



K&L GATES

Wednesday 12 February 2025

# State of the Workplace

Presented by Nick Ruskin, Partner and Meg Aitken, Senior Associate



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# Workplace Statistics at a Glance

## THE WORKFORCE AT A GLANCE

### Gender in the Spotlight

The current gender pay gap is **21.7%**.

In Australia, **22%** of chief executive officers are women.

### Contract and Casual

The number of casual employees in Australia is **2.7 million** (22% of all employees).

The number of employees employed on a fixed term contract is 3% (345,000 employees).

Of these:

- Those working on a contract with a total term length of one year or less was **73%**.
- Those working with less than nine months remaining on their contract was **60%**.

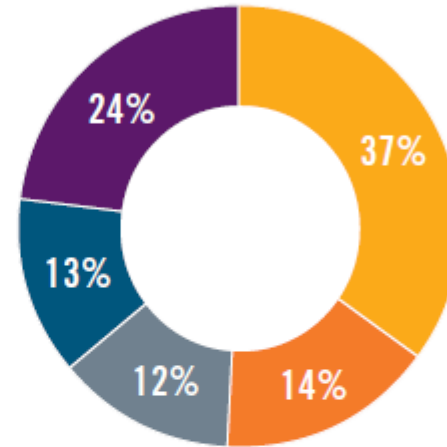
Industries with the highest percentage of independent contractors include:

- Education and training (**8%**).
- Public administration and safety (**8%**).
- Information media and telecommunications (**6%**).

## All About the Fair Work Commission

The total number of applications to the Fair Work Commission lodged in 2023-2024 was 40,190, a **27%** increase on the prior year.

The most common types of applications were:



■ UNFAIR DISMISSAL APPLICATIONS

■ GENERAL PROTECTIONS INVOLVING DISMISSAL APPLICATIONS

■ ENTERPRISE AGREEMENT APPROVAL APPLICATIONS

■ SUPPORTED WAGE SYSTEM AGREEMENTS

■ OTHER

Staff conciliators held over 11,000 conciliations and conferences in 2023-2024: **82%** of all lodgements were finalised within 8 weeks and **96%** were finalised within 16 weeks.



# Right to Disconnect



# What is the Law?

**New workplace right for *all* employees:** Employees may refuse to monitor, read or respond to contact, or attempted contact, from an employer or a third party about work outside of their working hours

.....unless the refusal is **unreasonable**.

Whether an employee's refusal to respond to contact is **unreasonable** will depend on the circumstances and will be considered with reference to the following factors:

- The *reason* for the attempted contact
  - *How the contact or attempted contact is made* and the *level of disruption* it causes the employee
  - The extent that the employee is *compensated* for working additional hours and/or remaining available during the period that contact is made or attempted,
  - The *nature of the employee's role*
  - The employee's *level of responsibility*
  - The employee's *personal circumstances*
- 1 *Attempt to resolve at a workplace level*
  - 2 *Apply to Fair Work Commission to make an order or otherwise deal with the dispute*

## What Does it Mean in Practice?

Significant impact yet to be seen...


... But new era of workplace dynamics.

OHS legislation already provides a protection.

More likely to impact lower-earning employees



# What Should you be Doing?

- 
- Communicate with employees about expectations
  - Include out of hours expectations in position descriptions and employment contracts
  - Review remuneration structures relating to identified roles to determine whether fit for purpose
  - Setting expectations clearly via training / policies
  - Risk assessment!

The background features a bokeh effect of out-of-focus lights in shades of blue, cyan, and orange. A dark teal horizontal band is overlaid across the middle of the image, containing the title text in white.

# Sexual Harassment and Positive Duty

## Prevalence of Sexual Harassment

1 in 3

1 in 3 people experienced sexual harassment at work in the last 5 years (41% of women and 26% of men)



Most sexual harassment in Australian workplaces is carried out by men

50%

50% of incidents are repeated and, of those, half were ongoing for more than one year

18%

Only 18% of incidents were reported



Around two-thirds of workers said their organisation has a sexual harassment policy

50%

50% said that their organisation provided information to workers about how to report

AHRC Fifth national survey on sexual harassment in Australian workplaces 2022 : <https://humanrights.gov.au/time-for-respect-2022>

