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H1 2024 Board Briefing

Labour & Employment – Australia

Executive Summary

Key

Red – Take Action

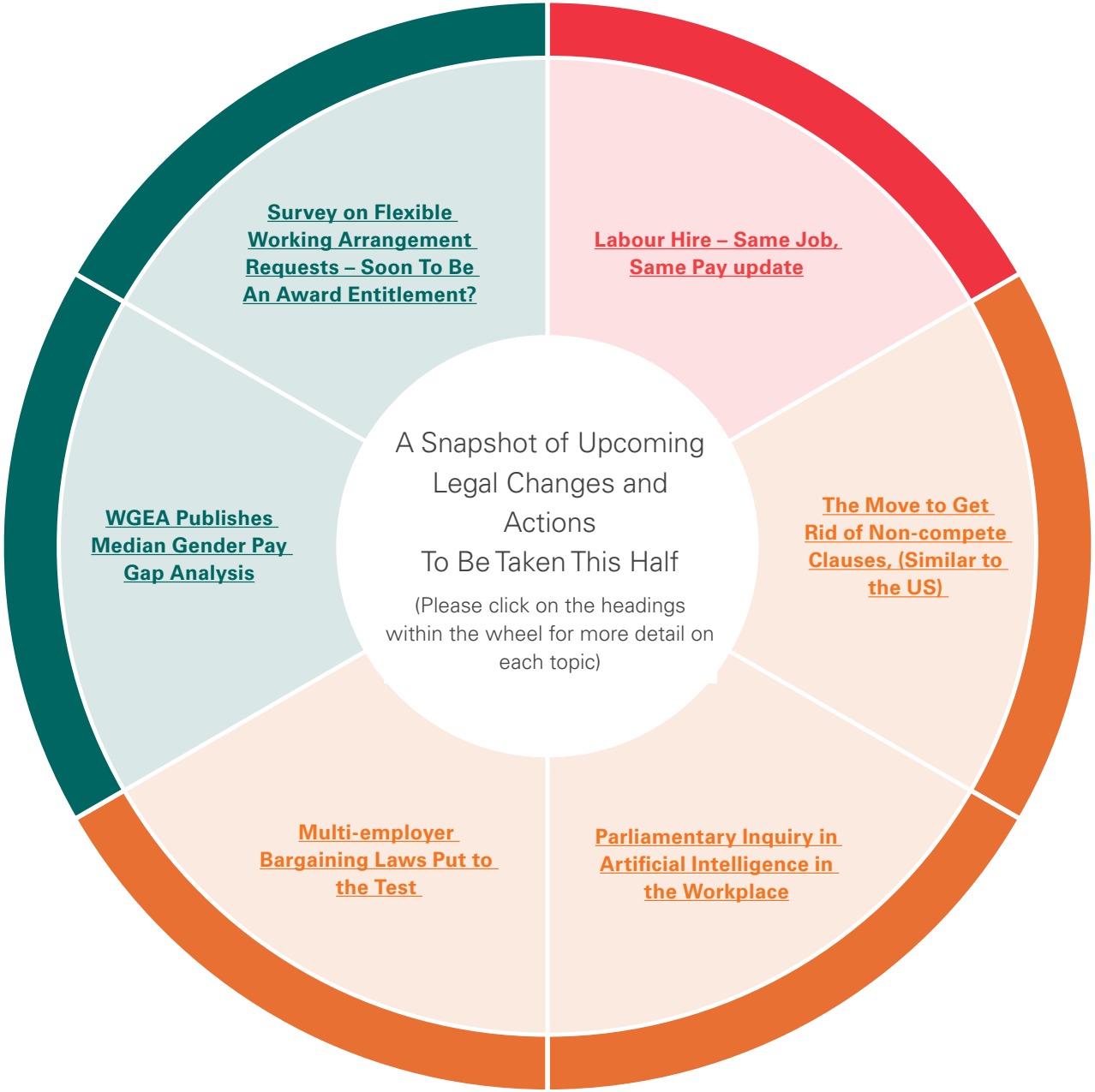
Amber – To Be Considered

Green – To Be Aware Of

Hot Topics Radar

This Hot Topics Radar shows the trends in Australia that we suggest ought to be high on the board's agenda in relation to its workforce:

- Modern Awards Review 2023-2024 (and Working from Home)
- First Federal Anti-Slavery Commissioner To Be Appointed
- National Human Rights Legislation Proposed



