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H2 2024 Board Briefing

Labour & Employment: Australia

Executive Summary

Key

Red – Take Action

Amber – To Be Considered

Green – To Be Aware Of

Half Yearly Board Briefing | Labour & Employment – Australia | H2 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				
Guidance by the Fair Work Commission in relation to Sexual Harassments Disputes	• On 1 October 2024 the Fair Work Commission (FWC) released a sexual harassment dispute benchbook regarding sexual harassment disputes	• The Fair Work Act (FW Act) prohibits sexual harassment in connection with work, where the sexual harassment occurred or commenced on or after 6 March 2023. • An applicant can ask the FWC to deal with a dispute by making an order to stop sexual harassment, or deal with the dispute (other than by arbitration). • The power to make a complaint is broad and includes workers, and prospective workers (including board members). • Employers may be vicariously liable if sexual harassment is found to be done by an employee "in connection with' their duties. To avoid liability, employers must demonstrate 'all reasonable steps" were taken to prevent the sexual harassment: – Although employers commonly rely on company policies and training to establish "all reasonable steps", this may not suffice. In *Von Schoeler v Allen Taylor and Company Ltd Trading as Boral Timber* (No2) [2020], an employer with a working with respect policy and a related training program was found to have not taken all reasonable steps, as their policy lacked a statement that sexual harassment was against the law, that sexual harassment would be taken seriously or that disciplinary action would be taken where sexual harassment was proven.	• Boards should review all company policies and training that relate to sexual harassment to assess whether "all reasonable steps" have been taken to prevent sexual harassment. • Boards should ensure that their organisations regularly assess the risk of sexual harassment within their operations. • Comprehensive training programs should be implemented and should cover legal obligations, as well as workplace conduct expectations. • Boards should establish clear reporting channels for employees to report concerns of sexual harassment. Such mechanisms can include confidential hotlines, regular feedback sessions, or dedicated points of contact. • Boards should monitor and require periodic updates on the organisation's compliance with its duty to prevent sexual harassment in the workplace.	• A risk assessment should be undertaken to mitigate the risk of vicarious liability arising in relation to potential sexual harassment complaints. • Boards should consider obtaining professional and legal advice on compliance, specifically at a board level. • Boards should consider how sexual harassment disputes are handled by management as formal proceedings will bring significant legal costs and reputational risks, as dispute outcomes are publicly available. • As the importance of Environmental, Social and Governance (ESG) considerations increases, failure to comply with sexual harassment obligations may affect investment opportunities, stock prices or the company's overall valuation.

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		• The test for sexual harassment requires unwanted conduct of a sexual nature which makes a person feel offended, humiliated and/or intimidated where that reaction is reasonable in the circumstances: – When assessing "a reasonable person", a range of considerations will be assessed, including, age, language, cultural background, family responsibilities, financials and any other relevant matters. – "Conduct of a sexual nature" has a broad meaning and includes sexually suggestive "jokes", comments, innuendos, insinuations, implications, overtones, undertones, hints or winking. Conduct of a sexual nature is not confined to conduct that is sexually explicit. As seen in *Vitality Works Australia Pty Ltd v Yelda (No 2)* [2021], an employer was found to have engaged in sexual harassment by displaying a poster showing a female employee under the caption "Feel great, lubricate!". – When assessing "in connection with work", the conduct must in some way be related or associated with an employee's employment and does not require an express, direct or causal relationship. • The FWC has also confirmed: – A single instance can constitute sexual harassment – Inconsistencies in accounts of sexual harassment do not necessarily impact adversely on a complainant's credibility (as a complainant may be recalling traumatic events)		

