most recent report published by the Department of Employment (Trends in Federal Enterprise Bargaining September 2017) shows a decline in the number of private sector agreements, while coverage in the public sector has not changed significantly.

Declining union density, increasing scrutiny of the BOOT and an ever increasing safety net of terms and conditions in modern awards may well lead to this trend continuing.

It remains the case however that many large employers want the security of an in-term enterprise agreement because employees are unable to take protected industrial action. But at what cost?

More and more we are seeing employers take on the challenge of attempting to drive organisational transformation through an enterprise agreement strategy. Where such change is unable to be achieved, this may well lay the platform for an employer to consider an application to terminate the existing enterprise agreement. This is likely to remain a feature of bargaining in the future for some employers.
TREND 5

The five yearly National Review of Model WHS laws

It has now been over five years since the introduction of harmonised WHS laws to most States and Territories in Australia. As planned, there will be a review of the model WHS laws in 2018.

The review is being led by Marie Boland, a former Executive Director of SafeWork SA. The scope of the review includes considering whether the model WHS laws are achieving their objectives, whether they have resulted in any unintended consequences and key concepts that were new or significantly different for most jurisdictions, such as the duties framework, penalty and enforcement measures.

Employers should expect a public consultation process to commence this year and may wish to make submissions as part of the consultation process.

The terms of reference can be found here.

Employers should also watch developments in industrial manslaughter laws as part of the National Review of Model WHS Laws.

Industrial manslaughter laws introduced in Queensland

New industrial manslaughter offences commenced in Queensland in October 2017, as part of a suite of amendments which were made to the Work Health and Safety Act 2011 (Qld). While other states have not indicated if they intend to follow suit, the CFMEU in Queensland had campaigned for the laws to cover mining and was disappointed that the new laws did not do so.

The Queensland Government has stated its intention to press for similar amendments to be made to model WHS laws as part of the National Review of Model WHS Laws.
The Queensland offences apply to persons conducting a business or undertaking and senior officers of a PCBU.

A PCBU commits an offence of industrial manslaughter if:
- a worker dies in the course of carrying out work for a business or undertaking (or is injured and later dies)
- the PCBU’s conduct causes the death; and
- the PCBU is negligent about causing the death.

The maximum penalty for a body corporate is 100,000 penalty units (currently $10,000,000).

A senior officer of a PCBU commits an offence of industrial manslaughter if:
- a worker dies in the course of carrying out work for a business or undertaking (or is injured and later dies)
- the senior officer’s conduct causes the death; and
- the senior officer is negligent about causing the death.

The maximum penalty for this offence is 20 years’ imprisonment.

A “senior officer” of a corporate PCBU is an “executive officer” of the PCBU. An “executive officer” is a person who is concerned with or takes part in the corporation’s management, whether or not that person is a director or the person’s position is given the name “executive officer”.

Employers should ensure that executive officers and senior management are aware of the new offences of industrial manslaughter and the steps they can take to prevent allegations of negligent conduct in respect of work health and safety matters.
Managing whistle-blowing complaints and the treatment of whistle-blowers

Expanded protections for whistle-blowers are likely to come into effect in 2018.

Following a Joint Parliamentary Committee report in September 2017, the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 was introduced to the Senate on the last sitting day of 2017. The Bill proposes to strengthen Commonwealth whistle-blower protections in the private sector in a variety of ways, including:

- expanding the definition of whistle-blower to include former officers, employees and suppliers of goods and services
- including a broad scope of the misconduct that may be disclosed by a whistle-blower
- allowing for anonymous disclosures
- enhancing protections, immunities and compensation available to whistle-blowers; and
- introducing a requirement that public and large proprietary companies have in place internal whistle-blower policies.

The Government has committed to a Parliamentary vote on the Bill by 30 June 2018. Employers should follow the passage of the Bill and should consider whether their current practices, procedures and policies in relation to whistle-blowers will be adequate if the proposed reforms are implemented.
TREND 7

Accessorial liability of HR and third parties

In 2018 we expect to see the FWC continue its recent trend of extending accessorial liability under section 550 of the FW Act to apply to HR managers and third parties.

Section 550 provides that people “involved in” conduct which contravenes the FW Act can be held liable as an accessory to the contravention. An “involved” individual can still be liable even if they do not appreciate that the conduct is unlawful.

ACCESSORIAL LIABILITY AND HR

In late 2017, the Fair Work Ombudsman was again successful in an action against an HR manager for underpayments. This action resulted in the HR manager being fined a penalty of $21,760.