Half Yearly Board Briefing | Labour & Employment – Australia | H1 2024

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				
FWC Surveys Employers on Flexible Working Arrangement Requests – Soon To Be An Award Entitlement?	• Since 6 June 2023, the flexible working arrangement provisions of the *Fair Work Act 2009* (Cth) (*FW Act*): – Expand the circumstances in which an employee may request a flexible arrangement – Increase an employer's obligations when considering an employee's request – Introduce dispute resolution provisions that empower the Fair Work Commission (FWC) to make orders where an employer refuses an employee's request, including whether the employer has reasonable business grounds to refuse the request, or where the employer has not responded to the request within the required 21 days • The introduction of a dispute resolution process is particularly significant, as this aspect was specifically carved out of dispute resolution processes when the *FW Act* was first introduced.	• The key findings of the survey were: – Employers reported informally using role type to evaluate whether work is amenable to flexible working arrangements or not. Person-facing roles were typically seen as less amenable to flexible working arrangements, while desk-based roles were seen as more amenable to flexible working arrangements. – Operational considerations were the key factor in accommodating workplace flexibilities, including role type, operational requirements, manager preferences and employee entitlement. Other considerations which may influence the approval of flexible work arrangements included tenure, seniority, workplace routines, length of arrangements and task completion. – For those roles which are amenable to flexible working arrangements, employers typically approve high proportions of requests for workplace flexibilities, with one employer surveyed saying they "can't see a situation where we knock it back". Flexible working arrangements are also seen as key to retention and recruitment of employees in these roles. – Although many highly feminised industries involve in-person or person-facing roles, which	• In the wake of the *FW Act*'s dispute resolution framework for flexible work arrangement requests and the general acceptance of the hybrid working model, businesses should carefully consider requests on a case-by-case basis. Before a request is refused, businesses should ensure they have clear and demonstrable business grounds for the refusal. • The FWC-commissioned survey indicates that most employers are quite accepting of flexible working arrangements, including working from home, although this will depend on the nature of the role and the degree of face-to-face or in-person interaction required. • In light of the survey, it is possible that the FWC may look to introduce an entitlement to flexible working arrangements and to WFH in some awards. So businesses with a higher proportion of employees who may be affected may want to pre-emptively assess the potential impact this will have from an operational perspective.	• It is risky to take a blanket "say no" approach to requests for flexible working arrangements, particularly now that the FWC can potentially overrule an employer's decision if an employee makes a flexible working arrangement dispute application. • Although the results of this survey do not guarantee that the FWC will introduce a right to flexible working arrangements and work from home in some awards, businesses may want to consider the ways in which operations would be affected if this right was introduced for some roles (particularly roles that can be performed remotely), whether this aligns with current policies and ways in which the business would need to adjust to accommodate this.

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	• As part of the Modern Awards Review 2023-2024 Work and Care Stream, a survey was conducted by the Social Research Centre (SRC) in Melbourne, which was commissioned by the FWC. • The survey was used to consult a wide range of employers to understand their perception of the use and availability of flexible work arrangements to employees, including employees with care responsibilities. • The results of the survey (as set out in the SRC's final report released on 30 May 2024: Work and Care Survey Report (fwc.gov.au)) indicate that employers are approving most flexible hours and work from home (WFH) requests, with the report encouraging the FWC to consider entrenching a right in some modern awards to fully flexible arrangements for work that can be performed remotely.	are identified to be the types of roles less amenable to workplace flexibilities, these industries also have employees with higher proportions of unpaid caring responsibilities. In that regard, the survey report states that the potential role of modern awards in these industries to improve flexible working conditions is significant, due to the high level of awards and collective agreements in setting employment conditions in these industries. – Working from home is widely available, but sometimes limited in practice, with some employers noting employee dissatisfaction with a push to reversion to pre-COVID working arrangements, and compliance with management-specified in-office days. Acknowledging that this could particularly impact employees with care responsibilities, the survey report states "The Commission may wish to further consider the right to employees for fully flexible working arrangements for work which can be done remotely."	• Boards do not necessarily have to take any immediate action, but businesses may want to consider whether their current flexible working arrangement or WFH policies indirectly impact more on employees with care responsibilities, and if so, whether they need to be adjusted to accommodate more for these employees.	• This does not mean that every flexible work or WFH request needs to be approved, with the FWC already demonstrating that it will side with employers if there are sound business reasons for refusing a request. (For example, in the recent case of *Gration v Bendigo Bank* [2024] FWC 717, the FWC upheld an employer's decision to refuse an employee's request to work from home 100% of the time, with the Commissioner stating, "The employment relationship is a two-way street".) • However, as noted in the survey report, employers should look at flexible working arrangements, including working from home, as being a way in which they can attract and retain employees in some roles, as long as those roles are amenable to those arrangements.