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Changes to Discrimination (including Sexual Harassment) Litigation Costs	• On 19 September 2024, the Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (Cth) (Costs Protection Bill) was passed by amending the Australian Human Rights Commission Act 1986 (Cth). • The equal access cost protection applies to sexual harassment and other forms of discrimination (not limited to claims under the Sex Discrimination Act 1984 (Cth)).	• The Costs Protection Bill inserts a modified "equal access" cost protection for applicants in federal unlawful discrimination (including sexual harassment) proceedings. • In the event of litigation, the following cost outcomes will now apply: – If an applicant is successful: - The court must order the applicant's costs be paid by the respondent - The court cannot make no order as to costs - A respondent will not be ordered to pay costs if an applicant engages in unreasonable acts or omissions. – If the respondent is successful on all grounds: - The parties will generally pay their own costs - The applicant will be made to pay costs if the court is satisfied that: - The proceedings were commenced vexatiously or without reasonable cause - An employee's unreasonable act or omission results in legal costs for the employer - The employer was successful in the proceedings, the employer does not have a significant power advantage over the employee, and the employer does not have significant financial or other resources relative to the employee • An "unreasonable act or omission" referred to above is intended to be a high threshold and reserved for rare cases, requiring holistic consideration of the circumstances to determine unreasonableness. • It has been clarified that certain actions (such as refusing a settlement offer or not participating in conciliation) do not automatically constitute unreasonable behaviour.	• Boards should undertake a gap analysis by comparing the organisation's framework against the Australian Humans Rights Commission Guidelines. • If litigation arises, boards should consider obtaining early advice in relation to the merits of the claim to assess litigation risks. • Further to the above, if litigation risks arise, boards should consider the benefits of reaching an early settlement during conciliation before legal expenses increase significantly. • Boards should take practical steps to mitigate litigation risks by overseeing training for all staff on sexual harassment matters (such as bystander intervention and unconscious bias).	• Prior to the Costs Protection Bill, employees may have been deterred from making a complaint due to possible adverse costs orders. As such, boards should now be aware of the potential future costs that may come with an applicant succeeding in a sexual harassment matter. • The cost protection regime could lead to a rise in the number of unlawful discrimination/sexual harassment claims being pursued by employees • The Costs Protection Bill may also bring adverse media publicity and reputational damage. Organisations may consider earlier settlement of claims to avoid scrutiny, rather than waiting to see if the applicant will take the claim beyond the initial AHRC stage.

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AI in the Workplace	• The Senate has established a Select Committee on Adopting Artificial Intelligence to inquire into and report on the opportunities and impacts for Australia arising out of the use of generative artificial intelligence technologies (AI) in Australia (AI Inquiry). The AI Inquiry report was released on 26 November 2024 (Report). • There are growing concerns regarding the as yet largely unregulated use of AI in Australian workplaces. While the AI Inquiry will ideally provide guidance as to appropriate regulatory interventions and safeguards to guide responsible implementation of AI in the workplace, given the rapidly evolving nature of AI and the typically slow-moving nature of regulatory change, employers should be taking their own active steps now to manage the use of AI in their businesses.	The Report emphasises that AI has vast potential to promote further innovation, growth and productivity gains across all sectors of the economy. However, the Report also highlights that many stakeholders have expressed serious concerns about the potentially negative impacts of AI on workplaces the rights and conditions of workers, and the risk of AI having a disruptive effect on particular industries and professions (particularly creative industries, which are already experiencing significant disruption). The Report makes a number of recommendations, including, relevantly, that: • The government introduce new, whole-of-economy, dedicated legislation to regulate high-risk uses of AI • The government ensure that the definition of "high-risk AI" clearly includes the use of AI that impacts on the rights of people at work • The existing work health and safety legislative framework is extended to include workplace risks posed by the adoption of AI • The Australian Government ensure that workers, worker organisations, employers and employer organisations are thoroughly consulted on the need for, and best approach to, further regulatory responses to address the impact of AI on work and workplaces It is anticipated that the federal government will now, in response, introduce overarching legislation regulating the use of AI, with existing relevant laws amended as needed.	• Businesses should carefully consider the findings of the AI Inquiry, and be alert to any legislative changes arising as a result. • Those businesses already implementing AI in the workplace should be cognisant of and responsive to legal risks arising from the use of AI, particularly as Australian laws evolve to respond to the rapid development of AI.	• AI undoubtedly presents a significant opportunity to reduce costs and increase efficiencies in the workforce. • However, with the capabilities and scope of AI in the workplace rapidly developing, businesses should ensure that their policies adequately govern the use of AI (and ensure that, in practice, employees' use of AI aligns with the employer's policies and any applicable laws). • Employers may wish to establish an AI focus group, which is specifically tasked with monitoring legal developments in the AI space and developing responsive policies and procedures governing the use of AI in your business.

