HARMERS
WORKPLACE LAWYERS

LOOKING AHEAD IN 2023

AUSTRALIAN EMPLOYMENT LAW UPDATE

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L&E GLOBAL
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Looking ahead in 2023, employers operating in Australia will be required to adapt to recent developments and upcoming changes in the regulatory landscape. This Harmers publication seeks to address some of these changes, and how employers can prepare to meet these new challenges. In particular, we cover:

1. Nationwide trends, upcoming events and new resources for employers;
2. Industrial relations reform and other upcoming changes in 2023;
3. Changes to employment contract practices;
4. The Paid Parental Leave Bill;
5. The Respect at Work Bill; and
6. The whistleblower regime.

1. NATIONWIDE TRENDS, UPCOMING EVENTS AND NEW RESOURCES FOR EMPLOYERS

Authors: *Paul Lorraine, Amelia Dowey, Nicola McManis and Lachlan Pickering*

JOBS AND SKILLS AUSTRALIA

Jobs and Skills Australia is a new agency established by the *Jobs and Skills Australia Act 2022*, which was passed on 27 October 2022, and commenced on 16 November 2022. Jobs and Skills Australia is responsible for working with unions, employers, state and territory governments, and education and training providers in providing advice to the Australian Government on current, emerging, and future workforce, skills, and training needs.

A discussion paper released by Jobs and Skills Australia on 5 January 2023 invites stakeholders to provide their views on proposals for the agency's ongoing operation, including the agency's functions and ways of working, structure and governance. The deadline for stakeholders to make any submissions is 5pm AEDT, Friday 10 February 2023.

https://www.dewr.gov.au/newsroom/articles/jobs-and-skills-australia-make-your-submission-today

LAUNCH INTO WORK EMPLOYER PANEL

The federal Department of Employment and Workplace Relations is seeking responses from businesses interested in becoming members of the Launch into Work Employer Panel. Panel Members will use Launch into Work pre-employment projects such as training, practical workplace activities and mentoring to recruit at least 30 eligible job seekers per year into vacant entry-level roles within their organisation.

Responses close 5pm AEDT, Wednesday 15 February 2023.

https://www.dewr.gov.au/launch-work

LOCAL JOBS PROGRAM

In November 2022, the Department of Employment and Workplace Relations released the Local Jobs Program (LJP) 2020-2022 Evaluation Report. The LJP was introduced in 2020 to support effective local delivery of employment services. The LJP initiatives sought to fill gaps in local servicing to help job seekers into work or training aligned with local needs. The evaluation report found that, overall, each element of the LJP model had been implemented as intended, and were able to respond to challenges caused by COVID-19 as well as broader market and regional-structural challenges.

The 2020-2022 Evaluation Report can be found here: https://www.dewr.gov.au/employment-research-and-statistics/resources/local-jobs-program-2020-to-2022-evaluation-report

The Local Jobs Program will be continuing in 2023 with the second evaluation taking place between July 2022 and June 2025. Details regarding the Employment Facilitators, Local Jobs Plans and Approved Activities for each region that is a part of the program can be found here: https://www.dewr.gov.au/local-jobs/employment-facilitators

NEW WORKPLACE SEXUAL HARASSMENT RESOURCES

The Respect@Work Council has published two new resources to assist organisations in preventing and responding to workplace sexual harassment.

The first is a set of guidelines on the use of confidentiality clauses in settling sexual harassment claims. The guidelines provide that confidentiality clauses should be clear, fair and in plain English, considered on a case-by-case basis and limited in scope and duration. The Sex Discrimination Commissioner, Kate Jenkins, has called on employers to read and follow the guidelines.