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WGEA Publishes Median Gender Pay Gap Analysis	• On 27 February 2024, the Workplace Gender Equality Agency (WGEA) published its first gender pay gap analysis for private sector employers with 100 or more employees (Relevant Private Employers), based on the data provided by these employers for the reporting period commencing on 1 April 2022 and ending on 31 March 2023.	• Under the *Workplace Gender Equality Act 2012* (Cth) (*WGE Act*), a "relevant employer" must annually report to WGEA on the six gender equality indicators prescribed under the *WGE Act,* including equal remuneration between women and men. • Prior to the amendments introduced to the *WGE Act* on 12 April 2023 under the *Workplace Gender Equality Amendment (Closing the Gender Pay Gap) Act* 2023 (Cth) (*Closing the Gender Pay Gap Act*), the relevant employers' data from their annual reporting was used by the WGEA to publish industry gender pay gaps. This approach was criticised by stakeholders for "not creating the transparency, accountability and insights necessary to close the gender pay gap fast enough." • Post *Closing the Gender Pay Gap Act*, the WGEA is now required to publish employer gender pay gaps. • In its first gender pay gap publication on 27 February 2024, the WGEA found that, of the Relevant Private Employers who reported for the 22/23 reporting period: – 30% have a median gender pay gap between the target range of -5% and +5% – 62% have pay gaps that are over 5% and in favour of men – 8% have pay gaps that are less than -5% and in favour of women • Further, 50% of Relevant Private Employers were found to have a gender pay gap of over 9.1%. • More information on the gender pay gap for each employer can be found on WGEA Data Explorer here.	• For each reporting period, the Board should review the business' annual reporting under the WGE Act to identify any workplace gender equality gaps within the business and ensure appropriate measures are put in place to address these gaps. • For example, these measures could include: – Conducting a gender pay gap audit to understand the size of the gender pay gap within the business and its possible causes – Assessing systems and processes for pay, job evaluation and performance of its employees – Putting in place policies and strategies to promote each workplace gender equality indicator (noting that a relevant employer with 500 or more employees are required to do so under the *WGE Act*).	• Environment, Social and Governance (ESG) has become a critical consideration in all aspects of business, including in relation to reputation among clients and customers, ability to recruit and retain top talent, and access to capital from investors. • With such increased focus on ESG, WGEA's publication of employer gender pay gaps bring both risks and opportunities for employers. • Employers are now under increased scrutiny on all matters relating to workplace gender equality, including gender pay gap. • On the other hand, employers have an opportunity to gain a competitive edge by benchmarking themselves against their competitors, implementing meaningful changes and establishing themselves as a leader in workplace gender equality.

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Multi-employer Bargaining Laws Put to the Test	• On 6 June 2023, amendments to multi-employer bargaining came into effect which provide greater access to multi-employer bargaining for employee bargaining representatives. • The first single interest employer authorisation was made by the FWC on 28 September 2023 in respect of an application which was supported by the 10 employers to which it related: Independent *Education Union of Australia v Catholic Education Western Australia Limited and others* [2023] FWCFB 177. • On 6 December 2023, the Association of Professional Engineers, Scientists and Managers, Australia (APESMA) made an application pursuant to section 248 of the *FW Act* for the FWC to make a single interest employer authorisation. This would provide for a proposed enterprise agreement to cover certain classes of employees employed by four employers involved in black coal mining in NSW.	• The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) made significant amendments to the multi-employer bargaining mechanisms. As a result of these changes, section 248 of the *FW Act* now allows either: – Two or more employers – The bargaining representative of an employee who will be covered under the proposed agreement to apply to the FWC for a "single interest employer authorisation" where previously, only employers could apply for such authorisation. • Where a bargaining representative brings such an application, they must satisfy additional tests, including that a majority of employees who are employed by the employer want to bargain for the agreement, and the employers are either: – Carrying on businesses under the same franchise – "Common interest employers" and the operations and business activities of the employers are reasonably comparable. • The requirement for employers to be "common interest employers" is met where: – The employers have clearly identifiable common interests	• Employers should be prepared for the circumstance in which a multi-employer bargaining application is brought by an employee bargaining representative and understand their rights and obligations under the new provisions. This includes considering the outcome of the test case and any further developments to understand the considerations the FWC will take into account in determining an application.	• While previously, single-interest employer authorisations could only be entered into voluntarily by two or more employers, the legislative amendments allow unwilling employers to be required to enter multi-employer bargaining. This is the case in APESMA's application against four mining companies in New South Wales (NSW) which is currently being contested in the FWC. • This test case is likely to clarify some of the important concepts introduced by the changes, including how to determine whether employers are reasonably comparable and have clearly identifiable common interests, and whether making an authorisation is not contrary to the public interest.

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	• On 12 February 2024, the Australian Council of Trade Unions and the Mineral Council of Australia each applied for permission to intervene. In the decision dated 5 March 2024, permission was granted, the Full Bench noting that the matter is "a significant test of relatively new provisions". • The substantive matter was listed for hearing in late April and early May 2024.	– It is not contrary to the public interest to make the authorisations • In APESMA's application, the bargaining representative states that the following factors are common between the employers and show that the employers have clearly identifiable common interests: – Industry – Method of work (underground mining) – Geographic location – Health, safety and operational regulatory regime – Industrial instrument regulating employment • APESMA also relies on the statutory presumptions that where an employer has more than 50 employees, the operations and business activities of the employer are reasonably comparable with those of the other employers and the employers are common interest employers. • All four of the employers oppose the application on various bases, including: – The employer's operations and business activities are not reasonably comparable – The employers do not have easily identifiable common interests – It would be against the public interest to make the authorisation – The applicant lacks evidence to show that there is majority support for the agreement from the employees of the employer		• The case will likely also deal with the statutory presumptions regarding employers' comparability and having easily identifiable common interests. Given that these presumptions are enlivened by having more than 50 employees, it is important that employers understand the standard which is required to rebut the presumptions if necessary.

