SQUIRE PATTON BOGGS

Local Connections. Global Influence.

Board Briefing

Labour & Employment – Australia

H2 2023

Executive Summary

Key

Red – Take Action

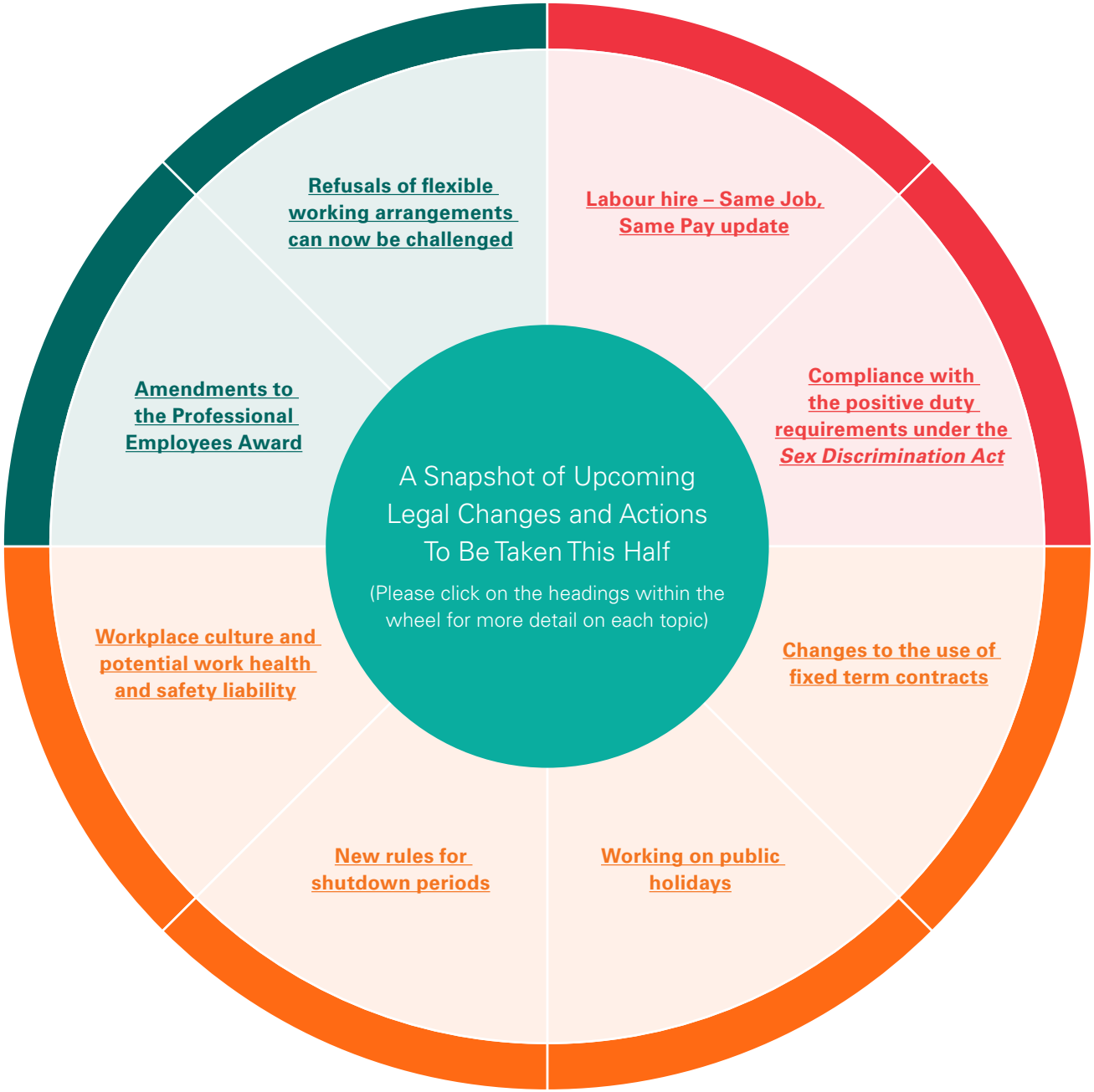
Amber – To Be Considered

Green – To Be Aware Of

Hot Topics Radar

This Hot Topics Radar shows how the legal changes and actions to be taken relate to some of the issues that we know to be high on the board's agenda in relation to its workforce:

- Workplace culture
- Sexual harassment
- Award amendments
- Flexible work arrangements
- Labour hire – Same Job, Same Pay changes



Half Yearly Board Briefing | Labour & Employment – Australia | H2 2023

This briefing aims to provide boards with a strategic steer on key present and impending legal changes this half in Australia.

It also includes useful data for legal and HR teams to ensure they are taking action or preparing for change.

