

# Environmental, Social and Governance (ESG) in the Changing Landscape of Australian Labour and Employment Law

2024



# It's a Cultural Thing

## Employers Can Be Held Liable for a Poor Workplace Culture

Most businesses would claim to have a positive workplace culture (or aspire to have one), although this may not be borne out in reality. However, if a poor workplace culture exists, can an employer (or person conducting a business or undertaking (PCBU) in work health and safety terms) be held liable if a poor workplace culture impacts on workers' health?

In October 2023, Court Services Victoria pleaded guilty to breaching the Victorian *Occupational Health and Safety Act 2004 (OHS Act)* by failing to provide and maintain a safe workplace after principal in-house counsel and acting senior legal counsel Jessica Wilby took her own life. Jessica experienced an excessive workload, long hours and what was described as a "toxic" workplace culture, but continued working for five weeks after having a mental breakdown, before being forced to take sick leave.

There is little doubt that workplace culture and health and safety in the workplace are intrinsically linked, with the increasing emphasis on the need to address "psychosocial hazards" that can pose a risk to workers' mental health now incorporated in work health and safety regulations and codes of practice in a number of jurisdictions. This means that PCBUs are responsible under applicable work health and safety 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.

Businesses and organisations need to be aware of and monitor the work environment to ensure that the prevailing culture is not potentially creating a serious risk to workers' mental and physical wellbeing. This is not only necessary as part of their duty of care under workplace health and safety law, but, in some cases, it could even save a life.

We have summarised six steps businesses can take to ensure they are fostering and maintaining a healthy workplace culture:

### 1. Ownership and Accountability

A workplace will only have a healthy workplace culture if it is driven from senior management down. A key stakeholder (often a member of the board) must be seen to take ownership of and be accountable for any strategy designed to improve workplace culture. As evidenced by recent workplaces under the spotlight in the press, it will be impossible to foster good culture if senior management operates a culture of fear, indifference or turning a blind eye to alleged bad behaviour to avoid upsetting "the talent".

To ensure that companies stand by and fulfil their stated aims to improve their culture (usually as part of a wider ESG strategy), increasingly there is pressure to link executive remuneration to successful delivery of this outcome.

### 2. A Diverse Plan for Growth

Diversity, equity and inclusion (DEI) remain a key focus for many businesses. It goes without saying that instilling an inclusive organisational culture with leadership that better reflects the communities in which the business operates, and rewards the talents of a diverse workforce, will lower costs, lead to productivity gains and help strengthen the fabric of an organisation.

A key deliverable will, therefore, likely be a DEI strategy (including up-to-date equality and anti-harassment policies) that seeks to prevent discrimination and aims to ensure equity for all. To ensure the plan is on track, we recommend occasional "testing" of the strategy to see if it resonates within the culture of the organisation.

### 3. Train Your Staff

All staff should be provided with regular training on the key policies relevant to workplace culture, particularly equality, mental health and anti-harassment policies. Although providing this training to new starters is important, ensuring the training is repeated regularly will help to reinforce those messages. Make sure your training is comprehensive and the materials are updated for current legal requirements, and that senior management is not only invited, but also attends (and participates!). Respectful behaviour training will be even more important going forwards considering the recent amendment to the *Sex Discrimination Act 1984 (Cth)*, which introduces additional positive duties on employers to take reasonable and proportionate measures to eliminate or minimise workplace sexual harassment and related conduct.

#### 4. Give Your Staff a Voice

Silence is a common thread in workplaces where the culture has become toxic. That alone should be incentive enough for any business to address these issues so that inappropriate behaviour can be recognised and dealt with at an early stage. But beyond that, the ripple effects are also likely to be felt by other staff members too, which may have implications for mental health-related absences, employee engagement, retention rates, productivity and so on. Some organisations are achieving this through confidential complaint processes or whistleblowing hotlines.

#### 5. Act Quickly and Properly

For good culture to thrive, it is important that staff believe that any concerns raised will be thoroughly investigated (if appropriate) in an independent, fair, proportionate and transparent way.

We are seeing an increasing number of clients relying on our expertise to carry out culture reviews to deal proactively with any potential issues at an early stage. It is very rare in the case of allegations of serious wrongdoing that there is not some awareness in the business beforehand. The traditional approach of only acting once a formal complaint is made may be “too little, too late”, in that inappropriate behaviour can then continue unchecked for long periods of time. A culture review may flush out these issues early and allow the business to take swift action against the perpetrators, if that is its decision, and protect the rest of the workforce.