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Parliamentary Inquiry in Artificial Intelligence in the Workplace	• On 9 April 2024, the House Standing Committee on Employment, Education and Training adopted an inquiry into the digital transformation of workplaces (the Inquiry). • Public submissions for the Inquiry closed on 21 June 2024, with a public hearing set to take place on 3 July 2024. • The Committee has not yet indicated when it will report on its findings. • More information as to the current status and progress of the Inquiry can be found by clicking here.	• The Inquiry is tasked with inquiring into and reporting on the rapid development and uptake of automated decision making, and machine learning techniques (AI Tech) in the workplace. • The Inquiry follows the House Standing Committee on Employment, Education and Training's recent inquiry on generative artificial intelligence in the Australian education system, along with the ongoing Senate Select Committee's inquiry on Adopting Artificial Intelligence (in which the Australian Council of Trade Unions notably sought a total ban on the use of artificial intelligence in hiring, promoting, disciplining and/or termination of workers). • As part of the Inquiry, feedback was sought from a broad range of interested parties, including employees and employers, software developers and providers, academics, employer groups and trade unions. Insights were sought in relation to: – The benefits and risks of automated decision making and machine learning in the work setting – The role of business software and regulatory technology companies – How to ensure the safe and responsible use of automated decision making and machine learning technologies	• Businesses should carefully consider the findings of the Inquiry once they have been released. • Those businesses already implementing AI Tech in the workplace should be cognisant of and responsive to legal risks arising from the use of AI Tech. For example, to the extent AI is used in recruitment, steps should be taken to ensure that the outcome is not biased or otherwise discriminatory.	• Harnessed correctly, AI Tech presents a significant (and growing) opportunity for organisations (and, by extension, an opportunity for the Australian economy as a whole). • However, with the capabilities and scope of AI Tech in the workplace rapidly developing, organisations should ensure that their use of AI Tech remains within the confines of the current legislative framework and remain alive to the risks of unintended legislative breaches, including, for example, risks of discrimination.

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		• 52 submissions were received in total, including submissions from the Business Council of Australia, Australian Industry Group, eSafety Commissioner, Australian Manufacturing Workers' Union, SafeWork Australia and a number of universities. • While the Inquiry's findings have not yet been released, themes emerging from the submissions include: – It is apparent that the future of the Australian workplace is AI Tech-enabled. AI Tech presents a significant opportunity for Australian businesses, however exactly how AI Tech will reshape the workplace is obviously still unfolding. – Consideration should be given as to whether our current legislation is sufficient to deal with the changes presented by AI Tech. The introduction of new and specific regulations relating to AI Tech, if necessary, should be achieved through principles-based and outcome-focussed legislation that is adaptable to emerging and new technologies and builds an enabling environment that supports innovation, increased productivity and the broader public interest in maintaining a dynamic, agile and growing economy capable of competing at a global scale (see, in particular, the submissions of the Business Council of Australia dated June 2024). – The impact of AI Tech on workers' safety must be considered, and workers should be provided with a greater voice in any workplace reorganisation arising from AI Tech (including consultation with workers and their unions and investment in training).		

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The Move to Get Rid of Non-compete Clauses, (Similar to the US)	The Australian Government's 2023 Employment White Paper identified non-compete and related clauses as potentially hampering job mobility, innovation and wage growth in industries where they are prevalent. On 23 August 2023, the Australian Government announced that non-compete and related clauses in employment contracts would be an area of policy considered by the Competition Review – a 2-year review focussing on the government's priorities for modernising the Australian economy, which would provide advice to the Government on how to improve competition across the economy. In April 2024, the Competition Review released an Issues Paper titled "Non-competes and Other Restraints: Understanding the Impacts on Jobs, Business and Productivity". The paper sought information and views to inform the Competition Review's consideration of non-compete clauses and related clauses that restrict workers from shifting to better-paying jobs. The paper also noted that, should any potential reform be needed, the government will engage in further consultation on potential options.	**The Use of Restraint Provisions in Australia** When we talk about employment restraints, we are typically referring to the following types of provisions, which aim to protect the legitimate interests of a business by limiting the activities of a worker following their employment or engagement: • Non-compete clauses, which restrict the former worker from working or a competitor or establishing a competing business, typically within a certain geographic area and for a certain time after the worker leaves the business • Non-solicitation clauses, which restrict the former worker form "soliciting" former clients/ customers, business contacts (including suppliers) and co-workers • Non-disclosure or confidentiality clauses, which restrict the former worker from disclosing confidential information, such as formulas, client lists or pricing information, gained during the course of the employment or engagement The use of restraint provision in Australia is widespread. According to the Australian Bureau of Statistics (2024) and the e61 Institute (2023): • 1 in 5 workers has a non-compete clause • 50% of workers have some kind of restraint clause • 40% of very large businesses use non-compete clauses • 21% of all businesses use non-compete clauses	For now, we recommend that employers continue to utilise reasonable restraint provisions in employment contracts and contractor agreements, but also look to ensure their business interests are protected in other ways in case changes do eventuate. This includes ensuring that agreements contain robust confidentiality and intellectual property provisions, and restricting access to certain proprietary information to those that have a "need to know".	Australia is not alone in looking to regulate the use of restraint clauses. On 23 April 2024 the US Federal Trade Commission (Commission) voted to finalise a new rule to prohibit employers from enforcing non-competes against workers. The Commission has determined that non-compete clauses are an unfair method of competition and therefore violate Section 5 of the Federal Trade Commission Act. The rule prohibits employers from entering into new non-compete provisions with workers on or after 4 September 2024. The rule also prohibits employers from enforcing existing non-competes with workers other than senior executives. Some other countries, such as Australia, Finland and Germany, already regulate non-compete clauses. The UK is also considering proposed reforms that would limit non-compete clauses to a period of three months.