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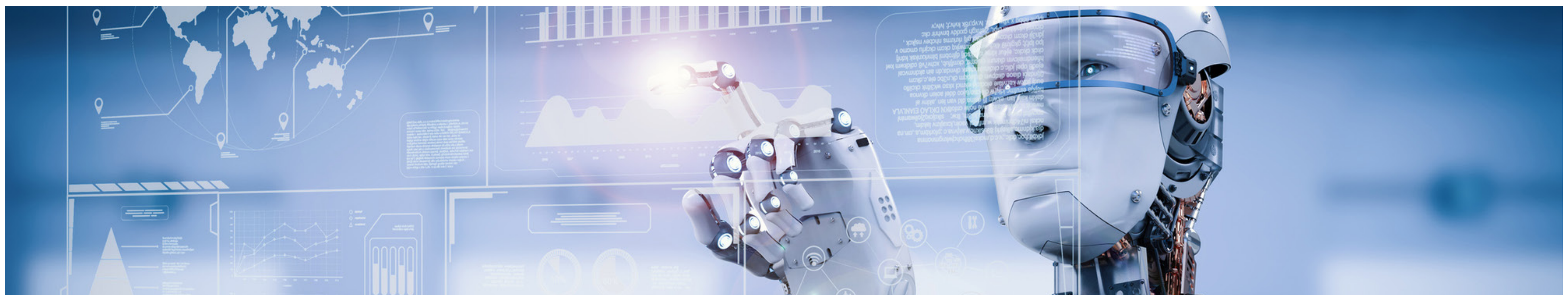
		More generally, some key concerns arising as to the use of AI in Australian workplaces, that should be considered in the short term, include: • **Discrimination risks** – Employers must be cognisant of the risk of discriminatory or biased output when using AI, particularly when used in recruitment processes. If data used to train AI contains bias, the AI's output may perpetuate and entrench such historical biases, leading to discriminatory decision making by an employer. Notably, prospective employees are protected from discrimination in the recruitment process and have access to various claims processes to remedy such discrimination. • **Confidential information** – Data input into AI typically involves the data being sent to a third-party, who may be overseas. Depending on the circumstances, there may not be any obligation on the third-party to keep confidential information confidential. This is particularly the case if a business is utilising a free platform. Employers should strictly regulate the information being input into AI Tech and ensure that, to the extent employees are entering information into free AI Tech, including platforms such as ChatGPT, this information is anonymised.		



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		• **Privacy** – Employers should be cognisant that their obligations under the Privacy Act (Cth*)* will apply to all uses of AI involving personal information. On 21 October 2024, the Officer of the Australian Information Commissioner (OAIC) released guidance on the use of commercially available AI products, with key takeaways including: – Privacy obligations will apply to any personal information input into AI (as well as any output generated by AI containing personal information) – Employers should update their privacy policies and notifications with clear and transparent information about use of AI – As a matter of best practice, the OAIC recommends that organisations do not enter personal information, and particularly sensitive information, into publicly available generative AI		

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Flexible Working arrangement requests – case law update	• Effective from 6 June 2023, the flexible working arrangement (FWA) provisions of the Fair Work Act 2009 (Cth) (FW Act) were amended to: – Expand the circumstances in which an employee may request an FWA – 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 when an employer refuses an employee's request • Of all the changes, the introduction of a dispute resolution process was particularly significant (and controversial), as an employee's ability to request an FWA was specifically excluded from the FWC's dispute resolution processes under the FW Act when it was first introduced. • Many employers and business groups expressed concern at the time these changes were announced, fearing that they may be flooded with applications from employees hoping to have decisions refusing requests for FWAs overturned, including requests involving working from home. • It has now been 18 months since these changes to the FWA provisions were introduced. A review of the FWC's decisions over this period paints an interesting picture.	• Some decisions over the last 18 months highlight the FWC's approach in resolving FWA disputes, notably, when an employer is considered to have "genuinely tried" to reach a compromise and what constitutes "reasonable business grounds" for refusal. • ***Ambulance Victoria v Natasha Fyfe* (2023) FWCFB 104** – This was an appeal from a decision that predated the changes to the FWA provisions. • Ms Fyfe, a paramedic, requested to amend the start and finish times of her night shift hours so she could care for her three young children. Ambulance Victoria refused this request on the grounds that a shortened night shift did not exist, they were unable to accommodate shift start/finish times outside of the team roster configuration, and there was insufficient resourcing in Ms Fyfe's area to accommodate the request. • In upholding its initial decision (albeit applying the updated FWA provisions), the FWC found that Ambulance Victoria lacked reasonable grounds for refusing the request, noting that it did not attempt to meet or hold discussions with Ms Fyfe before confirming its decision. The FWC also observed that the reasons provided for refusing the request were relatively trivial, likening Ambulance Victoria's explanation that the service area could not provide start and finish times outside the roster configuration to the Little Britain catchphrase, "Computer says No". • ***Shane Gration v Bendigo and Adelaide Bank Limited* (2024) FWC 717** – Mr Gration applied to the FWC after his request to work solely from home was refused. Mr Gration argued that he needed to work from home because he was the carer for his wife who had sustained a serious foot injury, and because he was responsible for the care of his school-aged daughter.	• In light of these decisions, businesses should carefully consider FWA requests on a case-by-case basis. Before a request is refused, businesses should: – Genuinely try to accommodate the employee's needs by offering alternative arrangements where a request cannot be fully accommodated – Ensure they have clear and demonstrable business grounds for the refusal, and clearly explain these to the employee • Boards do not necessarily have to take any immediate action, but businesses may want to consider whether their current flexible working arrangement or Work From Home (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.	• 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. • This does not mean that every flexible work or WFH request needs to be approved, with the FWC decisions demonstrating that it will side with employers if there are sound business reasons for refusing a request.