The second new resource is a good practice indicators framework to help employers understand and proactively meet their obligations in preventing workplace sexual harassment. The framework contains both 'simple' and 'mature' measurements, allowing employers of different sizes to assess their performance against each indicator.

https://www.respectatwork.gov.au/resource-hub/guidelines-use-confidentiality-clauses-resolution-workplace-sexual-harassment-complaints

https://www.respectatwork.gov.au/resource-hub/good-practice-indicators-framework-preventing-and-responding-workplace-sexual-harassment

2. IR REFORM AND OTHER UPCOMING CHANGES IN 2023

Authors: *Paul Lorraine, Maria Markoulli, Liz Baradan and Lachlan Pickering*

JOB ADVERTISEMENTS

From 7 January 2023 onwards, job advertisements cannot include pay rates that would breach the *Fair Work Act 2009* (Cth), an award or an enterprise agreement. This change is coming into effect as a result of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*, which amended the *Fair Work Act*. In addition to prohibiting advertisement of unlawful pay rates, the legislative changes require employers who hire under an Instrument that contains both a piece rate and a minimum wage floor, and who choose to specify a piece rate in their advertisement, to also specify either the periodic rate, which would be payable to the pieceworker, or to include a statement to the effect that a periodic rate of pay applies. Unless an employer has a reasonable excuse (e.g., the relevant pay rate changing while the job advertisement was live), they risk being subject to the civil remedy provisions under Part 4-1 of the *Fair Work Act*. Contraventions are punishable by up to 60 penalty units for an individual, and 300 penalty units for a body corporate.

AMENDING THE FAIR WORK ACT SMALL CLAIMS PROCEDURE

On 1 July 2023, amendments relating to the increase of the small claims cap and filing fees will come into effect.

The small claims procedure provides a low-cost, faster and more informal means of resolving claims under the *Fair Work Act* in the courts, such as those relating to underpayment. The small claims procedure also reduces cost and complexity for employers responding to these claims.

The amendments will increase the monetary cap on the amount that can be awarded in small claims proceedings under the *Fair Work Act* from $20,000 to $100,000. Where an applicant is successful, they may also have the ability to recover the court filing fee as costs against the other side.

Under the amendments, a larger number of workers will be able to take legal action through small claims proceedings. The increase of the small claims cap aims will now allow more applicants to make small claims simply, quickly, cheaply and without legal representation if they choose so, and as an informal means to resolve claims under the *Fair Work Act* and in the courts.

STRENGTHENING PROTECTIONS AGAINST DISCRIMINATION

On 7 December 2022, the discrimination provisions contained in the *Fair Work Act* were amended to include three new grounds of protection against discrimination, including breast-

feeding, gender identity and intersex status. This would ensure that an employee cannot be terminated, and adverse action cannot be taken against an employee or prospective employee, because of these three attributes. Modern awards and enterprise agreements also cannot discriminate based on these attributes.

The purpose of including these three new protections is to strengthen the framework in the *Fair Work Act* by adding three further protected attributes and bring the *Fair Work Act* into alignment with other federal anti-discrimination legislation, such as the *Sex Discrimination Act 1984* (Cth).

PAID FAMILY AND DOMESTIC VIOLENCE LEAVE TO BECOME AVAILABLE

The current entitlement to five days of unpaid family and domestic violence leave in a 12-month period will be replaced with an entitlement to ten days of paid leave for full-time, part-time and casual employees, with the passage of the *Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022*.

The leave will be available from:

- 1 February 2023, for employees of non-small business employers (employers with 15 or more employees on 1 February 2023).
- 1 August 2023, for employees of small business employers (employers with less than 15 employees on 1 February 2023).

SECOND TRANCHE OF FEDERAL WORKPLACE RELATIONS REFORMS

Following the passage of its *Secure Jobs, Better Pay Act* in December 2022, the Australian Government is currently preparing a second tranche of workplace relations reforms to be introduced in 2023.

The second tranche is expected to involve the introduction of a 'same job, same pay' obligation in the *Fair Work Act*. Broadly, this will require that workers employed through labour hire companies receive the same pay and conditions as workers employed directly by host organisations.