Please note, this document does not cover all legislative changes, just those we view to be of relevance at a board level.

Topic	Narrative and Key Date(s)	Overview	Board Action Required	Risks/Opportunities
To Be Aware Of				
Refusals of flexible working arrangements can now be challenged by employees	• The newly amended flexible working arrangement provisions under s.65A of the *Fair Work Act 2009* (Cth) (*FW Act*) took effect on 6 June 2023. • The "Secure Jobs" amendments empowered the Fair Work Commission (FWC) to deal with disputes about requests for flexible working arrangements as it considers appropriate, including by arbitration in certain circumstances. • Notably, there is no time limit for an employee to refer a dispute to the FWC.	• Where an employee makes a valid flexible working arrangement request and does not accept their employer's alternate arrangements or refusal of the request on reasonable business grounds, they may refer their dispute to the FWC if they are unable to resolve their differences at the workplace level. • Unless there are "exceptional circumstances", the FWC must first deal with the dispute by means other than arbitration, such as by mediation or conciliation. Where this fails to resolve the dispute, or where exceptional circumstances exist, the FWC may arbitrate the dispute without the parties' consent. • The FWC now has the power to order employers to grant requests or change working arrangements to accommodate employees' circumstances, or it can order them to take further steps if the parties have not responded adequately. Civil penalties may also be sought by employees. • On 10 November 2023, the FWC considered the provisions for the first time, finding that the employee had not satisfied the requirements for a valid flexible working arrangement request.	• Employers need to ensure they follow procedural requirements in responding to a flexible work request and must give a written response to an employee's request for flexible working arrangements within 21 days from the request being received by the employer. • Employers should firstly discuss the request with the employee and assess if the request can be accommodated in the original or a modified form. • Where an agreement cannot be reached, employers should provide comprehensive reasons for why they cannot accommodate the request, that is capable of withstanding review and scrutiny of the FWC. Employers should review their operations in anticipation of providing reasonable business grounds to refuse a flexible working arrangement request where applicable. • Employers need to review and refresh their internal systems and processes to ensure compliance with the changes to flexible working arrangements, as well as have clear and compliant hybrid work policies in place.	• The FWC is now an avenue that disgruntled employees can access more readily when they do not accept their employer's decision regarding their flexible work request. • After the COVID-19 pandemic, there was a drive toward greater flexibility in working arrangements. However, as we move on from the pandemic, there is increasing employer activity in encouraging employees to return to the office. • Where a business can clearly demonstrate that it has assessed a flexible working request, genuinely tried to reach an agreement, provided detailed and comprehensive reasonable business grounds for refusal and followed procedural requirements, it will likely be found to have reasonably declined a request as required by the new provisions. • Recent case law has also shown that employers can rely upon the terms of their employment contracts requiring work to be performed at their premises.

Topic	Narrative and Key Date(s)	Overview	Board Action Required	Risks/Opportunities
To Be Aware Of				
	• The Fair Work Ombudsman has developed a Flexible Working Arrangements Best Practice Guide and templates to assist.	• On 16 November 2023, the FWC dealt with the provisions for the second time, adopting a "strict" approach to determining whether it had the relevant jurisdiction to decide a dispute over a flexible working request. The employee's request to permanently work from home to accommodate a custody arrangement for his child was considered a valid request. However, the FWC found that the employer had reasonable business grounds for refusing the request, in particular (among other things): – The desirability for there to be face-to-face contact within the team – Face-to-face contact would allow for observation, interaction and coaching to improve and support the employee's productivity – The employee's knowledge and experience would be more easily accessible by less experienced team members when working from the office • Therefore, the employer was within its rights to require its employees to return to the office in accordance with their employment contract, which contained a term requiring work to be performed at their premises.		

Topic	Narrative and Key Date(s)	Overview	Board Action Required	Risks/Opportunities
To Be Aware Of				
Amendments to the Professional Employees Award (PE Award)	• The changes to hours of work and overtime under the PE Award came into effect on an employee's first pay period on or after 16 September 2023.	• The FWC varied the PE Award on 17 March 2023 to, among other changes, introduce entitlements to employees covered by the award with respect to overtime and penalty rates. • Full-time employees are entitled to the minimum hourly rate for work in excess of 38 hours per week (an entitlement that previously only existed for part-time and casual employees). • Casual, part- and full-time employees are entitled to penalty rates for ordinary hours or overtime worked before 6 a.m. or after 10 p.m. from Monday to Saturday, and Sundays and public holidays. • However, the new overtime and penalty rates provisions (and the corollary record keeping provisions) do not apply to employees entitled to an annual salary exceeding the minimum award entitlement by at least 25%.	• As per our H1 Labour & Employment Board Briefing in March 2023, to the extent that employers have not done so, employers with employees covered by the PE Award should take steps to implement the changes, including: – Conducting a remuneration audit to understand which employees are captured by the changes – Developing processes to capture and store records of employees captured by the changes – Checking whether employment contracts contain a comprehensive contractual set-off clause and whether these clauses can, in fact, be relied upon	• Our March 2023 insight reviews in detail these changes and what this means for employers with employees covered by the PE Award.