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	The closing date for submissions was 31 May 2024. We currently await publication of any submissions and next steps.	**Enforceability of Restraint Provisions in Australia** Presently in Australia, there is a presumption at law that restraint provisions are void and unenforceable unless they are reasonably necessary to protect the employer's legitimate business interests. To determine what is "reasonably necessary", a court will consider whether the purported restriction, such as the duration or geographic area, is necessary given the nature and extent of business interest to be protected. Generally, the courts are more likely to uphold a non-solicitation provision as compared to a non-compete provision, given the enforcement of a non-compete can prevent someone earning a living in their chosen field of expertise and experience. The approach taken by courts in the various states and territories of Australia does vary. In most states and territories, a court will not re-write or "read down" a restraint clause in order to render an otherwise unenforceable restraint enforceable (although, if drafted correctly, any part of a restraint which is not enforceable may be severed so that the remaining part of the restraint can survive if it is reasonable). However, NSW has adopted the *Restraint of Trade Act 1975* (NSW), which permits courts to "read down" a restraint provision in order to limit the duration or area such that it will be reasonable (and therefore enforceable) without the need to sever any unenforceable provisions in the clause. This makes NSW a particularly "friendly" jurisdiction in respect of the enforcement of restraints.		For this reason, multinationals with workers in Australia may start to take a different approach if considering restraint provisions on a global basis.

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Labour Hire – Same Job, Same Pay Update	• The "same job, same pay" framework introduced by the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) amends the *FW Act* to empower the FWC to make a "Regulated Labour Hire Arrangement Order" (RLHAO) if certain requirements are met. • Under a RLHAO, labour hire workers engaged by a host company must be paid no less than the host company's employees covered by the host's enterprise agreement. Some exceptions may apply, such as for trainees, businesses with fewer than 15 employees, or employment periods less than three months.	• Under the new provisions, the practice of paying labour hire workers lower rates than employees performing identical duties under an existing enterprise agreement can be prohibited by the FWC through a RLHAO, subject to certain exemptions. • 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 main exemption that applies is that a RLHAO cannot be made where the performance of the work is for the provision of specialised services, as opposed to supply of labour	• Businesses should assess their current workforce and operations to identify any areas where labour hire workers are used. • Businesses who use labour hire providers should conduct regular audits of their payroll systems, particularly in respect of employees undertaking similar duties to labour hire workers and those classified as independent contractors. Any pay discrepancies that are identified as a result of these audits should be addressed to ensure pay rates for labour hire workers align with the remuneration of permanent staff in equivalent positions. • One of the likely side effects of the RLHAO provisions is that labour hire providers will increase their rates to compensate for the impact of the new laws. So, businesses should prepare for potential increases in labour costs if they currently engage or plan to engage labour hire workers.	• For businesses that rely to some extent on labour hire to cover shortfalls in their workforce, the RLHAO provisions represent a significant change that is likely to be very disruptive for the entire labour hire industry. • The current lack of clarity on how the new laws will be interpreted and applied is a concern. For that reason, it is important to keep up with the latest case law, as more RLHAO decisions start to filter through the FWC, as this will provide businesses with guidance on the position the FWC will take on matters such as how exemptions will apply, and what sort of materials companies will need to file if faced with a RLHAO application.