Other proposed reforms include measures to tackle wage theft, changes to the definition of casual employment, and efforts to extend traditional employee rights such as minimum wages and unfair dismissal protections to workers in the gig economy.

The Government has not yet set a timeline for these reforms, though they are expected to be introduced in the first half of 2023. Consultation with stakeholders including employers and their representative organisations is ongoing.

NEW REGULATIONS ON MANAGING PSYCHOSOCIAL RISKS AT WORK

Recent high-profile reports, including the *'Review of the Model Work Health and Safety Laws'* by Marie Boland in 2018/2019 ("**the Boland Review**") and the *Respect@Work: Sexual Harassment National Inquiry Report* in 2020 have sparked a positive move towards improving psychosocial health and safety practices in workplaces.

On 1 October 2022, the *Work Health and Safety Regulation 2017* (NSW) was amended to include specific requirements in relation to managing psychosocial risks. The Regulation makes it explicit that a person conducting a business or undertaking (PCBU) has a duty to respond to, manage and prevent psychosocial risks. A PCBU must manage psychosocial risks in the same way that other risks to health and safety (i.e., physical risks) are dealt with under the NSW Regulation.

In April 2023, amendments to the *Work Health and Safety Regulation 2011* (Qld) will change the State of Queensland's statutory requirements in relation to managing psychosocial hazards.

The State of Victoria has draft regulations to manage psychosocial risks in the workplace which are still being finalised following public comment and will release a code based on the final regulations.

The new regulations on managing psychosocial risks at work require PCBUs and employers to take a proactive approach to:

- identifying reasonably foreseeable psychosocial hazards that could give rise to health and safety risks; and
- implementing control measures to eliminate or minimise psychosocial risks to health and safety.

3. CHANGES TO EMPLOYMENT CONTRACT PRACTICES

Authors: *Joellen Riley Munton and Paul Lorraine*

FIXED TERM CONTRACTS

As a consequence of amendments intended to improve job security, employers who use fixed term contracts for engaging staff will need to review their practices, to be ready for new rules taking effect in 12 months' time (from 6 December 2023). A new section 333E in the *Fair Work Act*, the national workplace relations legislation, prohibits the use of fixed term contracts exceeding two years, except in a range of exceptional circumstances listed in section 333F. Those exceptions include contracts for the completion of specialised tasks, training contracts, contracts to complete projects funded by government grants, and any circumstance permitted by a modern award. Relevantly, Modern Awards are instruments made by the Fair Work Commission, the national workplace relations tribunal, under the *Fair Work Act,* which set out minimum terms and conditions of employment for employees covered by those Awards. Modern awards will be able to include provisions permitting the use of fixed term contracts in circumstances suitable to the occupations covered by the award. It remains to be seen what kinds of clauses the Fair Work Commission will include in modern awards, following these changes.

The new provisions include a range of 'anti-avoidance' provisions, to ensure that employers cannot escape the prohibitions by using a series of shorter fixed term contracts, and delaying the reengagement of employees to create a hiatus between contracts. Practices that involve artificial changes to the contracts to make them appear as different jobs will also fall foul of these provisions. These are civil penalty provisions, and a serious contravention (involving deliberate and systematic breach) can attract significant penalties. Employers who regularly engage staff on a series of fixed term contracts will be most affected by these changes. If this is a practice used to avoid the need for rigorous performance appraisal (on the expectation that the contracts of poor performers can simply not be renewed), it will be necessary to reconsider those practices. A failure to renew an expired fixed term contract of longer than two years (including any earlier renewals) will no longer escape the application of unfair dismissal laws on the basis that expiry of the contract was not a termination of employment 'on the employer's initiative' for the purposes of the *Fair Work Act,* section 386(1)(a).

