



## What can employers expect in the workplace relations space from a Labor government in 2019?

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Australia is due for a federal election in the first half of 2019. Industrial relations remains one of the few policy areas in which key differences remain between the major political parties. We look at Labor's agenda and how it may impact your business in 2019 and beyond, should Labor come to power.

### Challenges ahead for employers

There are a number of potential initiatives in Labor's draft industrial relations platform that will impose greater compliance obligations and employment costs on employers. Some of the more notable proposals are as follows.

- **Penalty rates:** Labor has been vociferous in its criticism of the Fair Work Commission's decision to impose a gradual reduction in the penalty rates payable on Sundays and public holidays to employees in the hospitality, fast food and retail industries. In its draft platform, Labor commits to amending the *Fair Work Act 2009* (Cth) (**FW Act**) to restore the previous penalty rates in these industries and prohibit any future variations to modern awards that will result in a reduction in the take-home pay of employees.
- **Enterprise bargaining:** Whilst the draft platform simply states that Labor is committed to improving access to collective bargaining via multi-employer bargaining "where appropriate", Shadow Minister for Workplace Relations and Employment, the Hon Brendan O'Connor MP,

has publically discussed the possibility for a return to industry-wide bargaining for low paid workers. The platform also commits Labor to creating a "disclosure framework" that requires employers to produce to bargaining representatives information relied upon in rejecting claims made during bargaining and prohibiting the unilateral termination of enterprise agreements. These few changes have the potential to significantly alter the way in which enterprise level bargaining proceeds presently, placing more power in the hands of employee bargaining representatives.

- **Expanded compliance obligations for "economic decision makers":** Labor will impose liability on "economic decision makers", such as franchisors and businesses at the top of a supply chain, for failing to ensure that other employers, such as franchisees and subcontractor suppliers, comply with their workplace relations obligations. This proposal appears to reflect the recent focus of the Fair Work Ombudsman on prosecuting principals in a supply chain and franchisors as accessories to contraventions of the FW Act resulting in underpayments to employees of franchisors and subcontractors<sup>1</sup>. The message is: Those who can influence wage outcomes directly in their own

<sup>1</sup> Such as in *Fair Work Ombudsman v First Group of Companies Pty Ltd (Deregistered) & Ors* [2018] FCCA 1228.

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business, or of other businesses in their supply chain, should be held accountable.

- **Additions to the National Employment Standards (NES):** Labor has promised to include an express right of review for a refusal of a request for flexible working arrangements in the NES. The party will also introduce a new NES, entitling employees to 10 days per annum of paid domestic violence leave, significantly exceeding the entitlement recently included in all modern awards.
- **Abolition of the Australian Building and Construction Commission (ABCC):** Labor has pledged to abolish the ABCC when it returns to government, although it is presently unclear whether this would also result in the scrapping of the *Code for the Tendering and Performance of Building Work 2016*. Labor has long been opposed to the ABCC, having abolished an earlier incarnation of the industry regulator when it came to power in 2007.

#### Reforms said to provide greater certainty for employers

Some of Labor's policy initiatives are couched in terms that of standardising jurisdictional differences in entitlements and addressing confusion created by recent court cases. Some of the key reforms are as follows.

- **A legislated test for "casual" employment:** In the wake of uncertainty arising from the Full Federal Court's recent decision in *WorkPac Pty Ltd v Skene* [2018] FCAFC 131, Labor has pledged to amend the FW Act by inserting an "objective test" for identifying a casual employee. Whilst the draft platform provides no details on how the test may function, employers across all industries have long been calling for a unified approach to classifying casuals.
- **Harmonised long service leave entitlement:** The draft platform contains a commitment to work with State and Territory governments to agree upon a minimum long service leave entitlement for inclusion in the NES. This should help streamline the payroll function for employers operating in multiple States and Territories, as there are currently significant differences across the various jurisdictions in the rates at which long service leave accrues and the minimum periods of service required to access the entitlement. Labor has also pledged to establish a consistent national approach to the treatment of public

holidays that fall on weekends. However, where the "bar" is set remains to be seen.

- **Regulatory reforms in key industries:** Labor proposes to introduce a harmonised regulatory framework for occupational health and safety and workers' compensation in the shipping, offshore oil and gas and stevedoring industries. This reform has the potential to simplify the regulatory burden on employers in these industries in a similar manner to the introduction of the harmonised work health and safety legislation under the last Federal Labor government.

Assuming no significant amendments are made to Labor's draft policy platform ahead of the election, it appears that employers will need to prepare for the most significant wave of reforms in the workplace relations space since the introduction of the FW Act in 2009, following Labor's victory in 2007. The most significant of these to business are likely to be the increased focus on "economic decision makers" to ensure their business comply with workplace laws, and a tilt away from enterprise level bargaining to permit greater collective pressure by organised labour.

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