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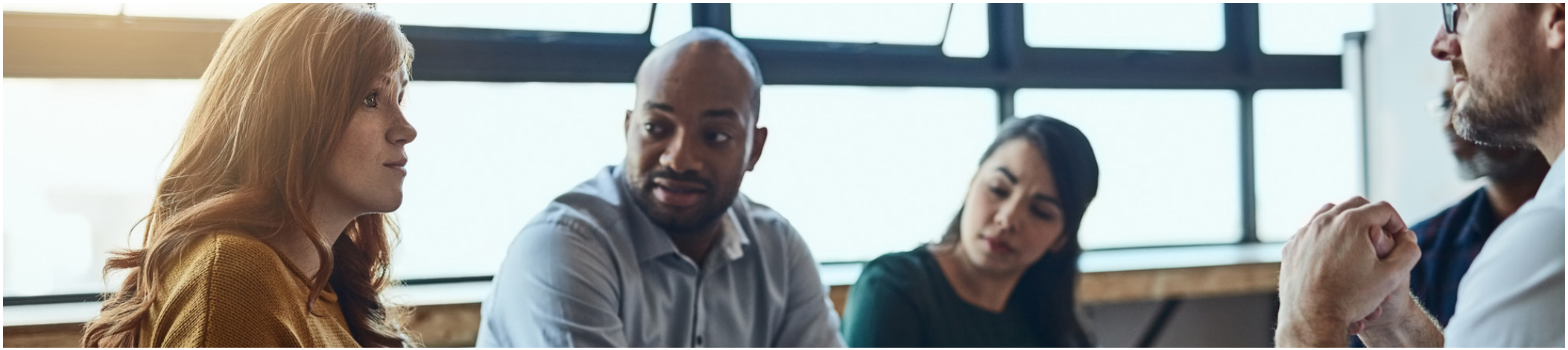
	• RLHAOs made by the FWC won't take effect until 1 November 2024. However, the related provisions commenced on 15 December 2023, which means companies who use labour hire workers, the company's employees or labour hire workers and unions, can apply for a RLHAO as of now (and the FWC is able to make those orders). • Several applications for RLHAOs have already been made by unions, with the Mining and Energy Union (MEU) in particular lodging a high number of applications. • In an interesting trend, some labour hire providers and the host employers who are the respondents to these applications have elected not to oppose the applications, allowing the FWC to make the orders "on the papers". In one case, the application needed to be withdrawn when the host employer (Thiess) offered to directly employ the labour hire workers.	• In making this determination, the FWC is likely to consider matters such as: – How much control does the employer have over the work – Does the labour hire worker use their own systems, or the systems used by the host employer – Are industry or professional standards applicable to the host employer in relation to the labour hire workers – Is the nature of the work carried out by the labour hire workers specialised or expert • How the distinction between the supply of services and labour will be assessed by the FWC is not currently clear, but the FWC has indicated that guidance will be provided, as more RLHAO cases are decided. • The new laws also include anti-avoidance provisions which: – Allow the FWC to expand a RLHAO to include additional host businesses and additional labour hire providers – Prohibit labour hire providers from intentionally turning over their workers to stay under the three month placement period – Prohibit host employers from engaging different labour hire providers to stay under the three month placement period – Prohibit host employers from directly engaging a labour hire worker as a contractor	• Businesses should familiarise themselves with the obligations and consequential administrative requirements on host employers during the application for an RLHAO and once a RLHAO is in force, as well as the anti-avoidance provisions which already apply. • It should also be noted that there has been a five-fold increase in civil penalties (up to a maximum of AUS$4.695 million for a serious contravention), which substantially increases the risks associated with any wage underpayments or breach of the *FW Act*.	• Businesses who are host employers for labour hire workers may want to consider re-negotiating commercial labour hire arrangements that may potentially be the subject of a RLHAO – However, in doing so, host employers must ensure they comply with the FW Act's anti-avoidance provisions. • Host employers who are parties to contracts for long term projects that rely on labour hire may want to initiate discussions with the other parties as a pre-emptive measure to assess any potentially significant cost impacts that may arise from a RLHAO being made. • In some cases, as we have already seen, businesses who are the respondent to a RLHAO application may want to consider whether the better option from a commercial and practical perspective is to not oppose the application, which will avoid costly and potentially protracted litigation in the FWC.



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	• Currently, the application made by the MEU and AMWU for RLHAOs at BHP Coal's Bowen Basin mines appears likely to be the first major test case in this area, after the company and its labour hire subsidiaries confirmed they will argue they are excluded from the RLHAO provisions because they are service contractors rather than labour suppliers. The matter is set for a further directions hearing on 9 October 2024.	• There are several RLHAO applications currently on foot, with some of the more notable cases and key dates listed below: – **13 March 2024** – MEU lodges the first RLHAO application, seeking orders in relation to labour hire provider Workpac and its employees who perform production work for host employer Batchfire Resources' Callide mine, near Biloela. – **20 May 2024** – WorkPac, Batchfire Resources and the MEU agree on the FWC deciding the case "on the papers", after both companies confirmed they will not oppose the application. – **23 May 2024** – MEU withdraws its bid for RLHAOs for Programmed labour hire workers, after host employer Thiess offered them direct jobs at its Mount Pleasant coal mine. – **5 June 2024** – Flight Attendants' Association of Australia (FAAA) lodges RLHAO applications targeting Qantas Domestic, an in-house labour hire company providing flight attendants and customer service managers to host employer Qantas Airlines Limited. (Qantas has yet to file a response, with the matter next up for hearing on 30 July 2024.)		