In that case, there were underpayments totalling almost $600,000 to 85 employees over a period of over 16 months. The primary contraventions were committed by a company that owns and operates a restaurant. In addition to the underpayments, the proceedings also related to contraventions involving falsified employment records, created by the HR manager (at the direction of the director) in order to conceal the underpayments. The company’s sole shareholder and director, as well as the HR manager and store manager, were respondents in the proceedings as it was alleged that they were accessories to the company’s breaches. Ultimately, all four respondents were found liable and the penalties totalled almost $400,000.

The HR manager in this case was employed on a 457 visa. In her role, the HR manager was directed by the company director to calculate the pay of employees, based on the rates provided by the director of the company that were below the award level and to pay the employees in cash. The HR manager knew that the award applied and that the hourly rates were below the award level, and the HR manager advised the director of this fact. Following an employee complaint, the HR manager did not seek to ensure the company was complying with its obligations, but then, at the direction of the company director, created false records to conceal the contraventions. The HR manager admitted to all of these contraventions.

In seeking to limit the penalty imposed, the HR manager argued that:
- she had no role in setting the pay of the employees and was simply following the direction of the company director
- in her culture, it would have been inappropriate for her to defy her boss
- she had no formal human resources qualifications (but did have HR experience generally); and
- she was reliant on her working visa to remain in the country.
These arguments in mitigation were rejected. It was held that, although she was not in the same position of control as the director of the company, there were serious aspects of her involvement, including her knowledge of the contravention, as well as the fact that the HR manager had a significant level of involvement in the contraventions, especially in relation to falsifying the records. This justified the imposition of a significant, as opposed to nominal, penalty of $21,760.

The case is noteworthy as it is an example of the FWO’s efforts in pursuing HR managers as a matter of deterrence. The case sends a clear message that HR managers cannot simply follow the instructions of more senior individuals and escape liability when they are aware they are engaging in contraventions. Further, the fact that the contraventions deliberately continued after the existence of a complaint (and arguably, were more serious, due to the creation of false records) were key considerations in this case.

ACCESSORIAL LIABILITY AND THIRD PARTIES

In 2017 the Federal Circuit Court also held that an accounting firm was “involved in” its restaurant client’s underpayment of employees because it had the relevant information “at its fingertips” and that it had “deliberately shut its eyes to what was going on”.

This case concerned a company who operated a Melbourne Japanese fast food chain. The company and its manager were held to be in contravention of the FW Act by the Federal Circuit Court of Australia, for underpaying employees and failing to provide rest and meal breaks in accordance with the Fast Food Industry Award 2010. In 2014, the FWO identified contraventions of the FW Act by the fast food restaurant and conducted an audit. This prompted the restaurant to engage the accounting firm for assistance. The firm provided services to the restaurant, including processing its payroll. The finding that the accounting firm was liable as an accessory to the contraventions was based on the fact that the accountants processed wage payments for the employees.

The Court held, in establishing accessorial liability under section 550 of the FW Act, that it was possible to infer that the accounting firm had actual knowledge of the contraventions from a combination of suspicious circumstances (such as the 2014 audit that revealed the contravention) and a failure to make inquiries and was “wilfully blind” to the contraventions. The Court noted that the firm had “at its fingertips” all the information it needed to confirm the failure of the restaurant to meet its obligations under the award, and yet persisted to process the payments responsible for the underpayment.

In November 2017 the Court imposed a penalty of $53,880 on the accounting firm. We expect to see more third parties named as respondents to FWO proceedings in 2018.
TREND 8

Increased calls for casual conversion

Employers with enterprise agreements in place are likely to face calls from employees and unions that casual conversion clauses should be included in an enterprise agreement in the next round of bargaining. While the clauses are not mandatory, they will be a significant consideration when applying the ‘BOOT’ assessment for casuals.

The source of this claim is the July 2017 decision by a Full Bench of the FWC to incorporate a model casual conversion clause into the vast majority of modern awards (see our Employment Alert).

The proposed clause allows a casual employee to request that their employer convert their employment to part-time or full-time employment after 12 months of service. The employer may refuse the request on reasonable grounds after there has been consultation with the employee.

It also requires that the employer give casual employees a written copy of the conversion clause within the first 12 months of their first engagement to perform work.