PAY SECRECY

Many standard form employment contracts contain confidentiality provisions prohibiting employees from disclosing their remuneration to anyone except family members and personal advisers. Effective immediately, these clauses will no longer be binding, and employers who continue to include them in employment contracts will face the risk of civil penalties. Employees will be entitled to disclose their remuneration to others, and will also be entitled to request information from others about their remuneration. The circumstances that arose in *AMIEU v Primo Foods Pty Ltd [2022] FedCFamC2G 540* – where an employee was dismissed for revealing that he had discussed remuneration with colleagues when he was negotiating his own salary – would now attract a penalty for the employer. The employee in that case brought an adverse action claim on the basis that he had been dismissed for making a complaint or enquiry in relation to his employment, but his claim failed when the employer asserted that his breach of the confidentiality clause in his contract was a legitimate reason for dismissal. The new provisions (in sections 333B-333D) make the right to disclose or not disclose remuneration a "workplace right" for the purpose of the General Protections in the *Fair Work Act.*

FLEXIBLE WORKING ARRANGEMENTS

The *Fair Work Act* contains a right for certain employees to request flexible working arrangements, and employers are obliged to consider those requests, but may refuse requests

on reasonable business grounds. Unless the employer is bound by a dispute resolution clause in an enterprise agreement that permits arbitration of disputes over refusals of such requests, employers have faced no sanctions for refusing requests, even without reasonable grounds. Amendments to section 65, and the insertion of new sections 65A to 65C, will mean that employers may soon face the prospect of Fair Work Commission orders that they grant flexible working requests. These amendments take effect six months from assent, i.e., from 6 June 2023.

The right to request flexible work is still limited to employees who are:

- over 55;
- living with a disability;
- caring for infants or school-aged children;
- carers within the meaning of the *Carer Recognition Act 2010* (Ch); or
- experiencing themselves or caring for someone experiencing family violence.

Employers are still entitled to refuse requests on reasonable business grounds. The difference now is that if a request is refused, or ignored for more than 21 days, the employee may bring a dispute about the matter. If not resolved at the workplace level, the dispute can be notified to the Fair Work Commission, and if the parties cannot reach an agreed solution, it is possible that the Fair Work Commission may make orders in respect of the request, including an order that the request be granted.

Employers are now well advised to provide as much information as they can in their employment contracts about the nature of the employment, and the essential requirements of the job, so that employees have a good understanding of what kinds of flexibility are feasible, and what kinds of requests will quite reasonably be refused. Employers who have not already established protocols for considering and responding to requests for flexible working arrangements should take the time now to develop those protocols, to ensure that they are not caught out by the new requirements when they become effective in the middle of 2023.

KEY ACTION POINTS FOR HUMAN RESOURCES AND IN-HOUSE COUNSEL

- Standard form contract precedents should be reviewed immediately to make sure they do not inadvertently breach the new provision on pay secrecy. Breaches of the new provisions attract civil penalties.
- Over the next six months, employers should review their practices in dealing with requests for flexible working arrangements, because after 6 June 2023, employees who have been disappointed by a refused request will be able to seek arbitration of a dispute by the Fair Work Commission.
- Over the next 12 months, employers should review their practices in respect of fixed term contracts. After then, fixed term contracts exceeding two years (including any renewal period) will be treated as continuing contracts, unless they fall within one of the exceptions in the *Fair Work Act* or in a modern award. Employers who use fixed term contracts to manage the risks of poor performance are well advised to review their performance appraisal practices.

4. PAID PARENTAL LEAVE BILL - IMPROVEMENTS FOR FAMILIES AND GENDER EQUALITY

Authors: *Paul Lorraine and Ben Niciak*

The Australian Government's 2022-2023 budget indicated a major change to the paid parental leave scheme in Australia, which aims to invest around $531.6 million over four years from 2022–23 to strengthen and expand the current Paid Parental Leave scheme.

Since then, the Government has introduced legislation to reform Australia's Paid Parental Leave scheme to ensure it better meets the needs of families. The Paid Parental

Leave Amendment (Improvements for Families and Gender Equality) Bill 2022 (Cth) aims to implement the first tranche of the changes announced in the federal budget.