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		• Bendigo Bank refused Mr Gration's request as it had already adopted a hybrid working model, while encouraging employees to work in the office to meet business needs foster meaningful team connection. Bendigo Bank also offered to allow Mr Gration to work from home or take carer's leave on the days he needed to provide care for his daughter. • The FWC found that it could not conclude on the evidence that Mr Gration was a carer within the meaning of the Carer (Recognition) Act 2010 (NSW) due to the lack of evidence surrounding his wife's condition. It also found that the bank's offer for Mr Gration to take carer's leave or work from home on days where he would need to provide care to his daughter was an appropriate response and there was no need for him to work permanently from home to deal with his caring responsibilities. As the commissioner stated, "The employment relationship is a two-way street." • ***Deborah Lloyd v Australia and New Zealand Banking Group Limited* [2024] FWC 2231** – Ms Lloyd applied to the FWC after her request to work solely from home was refused. Even though ANZ had adopted a 50:50 hybrid model, Ms Lloyd argued that, because of her old age (62 years), she faced a greater risk of COVID infection and serious illness if she was required to attend work 50% of the time. • The FWC found that there was no evidence that Ms Lloyd has increased risk of infection and illness due to her age. The FWC also criticised Ms Lloyd for having "no room for negotiation" and failing to "try and reach a mutually agreed arrangement", when ANZ had genuinely attempted to reach a compromise by offering several alternate options, including a staged return to work and providing an anchor desk away from others in the office.		

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		• Further, the FWC found that the 50:50 hybrid model was carefully developed by ANZ to strike an appropriate work/life balance for the employees while maintaining the necessary individual and team connection through workplace attendance. Given this, even though Ms Lloyd's duties could be theoretically performed from home, the FWC held that ANZ had reasonable business grounds to refuse her FWA request and had "a legitimate right to expect" the benefits of at least 50% workplace attendance. • ***Michael Fogo v Boeing Aerostructure Australia Pty Limited* [2024] FWC 3037** – Mr Fogo applied to the FWC after his request to work from home on Mondays and Fridays was refused. He argued that this arrangement would assist his transition into retirement and mitigate the negative impact on his mental health that would arise because of the drastic decrease in his social exposure. • The FWC held in BAA's favour and found that Mr Fogo did not provide any evidence to show how the two days of working from home would, in practice, mitigate the perceived negative impact on his mental health. The FWC also stressed that BAA had reasonable business grounds to refuse Mr Fogo's request. Given the nature of his role as a planning engineer and the level of his qualification and experience, the FWC accepted BAA's argument that allowing Mr Fogo to work from home for two days a week would likely result in a significant loss of efficiency or productivity, have a significant impact on internal customer service, and be impractical (or simply not an option).		