Topic	Narrative and Key Date(s)	Overview	Board Action Required	Risks/Opportunities
To Be Considered				
Workplace culture and potential work health and safety (WHS) liability	19 October 2023: • Court Services Victoria (CSV) is convicted and ordered to pay nearly AU$400,000 in penalties, in relation to a toxic workplace culture that contributed to the suicide death of a lawyer and to other workers taking stress leave. 29 September 2023: • WorkSafe Victoria charges the Victorian Building Authority (VBA) with breaching Section 32 ("Duty not to recklessly endanger persons at workplaces") of the Victorian *Occupational Health and Safety Act 2004* (*OHS Act*), in relation to the May 2022 death by suicide of a VBA inspector.	• With the increasing focus on "psychosocial hazards" in the workplace (being hazards that pose a risk to workers' mental health), safety regulators are now demonstrating that they are willing to take action (up to and including commencing prosecution proceedings) in relation to workplaces where a poor workplace culture has caused workers to suffer a psychological injury. • This means that employers (or "persons conducting a business or undertaking" (PCBUs) in the context of WHS legislation) can potentially be prosecuted and held liable in circumstances where a poor workplace culture has seriously impacted on a worker's mental health, including where the worker has committed suicide. • In the Jessica Wilby case, Ms. Wilby worked at the Coroners Court of Victoria. In February 2018, Ms. Wilby took on the role of acting senior legal counsel, as well as continuing in her substantive role. A month later, during which Ms. Wilby experienced an excessive workload (essentially performing three roles), long hours and what was described as a "toxic" workplace culture, Ms. Wilby suffered a mental breakdown at work. She returned to work the next day and performed the role for another five weeks until her condition deteriorated, and she was forced to take sick leave. In September 2018, Ms. Wilby took her own life. • An inquiry was held into Ms. Wilby's death, conducted by an NSW coroner (to avoid conflicts of interest).	• Businesses should be cognisant of and responsive to issues arising from poor workplace culture. • Workplace culture and health and safety in the workplace are intrinsically linked, and this is reflected in the greater emphasis on the need to address "psychosocial hazards" that can pose a risk to workers' mental health, now incorporated in WHS regulations and codes of practice in a number of jurisdictions. • It is also worth noting that several of the psychosocial hazards that are identified in the codes of practice – such as bullying and harassment, lack of organisational justice, high job demands, lack of support, inadequate reward and recognition, and workplace conflict – are factors that are commonly seen in or can contribute to a poor workplace culture. • PCBUs have a duty under WHS legislation to ensure, so far as is reasonably practicable, the health and safety of its workers. This includes psychological as well as physical health. • As a first step, boards and executive teams should be proactive in monitoring and reviewing the culture of their workplaces, identifying potential risks to workers' mental health arising from that culture and implementing appropriate control measures to eliminate or minimise these risks so far as reasonably practicable.	• These recent cases demonstrate that PCBUs are responsible under applicable WHS legislation for identifying factors in the workplace that may be contributing to a toxic workplace culture (that are also psychosocial hazards in their own right) and implementing control measures to eliminate or minimise those hazards so far as is reasonably practicable. • If a PCBU allows the culture of its workplace to deteriorate to the point where it becomes toxic, and does not take steps to address this, it can potentially be held liable for any psychological injury a worker suffers as a result, as reflected in the cases mentioned. • In particular, PCBUs need to be proactive in addressing bullying and sexual harassment in the workplace, which are significant psychosocial hazards in their own right that can play a major role in creating a toxic workplace culture if not addressed. • On a positive note, investing in creating and maintaining a positive workplace culture is not only beneficial to a business from a reputational and productivity perspective, but can also help reduce risks to workers' health and assist businesses in meeting their obligations under workplace safety laws.