The Bill amends the *Paid Parental Leave Act 2010* (Cth) to make the payment more accessible, more flexible and gender neutral.

The current Paid Parental Leave Scheme enables parents to take time off work to care for a newly born or newly adopted child by being provided income while caring for their child at the rate of the National Minimum Wage. The current scheme incorporates two payments: Parental Leave Pay, and Dad and Partner Pay.

Parental Leave Pay is primarily for mothers and provides eligible working parents with up to 18 weeks of pay. Dad and Partner Pay, on the other hand, provides eligible working fathers or partners with up to 2 weeks of pay. To be eligible, an income threshold of $151,350 per annum currently applies to all claimants.

According to a study conducted by the University of Sydney, academics argue that the current scheme does not promote gender-egalitarian sharing of parental leave[1]. In response, the Bill

- gives more families access to the payments;
- gives parents greater flexibility in how they take leave; and
- encourages parents to share care to support gender equality.

From 1 July 2023, the Bill delivers five key changes.

1. It extends parental leave payments from 18 weeks to 20 weeks from 1 July 2023, with two weeks reserved on a "use it or lose it" basis for each claimant. Parents who are single at the time of their claim will be able to access the full 20 weeks. This extension is a result of combining the current maximum of 18 weeks of parental leave pay with the current 2 weeks of Dad and Partner pay. By 2026, parents will be eligible for 26 weeks of paid leave after the birth or adoption of their child, and full-time, part-time, casual, contract and self-employed workers may be eligible for the scheme. Dad and Partner pay will be abolished.
2. It removes the notion of "primary", "secondary" and "tertiary" claimants and the requirement that the primary claimants of parental leave pay must be the birth parent. This allows families to decide who will claim first, and how they will share the entitlement.
3. It makes paid parental leave consist only of flexible paid parental leave days, allowing claimants to take the payment in multiple blocks, as small as a day at a time, within two years of the birth or adoption, and removes the requirement to not return to work in order to be eligible.
4. It introduces a $350,000 per annum family income limit, under which families can be assessed if they do not meet the individual income test.
5. It expands the eligibility criteria to allow an eligible father or partner to receive parental leave pay regardless of whether the birth parent meets the income test, residency requirements or is serving a newly arrived resident's waiting period.

The scheme is to be government funded and paid at the National Minimum Wage, and can be received at the same time as employer-provided paid leave. However, families with a combined taxable income of more than $350,000 and individuals with a taxable income over $156,647 will be ineligible, which is a slight increase to current individual threshold of $151,350 per annum.

The Bill is set to be passed by Parliament by March 2023, so parents expecting to give birth or adopt on or after 1 July 2023 will have the option of pre-claiming to receive their entitlement as soon as they are eligible.

1 Marian Baird , Myra Hamilton and Andreea Constantin, 'Gender equality and paid parental leave in Australia: A decade of giant leaps or baby steps?' (2021) 63(1) Journal of Industrial Relations, 546, 572

KEY ACTION POINTS FOR HUMAN RESOURCES AND IN-HOUSE COUNSEL

- Review internal policies to ensure that they align with any amendments made to the *Paid Parental Leave Act*.
- Consider briefing internal payroll departments to ensure that employees receive the correct entitlements when taking paid parental leave.
- Inform employees when the legislative amendments are ratified to allow for future planning.

SUMMARY OF CHANGES

- From 1 July 2023, Parental Leave Entitlements are extended to up to 20 weeks, at the national minimum wage rate.
- The leave entitlement increases by two weeks every year from 1 July 2024 to 1 July 2026 to a total of 26 weeks.
- New income threshold of $156,647 for individuals and $350,000 for families.
- "Take it or leave it" basis.

5. THE RESPECT AT WORK BILL – KEY CHANGES FOR EMPLOYERS

Authors: *Amy Zhang and Zeb Holmes*

On Monday, 28 November 2022, Parliament passed the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022* ("**Bill**"), this being one aspect of the Australian Labor Party's pre-election industrial relations platform.