## What is the Law?

'Positive Duty' - Employers and PCBU's (duty holders) must take reasonable and proportionate measures to eliminate, as far as possible:

Sexual  
harassment

Sex  
discrimination

Sex-based  
harassment

Hostile  
working  
environments

Victimisation

*(s 47C Sex Discrimination Act )*



# What Should you be Doing?



Source: AHRC Factsheet Series: Positive Duty under the Sex Discrimination Act

# AHRC Powers of Enforcement

AHRC has the power to:

- .....● Conduct inquiries into compliance with the positive duty and provide recommendations to achieve compliance.
- .....● Issue compliance notices specifying action that employers must take, or refrain from taking, to address any non-compliance.
- .....● Apply to the Federal Court for an order to direct compliance.
- .....● Enter into enforceable undertakings with an organisation.

The background features a dark blue field with numerous glowing, semi-transparent cubes in shades of cyan and orange. These cubes are arranged in a perspective that creates a sense of depth. Interspersed among the cubes are soft, out-of-focus bokeh lights in various colors, including blue, orange, and purple, which add a dreamlike, ethereal quality to the scene.

# Wage Theft

# What is the law?

## Changes to Civil Penalties

- Maximum penalties for underpayments have increased by five x
  - AU\$469,500 for corporations; or
  - Three x amount of underpayment

## Meaning of “Serious Contravention”

- Old test: Knowledge and systematic conduct
- New test: Knowing *or* reckless

## Wage Theft - 1 January 2025

- **Criminal Offence** (including officers as accessories)
- *Intentional* conduct
- *Intentionally* results in underpayment
- “Safe Havens” – Cooperation agreements
- Penalties:
  - 10 years imprisonment
  - AU\$7,825,000 or three x the underpayment (whichever is greater)



## What are the Issues?

Industrial instruments are complex

Common issues that we see

Civil remedy provisions

Director and Officer liability

Increased FWO Powers

New FWO Compliance and Enforcement Policy

# What Should you be Doing?



Steps to achieve proactive compliance should be a focus for all employers.



Rectify any *known* non-compliance ASAP.



Ensure systematic assessment and review of employee complaints regarding pay and conditions.



Payroll audits (Review sample of employees' pay against award/agreement terms and conditions).

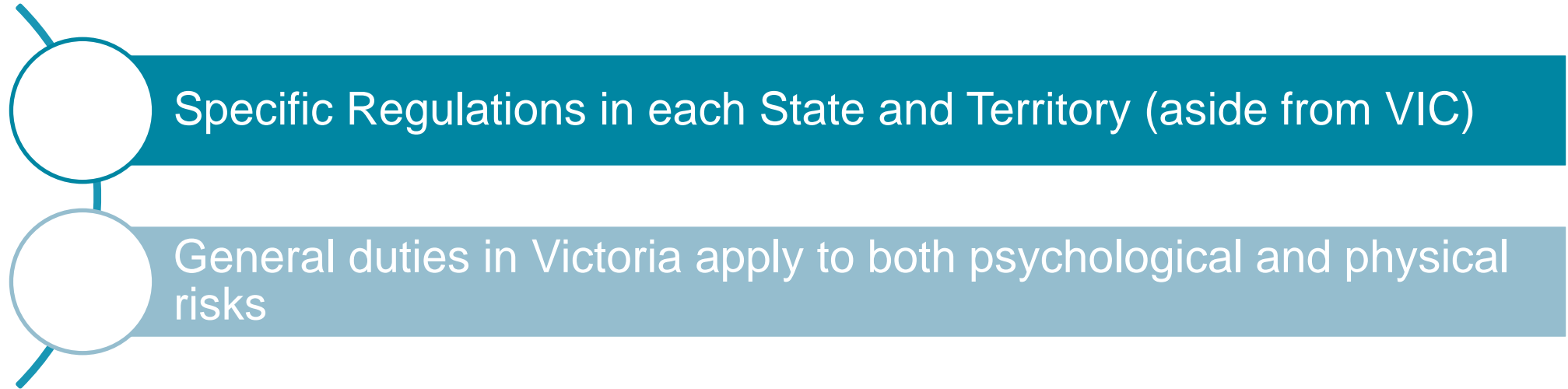


Compliance projects (If systematic underpayment is identified, consider a large-scale project).