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Restraints / non-compete clauses in AU workers	• In the H1 2024 Briefing Paper, we highlighted that 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 focusing on the government's priorities for modernising the Australian 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" which 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. • During the consultation period, 47 submissions were lodged, with the publicly available submissions being provided by individuals, employers and unions.	**The Use of Restraint Provisions in Australia** Employment restraints in Australia generally refer to the following types of provisions which endeavour 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 employment or engagement The use of restraint provisions in Australia remains widespread, with the Australian Bureau of Statistics (2024) and the e61 Institute (2023) setting out that: • 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 On 14 October 2024, e61 published a further research paper presenting the first empirical evidence on the relationship between rising non-compete use, job mobility and wages in Australia. Whilst it did not identify the causal effect of non-compete use, the results were consistent with the view that such clauses have contributed to recent low levels of job mobility and wage growth.	• For now, we recommend that employers continue to utilise reasonable restraint provisions in employment contracts and contractor agreements, but also continue to monitor developments in this area and 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 who have a "need to know".	• In our previous Briefing Paper, we noted that Australia is not alone in looking to regulate the use of restraint clauses. On 23 April 2024, the US Federal Trade Commission (FTC) voted to finalise a new rule to prohibit, on or after 4 September 2024, employers from enforcing non-competes against workers other than senior executives on the basis that non-compete clauses are an unfair method of competition and violate section 5 of the Federal Trade Commission Act. • However, on 20 August 2024, the US District Court for the Northern District of Texas handed down a judgment prohibiting the FTC from enforcing its prohibition on non-competes. This was done so on the grounds that the FTC does not have substantive competition-related rulemaking authority, and the rule was otherwise arbitrary in nature. On 18 October 2024, the FTC filed a notice of appeal of this decision.

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	• These submissions reflected a wide range of opinions on the place of non-competes in the Australian workspace, from prohibiting the clauses completely to maintaining the status quo or placing various conditions and limitations on the operation of such clauses.	In a recent article published on 1 November 2024, Assistant Minister for Employment Andrew Leigh called for further scrutiny of the necessity of non-compete clauses, referring to the e61 finding that workers in firms which use non-compete clauses are paid 4% less on average compared to similar workers at firms which only use NDAs, ultimately resulting in a AU$7 billion hit to workers' pay each year. **Enforceability of Restraint Provisions in Australia** Restraint clauses in employment contracts are generally enforceable under the common law in Australia, save for New South Wales (NSW) where restraint provisions are void and unenforceable unless they are reasonably necessary to protect the employer's legitimate business interests. In determining what is "reasonably necessary", courts 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 varies across states and territories of Australia. 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.		The outcome of this appeal could have significant implications for the future of non-competes in employment contracts across the US, and act as a benchmark for other countries, such as Australia, considering similar reform. • The recent difficulties in the US posed by the Court's resistance to enabling the FTC to enforce its prohibition of non-compete clauses may dissuade similar regulation to the Australian legal framework, although jurisprudential inspiration from other countries that have implemented prohibitions against non-compete nonetheless provide continuing scope for scrutiny. • The US is not the only country to challenge the operation of non-competes in the commercial landscape. In May 2023, the UK government announced its intention to legislate a statutory cap on post-termination non-compete clauses of 3 months for employment and worker contracts. Given this legislation has yet to come to fruition, the status of non-competes in the UK remains uncertain.

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		This makes NSW a particularly "friendly" jurisdiction in respect of the enforcement of restraints. **Key Perspectives From Submissions to the Competition Review** • Businesses largely support the continued use of non-compete clauses as a mechanism to protect trade secrets. • Individuals and unions that made submissions preferred the prohibition of non-compete clauses or alternatively suggested such clauses should be subject to income thresholds (i.e., workers below a certain income cannot be the subject of a non-compete) and/or maximum duration limitations on the non-competes (e.g. 3-6 months). • Other suggestions on how to regulate non-competes, such as from the Law Council of Australia, include introducing regulation requiring employers to identify the 'legitimate interest' they are seeking to protect in their employment contracts or requiring employers to provide reasonable compensation when enforcing non-competes. Despite this, the submissions indicate that the current available evidence does not support prohibiting or constraining the use of restraint clauses in Australia. The Business Council of Australia recommended that the Treasury should commission independent research into the effects of these clauses to inform further policy consideration and reform. It remains to be seen what further policy action, if any, the Australian government will take.		• Looking beyond the US and the UK, other countries, including Finland and Germany, already regulate non-compete clauses. Given the Australian Government's previous invitation to consider submissions on global policies and reforms, these jurisdictions remain important considerations for any future regulatory action in this space.