HISTORY OF RESPECT AT WORK BILL

To understand this Bill, it is first important to understand the history of its development. The Bill stems from the work of former Sex Discrimination Commissioner Kate Jenkins in the Respect@Work report ("**Jenkins Report**"). A significant context for the Jenkins Report was that the Australian Human Rights Commission ("**AHRC**"), Australia's national human rights institution, had found that 33% of people (including 39% of women) who had been in the workforce in the previous five years had experienced workplace sexual harassment.

There were 55 recommendations in the Jenkins Report, which covered a range of issues, such as research, keeping data, prevention initiatives and workplace changes. There were 12 recommendations specifically for legislative reform. While the Jenkins Report was delivered to the Morrison government in late 2019 and released to the public in March 2020, little was initially done to progress its recommendations. This changed in February 2021 when Brittany Higgins made public allegations that she had been sexually assaulted inside Parliament House and then historical sexual assault allegations were made about MP, Christian Porter. Shortly afterwards, the government accepted most of the 55 recommendations.

The Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021 ("**2021 Act**") addressed six of the Jenkins Report legislative reform recommendations. Some of these changes were quite positive for access to justice, such as extending the time limit for complaints under the *Sex Discrimination Act* (Australia's national sex discrimination legislation) from 6 months to 24 months. A few changes, such as making clear that sexual harassment is a valid reason for dismissal, seemed to just confirm matters that were already confirmed by a significant body of case law. There was some criticism of the 2021 Act because it did not go far enough and was a missed opportunity, specifically to prevent sexual harassment in the workplace via a positive duty.

PROCESS OF PASSING THE BILL

The Labor Party, as part of its 2022 Federal Election campaign, committed to implementing all 55 recommendations of the Jenkins Report, including the remaining legislative recommendations.

The Bill ultimately went through the House and Senate relatively unscathed. Jacquie Lambie included an independent review of the changes after 2 years, and the government clarified that the positive duty does not affect duties under Australia's

various work health and safety legislation and clarified the time limit of the compliance notice power.

There was little opposition pushback, with Michaela Cash's second reading speech being quite supportive in commenting that the Bill "builds on and continues the work that the former government had commenced" with the benefit of time for additional consideration and consultation.

The largest change to the Bill was the deferred amendment to the costs position in the AHRC. The Bill initially included a "cost-neutrality" approach in the AHRC, where each side paid for their fees unless the court decided to impose costs, which it would be allowed to do in certain circumstances. Under the proposed new section 46PSA, a court would have more flexibility to award costs where it considers it appropriate. The government removed the cost provisions of the Bill after concerns were raised about this approach deterring victims from applying to the AHRC. Instead, the government has referred the issue to the attorney-general's department to be reviewed.

MAJOR CHANGES WITHIN BILL

The major legislative changes in the now-passed Bill are:

Change	Section	Report Recommendation
Positive Duty to eliminate harassment, hostile work environments and victimisation	47C of the SD Act	17
Compliance Powers of the AHRC re Positive Duty	35B of the AHRC Act	18
Inquiry Function of the AHRC re systematic unlawful discrimination	35L of the AHRC Act	19
New Cause of Action – Hostile Workplace Environment on the Ground of Sex	28M of the SD Act	16c
Amended Contravention – Sex Based Harassment	28AA(1)(a) of the SD Act	16(b)
Class Actions	46PO(2) of the AHRC Act	23
Extension of Time	46PH of the AHRC Act	22

We will detail each of these separately below:

1. POSITIVE DUTY

The Bill introduces a positive duty for employers to take "reasonable and proportionate" measures to eliminate sexual harassment, harassment on the grounds of sex, hostile workplace environments and victimisation, as far as possible.

The Explanatory Memorandum makes clear that the meaning of "reasonable and proportionate" will vary depending on the particular circumstances. The matters to be considered when determining whether the duty holder is complying with the positive duty include:

- the size, nature and circumstances of the business or undertaking;
- the duty holder's resources, whether financial or otherwise; and
- the practicability and costs associated with the steps.
- the duty holder's resources, whether financial or otherwise; and
- the practicability and costs associated with the steps.