Topic	Narrative and Key Date(s)	Overview	Board Action Required	Risks/Opportunities
To Be Considered				
		• The coroner found it quickly "became evident to many at the Court" that Ms. Wilby was deeply distressed and physically unwell as a result of her workload, but at least two managers wrongly attributed her symptoms to personal issues, and nothing was done to address her excessive hours. • The coroner went on to find that many staff believed the court's working environment was "toxic", and noted that a number of senior personnel were on long-term stress-related sick leave at the time of the inquiry. • It was also noted that several complaints had been made by workers at the Coroners Court over the period between December 2015 and September 2018 in relation to matters including bullying, favouritism, verbal abuse, derogatory comments, intimidation, invasions of privacy and perceived threats to career progression. Despite this, very little had been done to address the poor workplace culture at the Coroners Court. • Ms. Wilby's employer, CSV, was subsequently charged by WorkSafe Victoria and pleaded guilty to breaching the *OHS Act* by failing to provide and maintain a safe workplace for Ms. Wilby within the Coroners Court of Victoria, which contributed to her suicide. CSV was fined AU$379,157, plus AU$13,863 in costs. • In the second case, involving the suicide of an inspector at VBA, WorkSafe Victoria has alleged that VBA refused to transfer the inspector to another supervisor and continued to pursue redundancy and performance processes against him when it knew this may place the inspector at risk of psychological injury.	• Executive teams and management can set an example by demonstrating that a positive, inclusive and safe workplace is prioritised and valued. • Businesses should also obtain feedback and input from the workforce on concerns they may have at work (even if that must be done anonymously), so that a plan can be developed on ways in which issues (and potential risks) arising from a poor workplace culture can be addressed. • PCBUs should also take steps to monitor whether any workers are exhibiting high levels of stress at work and, if so, step in to offer additional support. (For example, if a worker's stress is related to their workload or excessive hours, this may involve redistributing work or taking on additional staff to assist.)	

Topic	Narrative and Key Date(s)	Overview	Board Action Required	Risks/Opportunities
To Be Considered				
		• Under the *OHS Act*, reckless endangerment is one of the most serious offences (second to workplace manslaughter) and carries a maximum fine of just over AU$3.6 million as applicable at the time of the alleged offence. • Similar to the Jessica Wilby case, this has come at a time when VBA is reported to have an "appalling" workplace culture and unsafe practices, to the point where VBA's board has commissioned an independent inquiry into allegations of bullying and workplace culture issues within the organisation. The WorkSafe proceedings are ongoing.		
New rules for shutdown periods	• On 1 May 2023, amendments to 78 modern awards changed the way that employers must deal with employee leave over shutdown periods (for example, business closures over the end-of-year festive season or when a business is closed for renovation).	• Employees covered by one of the amended modern awards (see list here) are now entitled to decline a request to take unpaid annual leave over a shutdown period, if they do not have enough annual leave accrued. • Where an employee does not have enough annual leave for the shutdown period, they can agree with their employer to either: – Take annual leave in advance – Use accrued time off, such as accrued rostered days off (RDOs) – If practicable, continue to work over the shutdown period	• Shutdown periods must be planned for in advance, even if using tentative dates, noting when written notice will need to be provided to employees. • Leave requests must be managed to ensure that employees retain sufficient leave for the shutdown period, or leave approvals are subject to the employee's agreement that they will take unpaid leave during the shutdown period. • Contracts, policies and handbooks should be updated to ensure compliance with these changes. Employers may also seek the agreement of employees to provide a lesser period of notice for shutdown periods, and to take unpaid leave in circumstances where they do not have enough leave accrued to cover shutdown periods.	• If annual leave is not appropriately managed throughout the year, then there is a risk that employees will need to work during a shutdown period or be paid despite performing no work. • Potential penalties for non-compliance with the amended modern awards.

Topic	Narrative and Key Date(s)	Overview	Board Action Required	Risks/Opportunities
To Be Considered				
	• Prior to these changes, employees without sufficient accrued annual leave would often take leave without pay during shutdown periods. This can no longer happen without the agreement of the employee and, if agreement is not given, the employee can insist on working over the shutdown period or, if it would not be safe to do so, be paid during the shutdown period despite performing no work.	• Where an employer intends to shut down for a particular period, written notice must be given to the affected employees. Unless a shorter time period has been agreed between the employer and its employees, the notice must be given at least 28 days before the temporary shutdown period begins. If an employee begins employment after the beginning of the requisite notice period, the employee should be provided with notice of the shutdown as soon as reasonably practicable, for example, in their contract of employment.	• Consider which roles employees could continue to perform during a shutdown period and whether there are any WHS concerns if work was performed without the usual level of supervision or support.	
Working on public holidays	• Following the Full Federal Court decision of *Construction, Forestry, Maritime, Mining and Energy Union v OS MCAP Pty Ltd* [2023] FCAFC 51 (in respect of which special leave to appeal was recently refused by the High Court of Australia), employers cannot direct or require employees to work on public holidays without first "requesting" them to do so.	• It is now settled that, under section 114(1) of the *FW Act*, employees are entitled to be absent from their employment on a day or part-day that is a public holiday. However, under section 114(2) of the *FW Act*, an employer can request that an employee works on a public holiday, if the request is reasonable. If an employer makes a request that an employee work on a public holiday, the employee may refuse the request if: – The request is not reasonable – The refusal is reasonable • In determining whether a request, or a refusal of a request, is reasonable, the matters in section 114(4) of the *FW Act* must be considered. A full list of those matters can be found here.	• Considering the now settled position, employers must ensure they follow the correct process to request that employees work on a public holiday. An indicative process can be found here. • The onus is on the employer to justify why a request to work on a public holiday is reasonable. Employers therefore need to consider such requests with reference to their operational requirements, contractual requirements or the nature of its enterprise.	• Employers operating in round-the-clock industries, like aged care, mining, hospitality and healthcare, need to be particularly vigilant of the processes required to request work on a public holiday, to ensure that they have enough staff to cover those public holiday shifts. • Potential penalties for non-compliance with the *FW Act*.