More broadly in the Asia-Pacific region, 2017 saw workers raise concerns about the “casualisation” of labour and pressure mount on multi-nationals to ensure compliance with labour laws throughout their supply chains. Enforcement activity increased particularly in the Philippines, where a Department of Labour and Employment drive against labour only contracting has seen thousands of workers regularised. That initiative will continue in 2018 and is likely to affect multi-nationals who have outsourced functions to the jurisdiction.
TREND 9

Increased vulnerable worker protections, including a possible Modern Slavery Act

In December 2017 the Committee for the Inquiry into establishing a Modern Slavery Act in Australia tabled in Parliament its Final Report, *Hidden in Plain Sight*.

The Report recommended that the proposed Modern Slavery Act include provisions for mandatory supply chain reporting requirements. This would require entities that earn over A$50 million to report on modern slavery risks in their supply chains. The mandatory reporting requirements will apply to companies, businesses and organisations (including religious bodies).

The Committee also reaffirmed its Interim Report recommendation to require Board (or equivalent level) approval of modern slavery statements and that the statements be signed by a director. These mandatory reporting requirements are broadly similar to the approach taken by the UK Modern Slavery Act.

The Final Report also recommended the inclusion of provisions to establish an Independent Anti-Slavery Commissioner and the introduction of measures to address labour exploitation, including establishing a labour hire licensing scheme and making changes to Australia’s visa framework. Changes to the visa framework would include a review of Australia’s visa framework for migrants to replace or eliminate “tied” visa conditions, such as employer sponsorship and sign-off requirements.

The Australian Minister for Foreign Affairs, Julie Bishop, has made a commitment to introduce legislation to combat modern slavery. Employers should ensure that they have a thorough understanding of all parts of their supply chains in order to be conscious of potential liability for breaches of the proposed Act.
TREND 10

Increased Federal Government regulation over unions

There are currently five industrial relations Bills before the Senate which were introduced to, among other things, respond to certain recommendations made by the Royal Commission into Trade Union Governance and Corruption. The most controversial of these are the *Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017* which seeks to place further scrutiny on the financial affairs of unions and protect workers’ benefits in trusts and other funds controlled by unions, and the *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017* which would require a public interest test to be applied to union mergers. We expect to see continued heated debate on these Bills when the Senate resumes sitting in 2018.

The proposed public interest test for union amalgamations, which would allow each union’s record of compliance with industrial laws to be taken into account, is aimed squarely at blocking the planned merger of Australia’s most militant unions; the CFMEU, the MUA and the TCFU. Employers have expressed grave concerns for the stability of the resources and energy supply chain if the merger proceeds, but with a FWC hearing on the merger to take place in Melbourne on 2 February 2018 it is unlikely the Bill will be passed in time to prevent the amalgamation. If the merger is approved, we can expect to see further legal action by employer groups to try to overturn the FWC’s decision.
Other developments

DOMESTIC VIOLENCE LEAVE AND FAMILY FRIENDLY WORK ARRANGEMENTS

Domestic and family violence leave and family friendly work arrangements remain issues of public importance in 2018. Over 1.6 million Australian workers now have access to paid domestic and family violence leave in union negotiated workplace agreements. Arising from this, we anticipate there will be a continued push by employees and unions for domestic and family violence leave.

In late 2016 Queensland became the first state in Australia to introduce legislated domestic and family violence leave arrangements in the Industrial Relations Act 2016 (Qld).

In 2016 the ACTU made a claim as part of the four yearly review of modern awards to include in all modern awards an entitlement to ten days’ paid family and domestic violence leave per year and an additional two days of unpaid leave on each occasion. Ultimately, the unanimous decision of a Full Bench of the FWC was to reject the ACTU’s claim, however Deputy President Gooley and Commissioner Spencer expressed the preliminary view that all employees should have access to unpaid family and domestic violence leave. They also said that employees should be able to access personal/carer’s leave for the purpose of taking family and domestic violence leave. On 5 December 2017 the Federal Opposition also announced that it is committed to including the right to ten days’ paid domestic and family violence leave in the National Employment Standards.

Against this background, employers can expect increasing pressure to introduce paid domestic and family violence leave for their employees. This raises a number of important considerations, including the relationship with paid personal/carer’s leave and the breadth of the specific circumstances in which domestic and family violence leave can be accessed.

Family friendly work arrangements

On 12 January 2018, the FWC released a Statement and published three background papers as part of its four yearly modern award review proceedings.