#### 6. Be Mindful of Each Person's Rights

Acting swiftly and robustly is all very well, but keep in mind the legitimate expectations of those accused of misconduct to a fair hearing before key decisions are made in connection with suspension or dismissal, the maintenance of confidentiality as far as practicable and the presumption of “innocent until proven guilty”. Knee-jerk decisions made in haste may cause more legal harm than the original allegations.

Our team of labour and employment specialists has a proven track record of advising clients on these issues around the world. For more information on our labour and employment team, please get in touch with the team.





# AI, ESG and DEI

## The Use of Artificial Intelligence (AI) To Maintain Both the Legal and Social Licences To Operate

As ESG factors continue to prove themselves as drivers of financial performance and business resilience, ESG is a hot topic for investors, shareholders and boardrooms worldwide, as well as regulators, consumers and prospective employees. AI may prove useful in data processing and analysis procedures for ESG-related issues, such as combatting modern slavery and achieving DEI objectives.

Under the *Modern Slavery Act 2018 (Cth) (Modern Slavery Act)*, businesses are responsible for their own operations as well as the compliance of members of their supply chain. In late November 2023, the Australian government introduced the *Modern Slavery Amendment (Australian Anti-Slavery Commissioner) Bill 2023* into Parliament to establish the first Commonwealth anti-slavery commissioner.

Once established, it is anticipated that the anti-slavery commissioner will push recommendations to:

- Lower the reporting threshold
- Introduce due diligence obligations
- Introduce penalties for noncompliance
- Propose new measures for monitoring for and complying with the mandatory reporting criteria

Compliance with modern slavery requirements is going to become increasingly onerous for more businesses. In 2022, it was reported that out of a sample size of 102 reports, 77% of companies failed to address the mandatory reporting criteria.

There is currently research being undertaken by Project AIMS with the assistance of QUT and Mila into the use of AI to examine the thousands of reports made under the Modern Slavery Act. This research and the rapid advancement of AI technology is likely to result in closer analysis of the submitted reports, which may identify increased levels of noncompliance with the reporting obligations required by the Modern Slavery Act.

Businesses can expect the use and application of AI in modern slavery reporting to increase the focus on disclosure responsibilities, particularly around supply chains they own or control.





The use of AI in the modern slavery context has implications on a broader scale for other aspects of ESG. By its nature, AI can perform more efficiently, accurately and consistently than humans, and can provide, or at least aid in, more insightful analysis. For that reason, AI can be used to complement and streamline monitoring, risk assessment and data analysis in other important ESG-related processes.

AI allows for:

- **Efficient data analysis** – AI has the power to search and collect large data sets from multiple sources in a more time-efficient way than human capabilities. Without AI, data collection becomes a manual task involving multiple databases, which has the potential to lead to inaccuracies and errors in reporting. In addition, it can track performance against given objectives, highlight trends, and enable and inform decision-making processes.
- **Risk assessments** – AI provides foresight into risk exposure, which in turn enables the proactive development of effective risk-mitigation strategies.
- **Enhanced compliance** – AI can automate compliance tasks as well as identifying compliance gaps. This automated process allows businesses to review their progress more regularly and adapt accordingly to deliver their ESG objectives, while also allowing businesses to verify their disclosures. In addition, this automation reduces costs for businesses and improves their efficiency.
- **Investment opportunities** – AI can identify investment opportunities that align with a business's ESG goals, thereby improving ESG-related performance and enhancing the associated competitive advantage.

However, there are also potential risks relating to:

- **Data bias** – AI learns from the data that humans provide to it, so if this data is biased, then the outcomes will also be biased, which will result in AI making unfair or discriminatory decisions on behalf of businesses.
- **Privacy** – AI relies on a large volume of data at a time when the general public is highly sensitive to data privacy. There will likely be difficulties in obtaining reliable personal data in relation to race, gender, sexuality and disabilities. Combined with the risk of data bias, this may lead to inaccuracies in reporting on ESG and DEI objectives.