Topic	Narrative and Key Date(s)	Overview	Board Action Required	Risks/Opportunities
To Be Considered				
	In practical terms, this mandates employers to undergo a consultative process with their employees, regarding work on a particular public holiday. • The publication of a roster with workers scheduled to work on a public holiday will not constitute a "request" and, therefore, will not satisfy the requirements imposed by the *FW Act*.	• The requirement to make a request to an employee, as opposed to a unilateral demand to work on a public holiday, is intended to prompt a discussion, negotiation and/or refusal of the request.		
Changes to the use of fixed term contracts	• From 6 December 2023, various restrictions apply to the use of fixed term employment contracts. • From 6 December 2023, employers must provide any employee engaged on a new fixed term contract a copy of the Fixed Term Contract Information Statement.	**Restrictions on Use of Fixed Term Contracts** • Following amendments to the *FW Act*, employers' use of fixed term contracts is now limited. • The new provisions make it an offence for an employer to enter a fixed or maximum term contract with an employee: – For a period that exceeds two years – That allows the contract to be extended or renewed for a period that exceeds two years – That provides for an option or right to extend or renew the contract more than once	• The board should ensure that the business is aware of the changes and the impact of the changes on engaging employees on a fixed term basis going forward. • The board should consider if the business' use of fixed term contracts fits within any of the following exceptions: – The employee has specialised skills that the employer does not have, but needs, to complete a specific task – The employee is engaged as part of a training arrangement	• Going forward, if fixed term employees are not managed in accordance with the new requirements, there is a risk that employee will automatically convert to permanent under the new rules. • Potential penalties for non-compliance with the *FW Act*.

Topic	Narrative and Key Date(s)	Overview	Board Action Required	Risks/Opportunities
To Be Considered				
		– Where the contract continues the same, or substantially similar, employment relationship and work duties as a pervious fixed term contract, and: - The contract and previous fixed term contract exceed two years in length - The contract or previous fixed term contract contains a right of renewal or extension - The employee has previously been engaged under two consecutive fixed term contracts • Where a contract exceeds any of these requirements, it will automatically convert to a contract for permanent employment, if the contract rolls over. • For completeness, it is noted that the *FW Act* provides for several exceptions to this rule (see Board Action Required for a full list of the exceptions). • If an employer seeks to rely on one of the exceptions, it bears the burden in establishing that the relevant fixed term contract (or the employer itself, as applicable) falls into one of the exceptions. • In circumstances where an employer cannot offer a permanent role to an employee and an exception does not apply, the employer can either: – Offer the employee a casual role (noting that this would attract a 25% casual loading) – Ensure that the fixed or maximum term contract terminates in accordance with its terms before it rolls over	– The employer needs additional workers to do essential work during a peak period – The employer needs additional staff members during an emergency, or needs to replace a permanent employee who is absent for personal or other reasons – The employee earns over the high income threshold (currently AU$167,500) for the first year of the contract – The employer is reliant on government funding to directly finance the employee's position and there are no reasonable prospects that the funding will be renewed – The employee is appointed under governance rules of a corporation or other association (such as a constitution for a company or rules of association for an incorporated association) and those rules specify a length of time that the appointment can be in place (such as a term of office of three years) – The employer is permitted to enter into the fixed term contract by a term specified in a modern award that covers the employee	