These considerations would ensure that the positive duty is adaptable and can be applied by all employers and persons conducting a business or undertaking.

The preventative nature of this section mirrors the primary work, health and safety duty, that is, that businesses must take all practicable steps to ensure the health and safety of

workers. The Explanatory Memorandum states that these practical measures can include things like implementing policies, collecting and monitoring data, and providing training and support to employees.

If eliminating the risk of sexual harassment is not practical, a person conducting a business or undertaking must minimise the risk so far as reasonably practical. Employers may also be vicariously liable under the *Sex Discrimination Act* if they do not take "all reasonable steps" to prevent the conduct.

2. GRANTING POWERS TO THE AHRC TO ENFORCE COMPLIANCE WITH THE POSITIVE DUTY

The AHRC Act will be accordingly amended to give the AHRC new powers to ensure a person conducting a business or undertaking is complying with the positive duty. Specifically, these new powers allow the AHRC to:

- conduct an inquiry into a person's compliance with the positive duty, where the AHRC "reasonably suspects" non-compliance, and provide recommendations to the business specifying the action a business must take, or not take, to achieve compliance;
- issuing a compliance notice specifying the action that a person must take, or refrain from taking, to address their non-compliance;
- applying to the federal courts for an order to direct compliance with the compliance notice; and
- enter enforceable undertakings with those who have a positive duty.

These powers will commence 12 months after the Bill receives royal assent. This will afford employers the opportunity to implement any necessary changes to comply with the positive duty. It would also enable the AHRC to prepare and publish guidance materials on the positive duty and establish its new compliance functions.

3. POWERS GRANTED TO THE AHRC TO INQUIRE INTO SYSTEMIC UNLAWFUL DISCRIMINATION

The Jenkins Report found "there are significant cultural and systemic factors that drive sexual harassment in the workplace, and that addressing these drivers can be challenging".

The Bill defines 'systemic unlawful discrimination' as unlawful discrimination that "affects a class or group of persons" and "is continuous, repetitive or forms a pattern". The Bill gives the AHRC the power to inquire into any matter that may relate to systemic unlawful discrimination or suspected systemic unlawful discrimination, including conduct within individual businesses or across a broader industry or sector. The AHRC will be able to commence such inquiries on its own initiative or at the request of the Minister and then they may report to the Minister or publish a report in relation to the inquiry (or both), and make recommendations to address the issues identified.

4. NEW CONTRAVENTION – HOSTILE WORK ENVIRONMENT

The Bill proposes to introduce a new cause of action in the Sexual Discrimination Act, making it unlawful for a person to subject another person to a workplace environment that is hostile on the grounds of sex.

The Bill provides that a workplace environment is "hostile on the grounds of sex" if a reasonable person having regard to all the circumstances would have anticipated the possibility of the conduct resulting in the workplace environment being offensive, intimidating or humiliating to a person of the sex of the relevant individual or with someone with characteristics that generally appertain or are imputed to persons of their sex.

The provision does not require the conduct to be directed towards a particular person and is intended to capture sexually charged or hostile work environments. The factors that will be considered when determining whether the conduct is unlawful include:

- The seriousness of the conduct
- Whether the conduct was continuous or repetitive
- The role, influence or authority of the person engaging in the conduct; and
- Any other relevant circumstances

The Explanatory Memorandum gives several examples, explaining that "conduct such as displaying obscene or pornographic materials, general sexual banter, or innuendo and offensive jokes can result in people of one sex feeling unwelcome or excluded by the general environment. The existence of these environments can increase the risk of people experiencing other forms of unlawful discrimination, such as sexual harassment."

5. AMENDED CONTRAVENTION – SEX-BASED HARASSMENT

The Bill also lowers the threshold for the existing prohibition on sex-based harassment that was introduced in the 2021 Act.