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Psychosocial hazards – First prosecution commenced in WA	• The regulations supporting the Work Health and Safety Act 2020 (WA) (WHS Act) define specific duties in relation to psychosocial risks in the workplace. • Specifically, persons conducting a business or undertaking (PCBUs) are expressly required to eliminate psychosocial risks, or to minimise them so far as is reasonably practicable, using the same "risk assessment" approach applied to risks to physical health and safety. • On 2 October 2024 WorkSafe WA announces that it has charged the state Department of Justice (DOJ) with breaching its duties under the WHS Act, and the regulations to not expose workers to risks to their psychological health. • This is the first time WorkSafe WA has commenced a prosecution in relation to psychosocial hazards under the current legislation.	• WorkSafe has commenced prosecution action against the DOJ in relation to a psychological injury suffered by a female prison officer at Bunbury Regional Prison. • The DOJ has been charged with breaching sections 19 ("Primary duty of care") and 31 ("Failure to comply with health and safety duty – Category 1") of the WHS Act, with WorkSafe alleging that the DOJ failed to provide and maintain a safe work environment and, by that failure, caused serious harm to a worker. • The maximum penalty for this offence is a fine of AU$3.5 million. • Specifically, WorkSafe alleges the DOJ did not have proper procedures in place at the prison to deal with inappropriate behaviours, which included bullying, harassment, sexual harassment and victimisation, which resulted in the prison officer suffering a serious psychological injury. • Notably, WorkSafe issued the DOJ with an improvement notice in March 2023 requiring it to implement such procedures, after WorkSafe found that staff at the prison were repeatedly exposed to inappropriate comments and advances, bullying, intimidation and threats. • However, according to WorkSafe, the DOJ failed to comply with the notice, even after being granted an extension of time, leading to the commencement of prosecution proceedings. • The duty under the WHS Act to manage and address psychosocial hazards is not in itself new, as this already forms part of the primary duty of care under the WHS Act to ensure workers' health and safety in the workplace, so far as is reasonably practicable.	• The circumstances of this case are somewhat unique, as they involve a male prison, which is an inherently dangerous and challenging work environment. • Nevertheless, the outcome of this case should provide some guidance on the extent to which the DOJ had a duty to control psychosocial hazards in that environment, and the systems it should have had in place to address unsafe behaviours and mitigate the risks to its staff. • The fact that WorkSafe WA is prepared to initiate prosecution proceedings in relation to a worker's psychological injury should be a "wake up call" for boards to recognise that each PCBU has a legal duty to manage potential risks to workers' mental health, which includes a duty to assess the potential psychosocial risks that exist for their workers, and ensure they are taking appropriate measures to eliminate or minimise these risks. • In addition, board members, as officers of a PCBU, have a personal duty to exercise 'due diligence' to ensure that the PCBU is complying with its WHS duties, including in relation to psychosocial hazards.	• WorkSafe's prosecution of the DOJ demonstrates that there are clear risks for PCBUs and boards that do not ensure they are addressing psychosocial risks, in that regulators such as WorkSafe are increasingly prepared to take enforcement action up to and including prosecution. • A conviction under the WHS Act can not only result in a significant fine being imposed, but, given that WorkSafe publicises successful convictions, can also result in reputational damage. • In addition to the impact felt from a regulatory prosecution, a workplace where psychosocial hazards are left unchecked can potentially develop into a "toxic" workplace culture, which can adversely affect a business in other ways, such as through increased sick leave, high turnover, workers' compensation and other types of claims, and again, reputational harm.

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		• However, as seen with this case, more recently, safety regulators in Australia have shown they are increasingly willing to focus on the measures PCBUs have implemented to eliminate or minimise psychosocial risks and target those who have not been compliant, including by initiating prosecutions. • This is potentially a significant landmark case, not just for WA, as it demonstrates that WorkSafe (and other safety regulators around Australia) are willing to treat contraventions that relate to psychosocial hazards with the same level of seriousness and gravity as those that relate to major risks to workers' physical health and safety, as reflected in the level of charges laid and potential penalties that apply. (Under the WHS Act in WA, the only offence higher than a Category 1 offence is that of industrial manslaughter.) • This reflects the increased awareness of the far-reaching impact psychosocial risks in the workplace (which include, but are by no means limited to, bullying and sexual harassment) can have on workers' mental health, and the degree of harm that can be suffered as a result.	• For that reason, boards should consider including as a regular agenda item reporting of information on psychosocial hazards in the workplace and the systems and training the PCBU has in place to address and manage these hazards. • Board members may also want to engage in training or upskilling in recognising psychosocial hazards and ways in which a positive workplace culture can be developed and maintained that is supportive of workers' mental health.	• Conducting a culture review or staff survey can help highlight potential risks to workers' mental health and areas of concern before they become significant, so that pre-emptive action can be taken to manage these issues, and in doing so, contribute to establishing a safe and supportive work environment.