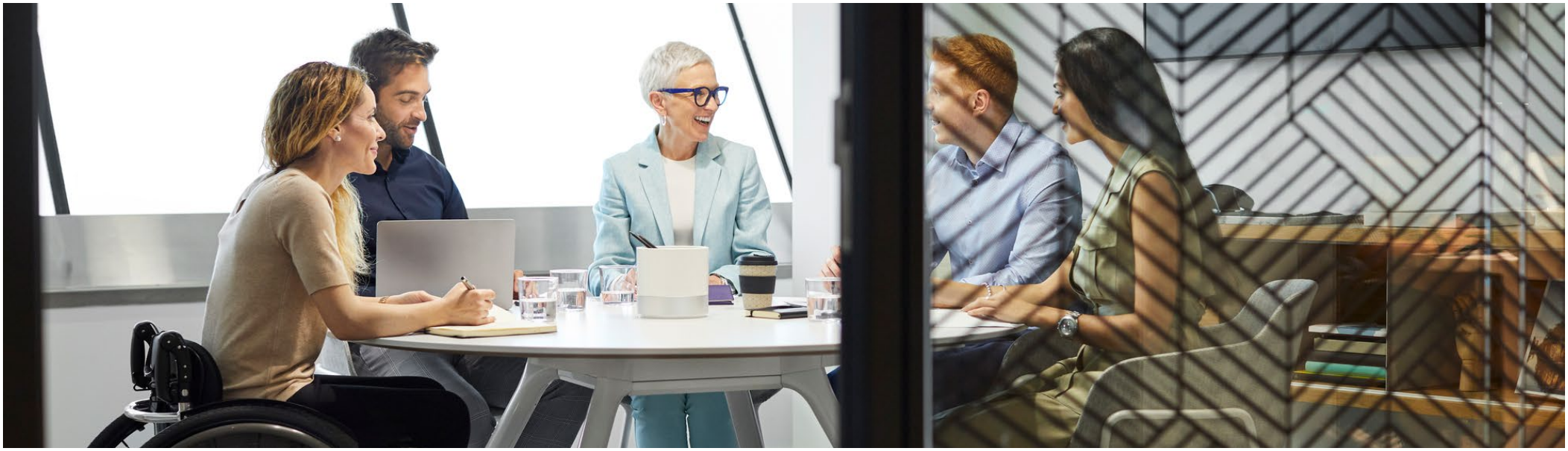
Topic	Narrative and Key Date(s)	Overview	Board Action Required	Risks/Opportunities
To Be Considered				
		Fixed Term Contract Information Statement • In accordance with the *FW Act*, from 6 December 2023, employers must provide any employee engaged on a new fixed term contract a copy of the Fixed Term Contract Information Statement (FTCIS). A copy of the FTCIS can be found on the Fair Work Ombudsman's website. • In addition to the FTCIS, employers must also provide new employees with a copy of the Fair Work Information Statement.	• Noting that the employer bears the onus in establishing if an exception applies, the board should consider including reference to the relevant exception relied upon in the fixed term contract, along with a brief explanation of the basis on which the exception is relied upon. Fixed and maximum term contract templates should be amended accordingly. • Induction processes should be updated to incorporate provision of the FTCIS to all employees entering a new fixed or maximum term contract.	

Topic	Narrative and Key Date(s)	Overview	Board Action Required	Risks/Opportunities
Take Action				
Compliance with the positive duty requirements under the *Sex Discrimination Act*	• In December 2022, a new positive duty on employers and persons conducting a business or undertaking (PCBUs) to eliminate workplace sex-based discrimination and harassment commenced. • The Australian Human Rights Commission's (AHRC) investigation and enforcement powers commence on 12 December 2023. • It is important that leaders of organisations recognise that addressing and preventing sexual harassment works on a spectrum, from legal compliance through risk management to recognising it is a leadership and safety issue.	• The *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) amended the *Sex Discrimination Act 1984* (Cth) (*SD Act*), introducing a positive duty on employers and PCBUs to eliminate: – Workplace sexual harassment, sex-based discrimination and sex-based harassment – Conduct that amounts to subjecting a person to a hostile workplace environment on the ground of sex – Certain acts of victimisation • This important change requires employers and PCBUs to shift their focus to actively preventing workplace sexual harassment and discrimination, rather than responding only after it occurs. The new positive duty imposes a legal obligation on employers and PCBUs to take proactive and meaningful action to prevent workplace sexual harassment, sex-based discrimination, sex-based harassment, conduct that amounts to subjecting a person to a hostile workplace environment on the ground of sex and victimisation from occurring in the workplace or in connection to work. • This act gives new functions and powers to the AHRC to monitor and assess compliance with the positive duty of care in the *SD Act*, including to: – Conduct inquiries into compliance by an employer or PCBU with the positive duty – Issue a compliance notice to address any non-compliance	• If boards have not already done so, they should urgently review the steps they currently take to prevent sexual harassment in the workplace and consider whether they might need to do more now that they have a statutory positive duty. • To better prevent sexual harassment, boards should take action in the following areas: – Leadership – Risk identification and assessment – Culture – set by leadership, policies and human resource practices – Knowledge, including education and training • Simply having a policy is not sufficient. The board and management need to have a proper understanding of their obligations and liabilities and have oversight of and involvement in the organisational approach to this issue. • It is also recommended that to better respond to sexual harassment, boards should take action involving: – Support to those reporting harassment – Reporting – addressing barriers to reporting	• Boards should consider obtaining professional advice on compliance, including running training for the board and management. • As well as legal risks, if the organisation fails to comply with the positive duty (being liability at the organisational level and personal liability of directors), this is a key issue in an organisation's reputation, for the attraction and retention of staff and from an ESG (including investment opportunity) perspective. • Boards can lead by example and demonstrate from the top down the organisation's commitment to setting and maintaining not just legally compliant standards, but also behaviours that will shape a culturally appropriate workplace.