The previous threshold for sex-based harassment was "unwelcome conduct of a seriously demeaning nature". The Bill removes the word "seriously" to lower the threshold. The Explanatory Memorandum notes, "this would ensure that the provision does not impose an unnecessarily high threshold on applicants".

6. CLASS ACTIONS FOR UNLAWFUL DISCRIMINATION

Previously, if a representative body such as a union made a claim on behalf of a group to the AHRC, but the claim wasn't resolved, the union couldn't then progress that claim to the federal court. The Act allows such class actions to be brought by a representative body in the Federal Court, intending to be a more accessible mechanism for anti-discrimination class actions.

The Explanatory Memorandum at paragraph 320 provides an example of a representative action, describing a scenario where an employment advocacy centre brings a representative action on behalf of four women within an organisation who have been demoted on their return from parental leave.

The Bill specifies that a representative application needs the written consent of each person on whose behalf the application is made. If a representative application is made, any class member will have the ability to opt out of the proceeding. Those class members cannot make a separate application in relation to the same claim unless they have opted out, and proceedings commenced by a representative action cannot be settled or discontinued without court approval.

7. EXTENSION OF THE TIME LIMIT FOR COMMENCING A COMPLAINT

The Bill also amends the AHRC Act with the effect that the time limit for a complaint under the *Age Discrimination Act 2004* (Cth), *Disability Discrimination Act 1992* (Cth) and *Racial Discrimination 1975* (Cth), Australia's national age, disability and race discrimination legislation, would be extended from six months to 24 months after the alleged acts, omissions or practices took place, consistent with the effect of the existing provisions on the timeframes for making complaints under the *Sex Discrimination Act*.

KEY ACTION POINTS FOR HUMAN RESOURCES AND IN-HOUSE COUNSEL

In light of the above, employers should ensure:

- their staff are trained on the impending changes; and
- they audit their workplaces against the new obligations, including ensuring their workplaces are not hostile work environments and that they have systems and processes in place to satisfy the obligations under the new positive duty.

WE COULD SEE AN UPLIFT IN UTILISATION OF THE WHISTLEBLOWER REGIME

Author: *Amy Zhang*

The new whistleblower regime under the *Corporations Act 2001* (Cth) first came into effect on 1 July 2019.

Among other protections, the regime protects eligible persons who make, propose to make, or can make, eligible whistleblowing disclosures from detrimental action being taken or threatened against them.

While not all employees of all organisations will be protected by the regime for 'blowing the whistle', and not all complaints will be covered, the 2019 regime does expand the scope of protections and can be considered a complement to the adverse action regime under the *Fair Work Act*.

Businesses (including management) that take detrimental action or threaten detrimental action against a person who makes an eligible disclosure (see details here) can be liable for compensatory damages, exemplary damages (which are designed to punish a wrongdoer), significant penalties, costs, and other forms of relief ordered by the Court.

Although the new regime came into effect in July 2019, there has still not been a final substantive case determined by the Courts under these provisions. However, there have been a small number of interlocutory decisions arising from summary dismissal and strike out applications concerning the scope of the new regime and whether the applicant is eligible for protection under the regime.

The dearth of cases is not unusual, and it is expected that we will see more cases under the new whistleblower regime next year as more applicants become aware of and utilise this regime, and more cases make their way through the courts. The pace of utilisation of this regime is similar to what we saw with the adverse action regime, which took a few years to kick off.

In the meantime, and to guard against an uptick in such cases and avoid falling foul of the provisions, businesses should ensure employees re-familiarise themselves with the whistleblower regime, including whether their business is covered by it, who is an eligible whistleblower (noting whistleblowers do not have to be employees), when is a disclosure protected under the legislation (including who the disclosure needs to be made to and what the disclosure needs to relate to), and what constitutes a detriment.

This can be done through preparation and (re)circulation of policies and fact sheets, and training.