These papers also deal with casual conversion. Submissions are due by 4pm on Friday 2 February 2018.

SCOPE OF BULLYING AND UNFAIR DISMISSAL REGIMES UNDER FW ACT

In 2018, we can expect that unions and employees will continue to test the scope of the bullying and unfair dismissal regimes under the FW Act.

In 2017 we saw the bullying scheme under the FW Act applied in an expansive way. Of particular note were the decisions of Trevor Yawariki Adamson [2017] FWC 1976 (where the Chairperson of an Executive Board was held to be a “worker” within the meaning of the scheme) and Lynette Bayly [2017] FWC 1886 (where the FWC issued an interim order preventing an employer from continuing an investigation and taking disciplinary action against an employee pending the determination of the employee’s application for a stop bullying order).
Similarly, a Full Bench of the FWC took a broad approach to the concept of dismissal under the unfair dismissal regime in the decision of *Khayam v Navitas* [2017] FWCFB 4092, finding that where a maximum term contract expires and is not renewed this may be a termination of the employment at the employer’s initiative.

Our Employment Alerts about these decisions can be accessed here.

**CHANGES TO IMMIGRATION AND CITIZENSHIP LAWS AFFECTING WORKER MOBILITY**

Changes to immigration and citizenship laws will remain in the spotlight in 2018.

Reforms to the work visa regime will see the abolition of the temporary work (skilled) subclass 457 visa program in March 2018. Existing 457 visas will remain in effect, meaning any foreign worker holding a 457 visa will be permitted to remain in Australia until the expiration of their visa. Where an employer can demonstrate genuine skill shortages they will continue to be able to recruit and employ foreign workers through the new Temporary Skill Shortage (TSS) visa program, although the TSS will introduce new eligibility criteria and change the visa validity periods for some foreign workers.

Employers and foreign workers will also need to navigate corresponding reforms to the permanent skilled work visa programs. The Employer Nomination Scheme and the Regional Sponsored Migration Scheme will undergo further reforms, associated with the introduction of the TSS visa, which will involve further restrictions to eligibility criteria. The changes will include:

- an increase in the time duration for transition to permanent residency (from two years to three years)
- a maximum age limit (45) for all applicants
- increased work experience requirements
- changes to the use and composition of occupation lists; and
- payments to the Skilling Australians Fund (as a method of demonstrating commitment to, and investment in, the training of Australian workers for each foreign worker who is nominated by an employer).

Employers should consider the upcoming changes both in terms of any affected employed foreign workers and the impact on future workforce planning.

Citizenship will also continue to be a hot topic in 2018. Potential citizenship applicants have been given a reprieve from tightened citizenship eligibility requirements following the rejection of the *Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017* by the Australian Parliament. However, employers and foreign nationals should continue to monitor developments for proposed changes in 2018 and beyond.
PENALTY RATES

We don’t expect to see significant movement on penalty rates in 2018.

A challenge by United Voice and the Shop, Distributive and Allied Employees Association to overturn the FWC’s decision to reduce Sunday and penalty rates in a number of modern awards was dismissed by a Full Court of the Federal Court in October 2017 (see Shop, Distributive and Allied Employees Association v The Australian Industry Group [2017] FCAFC 161, 11 October 2017).

The Hon. Senator Doug Cameron sought to introduce amendments to the Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017 which would have the effect of reversing the FWC’s decision. Recent reports indicate that the amendments do not have the support required.

In the meantime employers are well advised to review the arrangements for the phasing in of reductions to Sunday rates in the General Retail, Fast Food, Restaurant, Pharmacy and Hospitality Industry Awards which have effect from July each year.

FOUR YEARLY MODERN AWARD REVIEW

It is also unlikely that 2018 will see the start of another four yearly review of modern awards – the last review hasn’t finished yet!

In accordance with section 156 of the FW Act, the second four year review is due to commence as soon as practicable after 1 January 2018. The Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017 provides for the repeal of the requirement for the FWC to conduct four yearly reviews of modern awards. However, this Bill is not yet law.

In light of the volume of work still required to complete the First Review, the President of the FWC has expressed the provisional view that it is not practicable to commence the Second Review until the First Review has been completed and parties have had the opportunity to consider how the modern awards reviewed under the First Review operate in practice. The FWC sought submissions on the President’s provisional view by 21 December 2017.

ANTI-BRIBERY POLICIES AND PROCEDURES

Early 2018 is the time to review and update your organisation’s anti-bribery policies and procedures.