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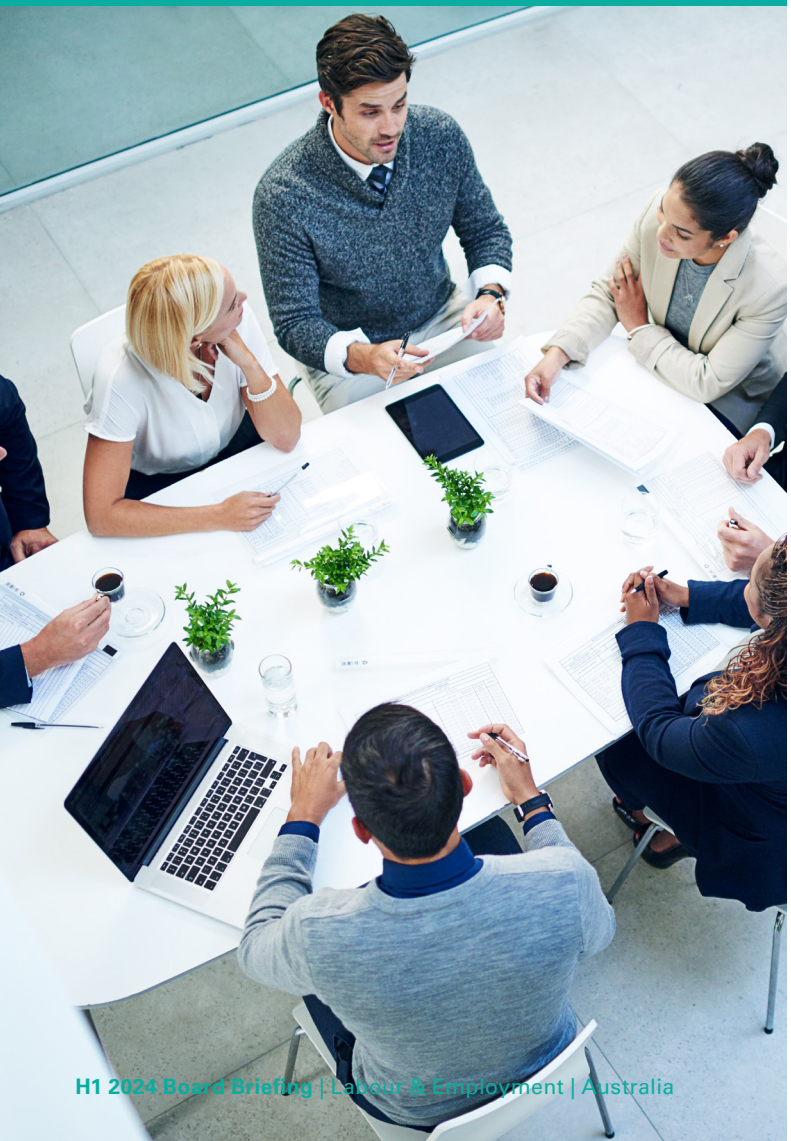
		– **12 June 2024** – MEU files 10 further RLHAO applications, targeting BHP coal mines in Queensland. – **20 June 2024** – A RLHAO application made by the MEU and AMWU in relation to BHP Coal's Bowen Basin mines looks like being the full bench test case, after BHP and its subsidiaries confirm in a FWC hearing that they will argue they are subject to the exemption for provision of services, rather than labour. (The matter is listed for a directions hearing on 9 October 2024.) – **21 June 2024** – RHLAO applications made by the AMIEU in relation to labour hire workers provided by Food Industry People Group Pty Ltd (FIP) to host employer Australian Country Choice Production Pty Ltd looks likely to be successful when FIP indicates it is likely to consent to the orders. – **27 June 2024** – The ETU applies for RLHAOs for employees of Condex Services Pty Ltd that supplies workers to Esso's Bass Strait operations. – **1 July 2024** – FWC Full Bench delivers its first RLHAO ruling in relation to Workpac and Batchfire at the Biloela coal mine – Decision is made "on the papers", resulting in more than 300 Workpac employees receiving increases of up to AUS$20,000 a year, according to the MEU.		

Spotlight on Hot Topics

- Modern Awards Review 2023-2024 (and Working From Home)
- First Federal Anti-slavery Commissioner To Be Appointed
- National Human Rights Legislation Proposed



Modern Awards Review 2023-2024 (and Working From Home)

Upon request of the Minister for Employment and Workplace Relations, the President of the Fair Work Commission initiated a review of Modern Awards in respect of four key areas:

- The Arts and Culture Sector
- Job Security
- Work and Care
- Making Awards easier to use

The Work and Care stream in particular is focused on the impact of work arrangements and flexibilities on work and care, including early childhood education and care and having regard to the findings and recommendations in the Final Report of the *Senate Select Committee on Work and Care* published in March 2023. Consultations were held with Deputy President O'Neill on 3-4 April and 9-11 April 2024. As already noted in this paper, during April and May, 45 employers were interviewed, and the findings were published in the *Modern Awards Review 2023-2024 Work and Care Survey* Final Report on 30 May 2024.