In addition to reporting requirements under the *Modern Slavery Act*, according to the Australian government's sustainable finance strategy, in the near future, businesses will need to make disclosures on their environmental impact as well. The days when companies could simply tell stories about their successes are gone. Australian businesses will need to be prepared to give a frank description about the impact that the business has on those around it – this includes the good, the bad and the ugly.

AI can help manage and carry out compliance tasks for ESG-related monitoring and reporting, and even risk-identification and mitigation. Businesses should consider implementing and investing in AI while recognising the risks that come with it. .

#### AI is already being utilised in the drive to achieve DEI goals.

Many businesses use AI to review resumes and ensure that candidates are selected based on skills and experience only. In line with arguments made above for ESG, AI facilitates measuring progress and reporting, and can help identify issues such as pay disparity, gender inequality, and any biases or trends that are forming, so that businesses can be proactive in resolving said issues.

Where AI is used to facilitate ESG and DEI strategies, the AI tools must be provided with high-quality data, and reviewed frequently to ensure accuracy and prevent bias. It is also important for businesses to remember that regardless of the influence of AI, ESG and DEI objectives must be tied to business performance and integrated into the core business strategy and governance processes, in order to be effective and ultimately deliver a real-world difference.





# Keeping Up With Fair Work Reforms

## Staying Ahead of the Game Among Changing Rules

The Australian government continues to make changes to labour and employment law, which it says will give workers greater protection and better conditions. While most reforms spend enough time as a proposal or bill to undergo a process of scrutiny, others have been more “fast-tracked”, creating uncertainty for employers, employees and lawyers alike.

While some changes relevant to business can be seen as codifying growing ESG obligations, it can be difficult to anticipate what the next raft of changes will look like and how they may affect key stakeholders.

Some of the recent changes include:

- **New rules for shutdown periods** – Employees covered by certain awards can now decline a request to take unpaid annual leave over a shutdown period if they do not have enough annual leave accrued and employers must give written notice of usually at least 28 days before a temporary shutdown.
- **Right to disconnect** – Employees now have the right to refuse to monitor, read or respond to contact from an employer outside of the employee’s working hours unless the refusal is unreasonable.
- **Flexible work arrangements** – The circumstances in which an employee can request flexible working arrangements has been broadened, and employers have additional processes and obligations to fulfil before they can refuse a request for a flexible working arrangement. The Fair Work Commission is now empowered to deal with a dispute about whether the reasons given by an employer for refusing a request were reasonable business grounds.
- **Parental leave** – The number of unpaid leave days available to employees under the National Employment Standards has been increased from 30 days to 100 days, and there is now increased flexibility for taking such leave.
- **Respect@Work** – A positive duty to take measures to eliminate, as far as possible, workplace sexual harassment was introduced in the *Sex Discrimination Act 1984* (Cth) and operates in conjunction with the similar duty to eliminate or minimise risks to health and safety under work health and safety law.
- **Fixed term contracts** – Fixed term contracts can now be no longer than two years, including renewals and extensions, and, in certain circumstances, fixed term contracts cannot be renewed more than once.
- **Superannuation** – From 1 January 2024, the right to superannuation will be contained in the National Employment Standards, meaning that employees will be empowered to recover superannuation entitlements directly from their employer.

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## Lead the Way

Future decisions of and guidance from the Fair Work Commission on the recent reforms will hopefully offer some clarity on what the changes mean and how they affect individuals and business. The cases (and recent legislative amendments) also show that businesses are facing higher penalties for not complying with new laws (including work health and safety law), including, in some cases, significant personal penalties for directors and company officers. Businesses should be mindful that when noncompliant practices become entrenched in an organisation, they can be difficult to rectify in the short term, further exposing the business to the risk of legal consequences.

It is important for businesses to create and encourage a culture that embraces change and leadership in workplace standards. We advise businesses to identify ESG strategies and trends that align with their culture and values, and to implement changes and initiatives that reflect your dedication to those principles before they are required by regulation.

## What ESG Looks Like in the Labour and Employment Space

Businesses have opportunities to focus on the following social and governance elements:

- DEI
- Mental health and wellbeing
- Preventing bullying and harassment in the workplace
- Whistleblowing protections and procedures
- Organisational justice
- Ensuring a safe workplace, including in relation to psychosocial hazards
- Flexible working arrangements and remote work

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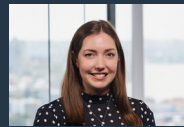
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