Topic	Narrative and Key Date(s)	Overview	Board Action Required	Risks/Opportunities
Take Action				
	• The AHRC has developed four guiding principles and seven standards that it expects all organisations and businesses to meet to satisfy the positive duty. It has also developed guidelines for complying with the positive duty, which is available on its website. Although the guidelines are not legally binding, they are authoritative and will be used by the commissions in assessing compliance with the positive duty. A court may also consider whether organisations and businesses have followed the guidelines when assessing compliance with the positive duty. The guiding principles and standards can be viewed here: Steps to meet the Positive Duty Factsheet (humanrights.gov.au).	– Apply to the federal courts for an order to direct compliance with the compliance notice – Enter into enforceable undertakings with an employer or PCBU	– Measuring and collecting data (for example, are there trends in reporting that point to a systemic cultural issue?) • The size, sector and operations of organisations will dictate different approaches to addressing sexual harassment. However, all organisations benefit when the board plays a strong role in establishing a culture that promotes equality and treats employees fairly. • The AICD recommends: "The board should include sexual harassment on relevant committee and board meeting agendas regularly. This should provide an opportunity to deepen directors' understanding, assess the organisation's progress, identify any risks or concerns, assess how the organisational culture responds to the issue, and emphasise the ongoing and personal commitment of all directors and management to preventing and addressing sexual harassment. Key messages from the discussions should be circulated to staff. Directors should take opportunities to emphasise to staff the commitment to preventing and addressing sexual harassment and building a respectful, just and safe culture." The AICD guidance can be reviewed here: 2021-04-AICD-Guide-to-preventing-sexual-harassment-.pdf (agec.org.au).	

Topic	Narrative and Key Date(s)	Overview	Board Action Required	Risks/Opportunities
Take Action				
Labour Hire – Same Job, Same Pay	• *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* has inserted a new Part 2-7A into the *FW Act* to take effect on 1 November 2024. • From November 2024, employees hired through labour hire firms, doing the same work as full-time employees of an employer, are to be offered the same pay and conditions.	• The FWC will be able, upon application, to make "Regulated Labour Hire Arrangement Orders" (RLHAO) that will impose restrictions on employers that provide services to other businesses involving a labour component. • The FWC must make a RLHAO where: – The employer supplies or will supply, either directly or indirectly, one or more employees of the employer to perform work for a "regulated host" – A "covered employment instrument" that applies to the regulated host would apply to the employees if the regulated host were to employ the employees to perform work of that kind – The regulated host is not a small business employer • The FWC must not make a RLHAO where the performance of the work is for the provision of a service (as opposed to supply of labour). However, this is subject to the level of supervision and control, as well as the use of the employer's systems, plant or structures and the extent to which the work is of a specialist or expert nature. • The RLHAO may cover additional arrangements, additional employers and employees and new employment instruments as circumstances and relationships evolve. • Where a regulated host or employer is covered by a RLHAO then: – They must notify tenderers of this requirement or face the civil remedy provisions of the *FW Act*.	• Will your current labour arrangements fall within the FWC criteria for making RLHAOs? • Detailed assessments/advice will need to be undertaken to determine if the limited exemptions to making RLHAO's can be reasonably relied upon. • Companies engaging in third-party workforce arrangements may need to demonstrate (to the satisfaction of the FWC) that the relevant relationship involves the provision of specialist/expert services. • Do you have scope to look at certain short-term arrangements of no longer than three months? • Be aware that the civil remedy penalty regime has had a five-fold increase in civil penalties (up to a maximum of AU$4.695 million for a serious contravention), which substantially increases the risks associated with any wage underpayments or breach of the *FW Act*.	• The changes are forecast to cause widespread disruption regarding the use of labour hire arrangements in Australia. • Assuming RLHAOs apply, is the company equipped to implement processes and systems to ensure applicable protected rates of pay are provided to regulated employees? • The new arrangements will require considerable HR adjustments to remain compliant with the *FW Act*.

Topic	Narrative and Key Date(s)	Overview	Board Action Required	Risks/Opportunities
Take Action				
		– The employer must not pay less than "protected rate of pay". This means the full rate of pay that would be payable to the employee if the host employment instrument covered by the RLHAO were to apply to the employee. • There is an exception to paying the "protected rate of pay" for certain short-term arrangements of no longer than three months. • Disputes regarding RLHAO's will be determined by the FWC via arbitration, including by making an order (an arbitrated protected rate of pay order). • The amendments also include detailed anti-avoidance provisions (involving civil remedy provisions), including where an employee (subject to a RLHAO) is dismissed and offered employment as an independent contractor under a contract for services.		