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Right to disconnect	From 26 August 2024, national system employees of non-small business employers have the "right to disconnect" under the FW Act. Employees of small business employers will have the "right to disconnect from 26 August 2025.	• The "right to disconnect" provides employees with a legislative right to refuse to monitor, read or respond to contact (or attempted contact) outside their working hours, unless the refusal is unreasonable. • The contact (or attempted contact) can be from an employer, or a third-party – such as a customer, supplier or other people who might contact the employee in relation to their work. • When considering whether an employee's refusal to monitor, read or respond to out-of-hours contact is reasonable, each of the following must be considered: – The reason for the contact or attempted contact – How the contact is made and the level of disruption it causes – The extent to which the employee is compensated to remain available (such as an on-call allowance) or to work reasonable additional hours outside their ordinary hours of work – The nature of the employee's role and level of responsibility – The employee's personal circumstances – If the contact or attempted contact is required under law. • If the unpaid outside-of-hours contact remains ongoing, or results in a dispute between the employee and employer, then the employee can seek the intervention of the Fair Work Commission (FWC) and ask for a "stop order". If the employer does not comply with the stop order, the FWC will be empowered to make any order it considers appropriate (other than issuing a fine).	Employers should do the following in light of the new "right to disconnect": • Review employment contracts to check if hours of work and remuneration clauses are adequate and, if relevant, provide scope for out-of-hours contact where that is a necessary part of the employee's role • Review remuneration packages and bonuses to ensure that employees who are required to remain available after working hours are adequately compensated • Perform job mapping and ensure position descriptions are updated and drafted to adequately reflect the requirements of the position, including in respect of out-of-hours contact • Consider the operational impacts of the new "right to disconnect", particularly in relation to employees under flexible working arrangements, employees who work across different time zones, and award-covered employees • Update policies and procedures to reflect the changes, and ensure managers and HR officers undergo proper training and are made aware of their obligations • Inform employees in different time zones of how the "right to disconnect" will impact their work with Australian colleagues; and • Prepare for employee general protections claims alleging that adverse action has been taken against them because they asserted their "right to disconnect"	• We consider that allegations of adverse action connected with the "right to disconnect" will be included with other allegations made by an employee who feels aggrieved in relation to their employment or its termination. • As at the date of publication of this Board Briefing, there have been no decisions of the FWC with regards to disputes about the "right to disconnect". We recommend that you keep an eye on our website for any updates once decisions start to be handed down.

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		• If an employer contravenes an order of the FWC, then the employer can be subject to a civil remedy penalty (but it has been confirmed that such breaches will not attract criminal penalties). • The "right to disconnect" is a workplace right for the purposes of the general protections provisions contained in Part 3-1 of the FW Act, meaning that employees are protected from adverse action being taken against them because they have exercised their right to disconnect.		