The review considered the availability of working from home arrangements and as part of the survey, participants were asked what work from home arrangements are available. The Discussion Paper notes that while the working from home flexibilities were introduced into the Clerks Award on a temporary basis during the COVID-19 pandemic, working from home provisions are not currently a feature of any modern award. The Final Report found that working from home arrangements were "widely available, but sometimes limited in practice" and generally deployed in "desk-based industries" and for "more senior role". Data privacy and security was a concern for some employers, including the cost of the security infrastructure working from home requires.

While the Discussion Paper included a discussion question regarding the right to disconnect, the Deputy President excluded the question from the consultation process in light of significant legislative reforms relating to the right and on the basis that separate proceedings will be initiated to in respect of the right to disconnect.

The Final Report observed that there is a low awareness around flexible work entitlements under the Awards. As the review may lead to the inclusion of provisions facilitating work from home arrangements in the Clerks Award and other industries or occupations, employers should regularly review the Awards relevant to their employees and update their policies and procedures to ensure they are in compliance.

The Final Report can be found on the Commission's website.

First Federal Anti-slavery Commissioner To Be Appointed

Following last year's statutory review of the *Modern Slavery Act 2018* (Cth) (*MSA*) (see our previous article located here), the *Modern Slavery Amendment (Australian Anti-slavery Commissioner) Act* 2023 was recently passed by both Houses of Parliament on 28 May 2024. It amends the MSA to establish the Australian Anti-slavery Commissioner as an independent statutory office holder within the Attorney-General's portfolio to provide an independent mechanism for victims and survivors, business and society to engage on issues and strategies to address modern slavery.

The Government has committed AUS$8 million over four years in the 2023-2024 Budget (and AUS$2 million a year ongoing) to support the Commissioner's establishment and operation.

The Commissioner's functions include:

- Promoting compliance with the MSA and supporting businesses to address modern slavery risks in their operations and supply chains (and of the entities they own or control)
- Supporting victims and survivors of modern slavery
- Educating the Australian community about modern slavery, collaborating with government agencies and stakeholders and advocating to government, including continuous improvement in policy and practice
- Harnessing and supporting data and research capabilities, as well as strengthening collaboration and engagement across sectors

According to the Explanatory Memorandum, while the Commissioner can undertake a range of activities to promote compliance, their functions would be "distinct from the functions of the Modern Slavery Business Engagement Unit in the Attorney-General's Department, which is responsible for administering the MSA, providing guidance and awareness raising to reporting entities on compliance with the MSA, assessing modern slavery statements, and maintaining the Modern Slavery Statements Register." It is also important to note that the Commissioner does not have any enforcement or investigative powers to resolve instances or suspected instances of modern slavery, rather the functions are primarily focused on promoting, consulting, providing support, advocating and educating.

The passing of the amending act demonstrates Australia's increasing focus on combatting modern slavery and the appointment of the Commissioner may pave the way for future reforms to the MSA (including those recommended in last year's review).

We recommend clients monitor this space, as it is anticipated that the Commissioner will develop targeted resources which promote best practice in addressing modern slavery risks and support compliance with the objectives of the MSA.

National Human Rights Legislation Proposed

The Parliamentary Joint Committee on Human Rights has concluded its inquiry into Australia's human rights framework, with the inquiry report tabled into Parliament on 30 May 2024. Over the course of its inquiry, the Committee received 335 public submissions, over 4,000 form or campaign letters and held six public hearings, during which it heard evidence from a range of community groups, religious organisations, government bodies and experts.

The report contains 17 recommendations, including the drafting of new national human rights legislation (the H*uman Rights Act*) as part of improving Australia's human rights framework.

Other key recommendations include (but are not limited to):

- A review of Australia's legislation, policies and practices for compliance with human rights and requirements for public servants to fully consider human rights in the development of legislation and policies
- Enhancements to the role of the Australian Human Rights Commission (AHRC)
- Calls for significant and ongoing funding of human rights education and support
- Allowing cases to be brought directly to a federal court, without the need for conciliation, when conciliation is not appropriate
- Consultation with Aboriginal and Torres Strait Islander peoples in relation to the framing of Indigenous peoples' right to culture to ensure it adequately captures all applicable rights under international human rights law
- Measures to monitor progress on human rights, such as developing a national human rights indicator index to measure progress on human rights and establishing a public database of findings and recommendations for Australia from UN human rights bodies, and any Australian government responses

The report, which has been welcomed by the AHRC, contains an example Human Rights Bill which reflects that all persons in Australia, citizens, non-citizens, ordinary and marginalised people, are equal before the law and are to be afforded human rights. While some states and territories (such as Victoria, Queensland and the Australian Capital Territory) have enacted human rights legislation, on a federal level Australia does not currently have a Human Rights Act and the Constitution does not contain a bill of rights.

The report's recommendations and the adoption of a federal legislative framework seeks to increase clarity on the rights of individuals, introduce standalone causes of action and shift the focus from a reactive model to a proactive approach to human rights issues.

At this stage, we recommend clients review the report and monitor for developments, as it is anticipated that Government will examine the report in full prior to issuing a formal response.

The full report for review can be located here.

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