Spotlight On

Further Government Reforms to the *Fair Work Act* in 2024

As of 8 December 2023, the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* has made significant changes in relation to the redundancy exemptions for small businesses, increased workplace delegates rights, strengthened protection against discrimination and criminalised wage theft, and made amendments to the *Work Health and Safety Act 2011* (Cth).

In 2024, we expect the government to continue its legislative changes concerning "employee-like" forms of employment (e.g. the gig economy), change the definition of casual workers, introduce a right to disconnect for employees and introduce a right for workers to challenge unfair contract terms.

We will cover all the new changes in our first half Labour & Employment Board Briefing in Q1, 2024.

In the meantime, should you need advice, support or further details on any of the matters covered, please contact one of our Australian Labour & Employment team members below.

Contacts

Kim Hodge
Partner, Perth
T +61 8 9429 7406
E kim.hodge@squirepb.com

Kim provides commercially minded and strategic legal advice on a wide range of contentious and non-contentious industrial relations, employment and human resources matters.

Nicola Martin
Partner, Sydney
T +61 2 8248 7836
E nicola.martin@squirepb.com

Nicola is a highly regarded lawyer with two decades' experience advising clients on the full spectrum of employment relations, industrial relations and human resources matters.

Steve Bowler
Director, Perth
T +61 8 9429 7566
E steve.bowler@squirepb.com

Steve advises clients on employment and workplace issues, including redundancy, workplace disputes, discrimination and harassment, contract and policy review, and workplace health and safety obligations.

Erin Kidd
Director, Sydney
T +61 2 8248 7837
E erin.kidd@squirepb.com

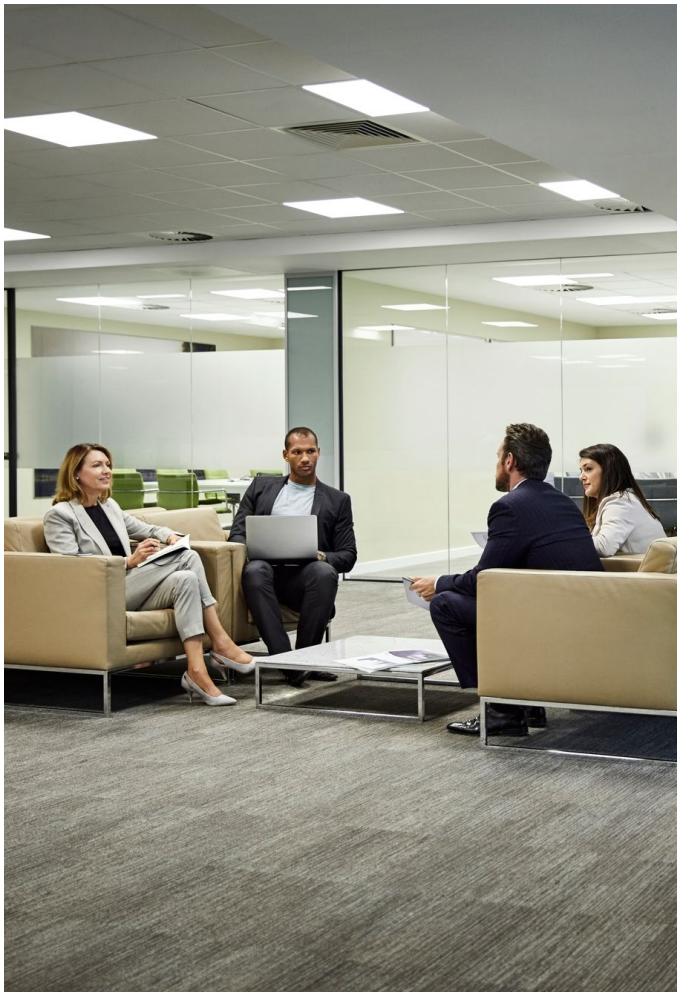
With extensive employment law experience, as well as qualifications in human resources and industrial relations, Erin understands the complexities of people management and provides practical advice and representation in all employment-related matters.

Elisa Blakers
Associate, Sydney
T +61 2 8248 7840
E elisa.blakers@squirepb.com

With experience across all facets of employment law, Elisa provides pragmatic advice to clients operating in a range of industries on both contentious and non-contentious matters.

Genevieve Mascarenhas
Associate, Perth
T +61 8 9429 7684
E genevieve.mascarenhas@squirepb.com

Genevieve assists clients with a range of employee relations, industrial relations and workplace health and safety matters.



squirepattonboggs.com