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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. • For companies who use labour hire workers, their employees or labour workers and unions have been able to apply for a RLHAO, and the FWC has been able to make such orders, since 15 December 2023. These RLHAOs have subsequently taken effect from 1 November 2024. • To coincide with the commencement of the operation of the RLHAOs on 1 November 2024, the FWC also published a set of guidelines to assist compliance with the new regulated hire arrangement orders.	• Under the "same job, same pay" framework, 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. • 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 exemptions to this requirement to make an RLHAO include where the performance of the work is for the provision of specialised services as opposed to the supply of labour or where it would be "fair and reasonable" to not make such an order. • Given most of the applications for RLHAOs to date have not been opposed by labour hire employers and their host companies, there has yet to be substantive consideration by the FWC on the interpretation, operation and application of the new provisions. An upcoming contested hearing is scheduled for January 2025, in which BHP and a number of third-party providers for its coal mining operations in Queensland are challenging applications for RLHAOs by the Mining and Energy Union (MEU) and the Australian Manufacturing Workers' Union. This means that we may then have the benefit of case law authority on some key provisions.	• The recent cases reflect the general acquiescence of labour hire employers and host companies to applications made for RLHAOs and the willingness of the FWC to make such orders. • The majority of these orders have been made in the context of blue-collar workforces. • As such, businesses should assess their current workforce and operations to identify any areas where labour hire workers are used. • Businesses who use labour hire workers should familiarise themselves with the "same job, same pay" reforms so they can comply with their 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. A good starting point would be to consider the recent guidelines published by the FWC. • Additionally, businesses who use labour hire providers should, if not doing so already, 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.	• 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 – in doing so, however, 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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	• Since the implementation of the "same job, same pay" framework, numerous applications for RLHAOs have been made by unions, with the Mining and Energy Union (MEU) in particular lodging 24 applications to date, with 5 of such applications already resulting in the making of RLHAOs, and others still pending before the FWC. • The predominant trend continues to be that the labour hire providers, and the host employers who are the respondents to these applications, have elected not to oppose the applications, enabling the FWC to make the orders "on the papers" (i.e. without a hearing). Exceptions to this have been limited, although in one case, the application ended up being withdrawn when the host employer offered to directly employ the labour hire workers, and in another case, an employer, sought, unsuccessfully, to limit the scope of the RLHAO.	• However, key recent decisions that demonstrate the monetary impact of RLHAOs are as follows: – The MEU has reported that approximately 320 labour hire workers at the Batchfire Callide mine in Queensland will receive up to an additional AU$20,000 each per year – Workers employed by 2 labour hire firms (FIP Group and Task Labour Services) working at Australian Country Choice Production meatworks are expected to see pay rises of up to 25% – Labour hire workers at South 32 Cannington silver and lead mine are expecting pay increases of up to 60%. – The Shop, Distributive and Allied Employees' Association (SDA) reports that 180 labour hire workers at a Queensland Kmart warehouse will see their pay increase from AU$8 to AU$12 an hour. – SDA reports that in league with the United Workers Union (UWU), it has secured RLHAOs which will increase wages for on-hire workers at Metcash Trading Limited's Gepps Cross Warehouse in Adelaide by AU$6.50 an hour or AU$12,600 per year for those working 38-hour weeks. Notably, since the date the application was made until now, Metcash has cut back on the use of labour hire workers and has been transferring such workers to direct employment in anticipation of the FWC making the order.	• One of the anticipated implications of the RLHAO provisions is that labour hire providers will increase their rates to compensate for the impact of the new laws. As such, businesses should prepare for potential increases in labour costs if they currently engage or plan to engage labour hire workers. • It should also be noted that there has been 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. • Businesses also need to be poised to deal with disputes as they arise, with the most common dispute likely to be about how to calculate "the protected rate of pay". There are a range of steps businesses can take to prepare for the impact to their businesses. The NESA (National Employment Services Association) publication: "Employer's Guide: Regulated Labour Hire Orders" provides some useful tips on such steps. At page 54 there is a handy Risk Assessment Checklist that can be used as a starting point: 4531-ACCI-guides_Regulated-Labour-Hire-Arrangements-WEB-NESA.pdf	

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		• Ultimately, while most applications for RLHAOs have largely gone unopposed, an exception to this has been the application by the MEU re Boggabri Coal Mine (C2024/4157). – Here, the MEU applied under s 306E of the FW Act for a RLHAO applying to Boggabri Coal Operations Pty Ltd as the regulated host and FES Coal Pty Ltd as an employer. While FES did not oppose the application, it opposed the form of the order sought by the MEU and submitted that the FWC should make an order in a more limited form confined to employees who are currently supplied under a particular labour hire contract. Its concern was that, in the absence of the additional wording, it would be open to argue that the order not only captured current labour hire employees supplied by FES, but also all future FES employees based at the Boggabri Mine. FES submitted that if it was to commence supplying further services (i.e. services other than labour hire services) to Boggabri Coal, such an arrangement should not automatically fall within the scope of the order without consideration being given to whether the FWC was satisfied that the performance of work "is not or will not be" the subject of an order under s 306E(1A). – The FWC rejected this more limited order for various reasons, one of which being that in the event there was some uncertainty in relation to the coverage of the order, or if it was to be contended that the order applies to employees who should be excluded from its operations, the employer could apply to the FWC to vary the order.		

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