On 6 December 2017, the Australian Government introduced the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 into Parliament.

The new laws will mean that companies need to have “adequate procedures” in place to proactively guard against foreign bribery, or else they may automatically be held responsible for bribery committed for the profit or gain of the company by its employees, contractors and other service providers, even if the company had no knowledge of the bribery.

CHANGES TO CHAIN OF RESPONSIBILITY LAWS

Changes to the chain of responsibility provisions in the Heavy Vehicle National Law will commence in mid-2018. The new laws will provide that every party in the heavy vehicle supply chain has a positive duty to ensure the safety of their transport activities.

All parties in the supply chain will have a primary duty to ensure, so far as is reasonably practicable, the safety of the party’s transport activities relating to a vehicle. Parties must, so far as is reasonably practicable, eliminate or minimise public risks to safety.

Executive officers of a legal entity will have due diligence obligations to ensure that the entity complies with its primary duty.

These changes better align the HVNL with the model WHS laws, and will be relevant to entities who use heavy vehicles as part of their supply chain, including through the engagement of contractors.
**BREXIT**

The UK Government formally started the Brexit ball rolling by triggering Article 50 of the EU treaty on 29 March 2017, and the negotiations between the United Kingdom and European Union over the Brexit process will continue into 2018. With just over one year until 29 March 2019 when the clock expires on the two year Brexit negotiation period, there remains much yet to be agreed. This means that as 2017 drew to a close there was considerable uncertainty about how a post-Brexit UK will look. That uncertainty has led some companies to begin the process of moving operations and employees elsewhere, and it is likely that that will continue into 2018.

However, the prospect of a “cliff-edge” Brexit (without a negotiated exit) has abated. In December, the UK government reached an in-principle agreement with the European Commission on three key areas of negotiation: the status of UK nationals living in other member states and of EU citizens living in the UK, Northern Ireland and the financial settlement. The basic principle in terms of citizens’ rights is that both UK and EU citizens will be allowed to continue exercising the EU-derived rights that they were already exercising as at the date of the UK’s withdrawal. This means that UK companies who employ locally-resident EU citizen workers (and vice versa) will likely be able to continue employing them post-Brexit without the need for new immigration arrangements. However, businesses will still need to keep a close eye on the negotiations and the shape of the UK and European countries’ post-Brexit immigration policies.

It seems unlikely that there will be immediate or profound changes to UK employment law as a result of Brexit. The so-called “Great Repeal Bill”, introduced during 2017, copies EU law into UK law, with the result that post-Brexit the UK Parliament will then be able to pick and choose which parts of EU law to keep and which to amend or repeal. Workers’ rights formed a prominent part of both major parties’ campaigns during the 2017 general election and there is little political will to wind back the protections that EU law provides for workers. However, there may well be some medium to long term changes depending on the economic and political climate in the UK.

You can read more about Brexit, and keep up to date with the latest developments, at Ashurst’s [Brexit Hub](#).

**EUROPEAN GENERAL DATA PROTECTION REGULATION**

2018 will be a very significant year for privacy and data protection law.

**Australia**

In Australia, businesses should be preparing for the Notifiable Data Breaches scheme which will take effect from 22 February 2018. The scheme applies to all organisations and agencies that already have obligations under the *Privacy Act 1988* (Cth) in respect of personal information. This scheme introduces an obligation to notify people whose personal information is involved in a data breach that is likely to result in serious harm.

**Global**

The European General Data Protection Regulation (GDPR) will become directly applicable in all EU member states from 25 May 2018. The GDPR affects all businesses established in the EU which are controllers or processors of data. For businesses which are established in EU countries, the significance of the GDPR is that it will apply to data controllers and data processors who are not established in the EU and who process data which relates to data subjects who are within the EU, irrespective of where the data is processed. Previous legislation only applied to controllers established outside the EU who processed data within the EU.

Businesses will be working hard during the first half of 2018 so that they can be GDPR-ready by 25 May 2018. Australian employers should take this opportunity to consider whether the GDPR might affect them and, if so, the steps that will need to be taken to comply. Of particular relevance in relation to employees is the GDPR’s stricter approach to consent as a lawful basis for data processing – it will be much harder under the GDPR to show that employees have freely given consent to their data being processed by their employer, particularly where consent is set out in an employment contract. Further, under the GDPR individuals will have increased rights to access their personal data held by their employer.

You can read more about the GDPR and our suggested steps towards compliance [here](#).