The background features a bokeh effect of out-of-focus lights in shades of blue, cyan, and orange. A semi-transparent teal horizontal band is overlaid across the middle of the image.

# Psychosocial Issues

## What is the law?



A PCBU must:

- Identify *reasonably foreseeable* psychosocial hazards that could give rise to health and safety risks
- Introduce, maintain and review *control measures* to eliminate (or minimise) psychosocial risks to health and safety so far as is reasonably practicable



## What is the law? Cont.

### Identify Psychosocial Hazards

- Identify reasonably foreseeable psychosocial hazards that may cause psychosocial harm, irrespective of whether it may also cause physical harm

### Eliminate or Minimize Risk

- Controls must consider the duration, frequency and severity of hazard exposure, how hazards may interact or combine, the design of work and the systems of work

### Maintain Control Measures

- Controls must be effective, fit for purpose, suitable and implemented correctly
- Controls must also be reviewed and if necessary, revised

### Consultation

# What Should you be Doing?

**Assess** level of compliance maturity

**Develop** hazard register – multi-disciplinary approach

**Review** training and education programs

The background features a dark blue field with out-of-focus, colorful bokeh lights in shades of orange, yellow, and cyan. Overlaid on this is a semi-transparent dark teal horizontal band. Within this band, the text 'Changes to the Industrial Landscape' is centered in a white, sans-serif font. The overall aesthetic is modern and technological.

# Changes to the Industrial Landscape

# What is the law?

## Multi-employer Bargaining

- Single interest employer agreements
- Supported bargaining agreements
- Cooperative workplace

## Minimum Standards for Employee-like Workers

- The Commission is able to make minimum standards for gig workers

## Same Job, Same Pay Orders

- Apply where a host business has an enterprise agreement but engages labour hire
- Labour hire workers/unions may apply for an order
- Not all conditions – just actual rate of pay

## Intractable Bargaining

- Parties may apply for declaration if bargaining is "intractable"
- If parties cannot agree, Commission may arbitrate
- Arbitration cannot be less favourable than current agreements



## What Does it Mean in Practice?

Employers may be drawn voluntarily or involuntarily into multi-employer bargaining – but less likely if you have your own enterprise agreement.



**Intractable bargaining shifts the dynamic for enterprise bargaining.**

Effect of multi-employer agreements on industry expectations, market rates, and even government funding (eg Early Childcare).



**Same Job, Same Pay orders may have a significant impact on labour hire industry, particularly in unionised sectors.**

# What Should you be Doing?

Review existing enterprise agreement framework



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graph TD; A[Review existing enterprise agreement framework] --> B[Follow developments regarding potential multi-employer bargaining in your industry]; B --> C[Determine bargaining strategy]; C --> D[Review current labour hire arrangements and consider risk profile and mitigation strategies];
```

Follow developments regarding potential multi-employer bargaining in your industry

Determine bargaining strategy

Review current labour hire arrangements and consider risk profile and mitigation strategies

# Workplace Delegates

Rights for workplace delegates:

Represent the  
industrial interests of  
members

Reasonable  
communication with  
those members

For purpose of:

- Reasonable access to the workplace and workplace facilities
- Reasonable access to paid leave and time, during normal working hours, for the purposes of related training

Award conditions are more proscriptive

# Protections for Workplace Delegates

The employer of a workplace delegate must not:



Unreasonably fail or refuse to deal with the workplace delegate; or

Knowingly or recklessly make a false or misleading representation to the workplace delegate; or

Unreasonably hinder, obstruct or prevent the exercise of the rights of the workplace delegate under this Act or a fair work instrument.



# Employees v Contractors



# What is the law?

## “New” definition of ‘employee’ inserted into section 15AA of the Fair Work Act

- 1 To make an assessment concerning the real substance, practical reality and true nature of the relationship, consider: *degree of control, ability to delegate or subcontract work; financial responsibility and risk; tools and equipment.*
- 2 A return to the common law multi-factorial test.
- 3 This section was enacted as a response to the decisions of the High Court of Australia in *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2.
- 4 New ‘Opt out notice’ provisions.

## What Does it Mean in Practice?

No longer able to rely on terms of a contract alone (absent an opt out)

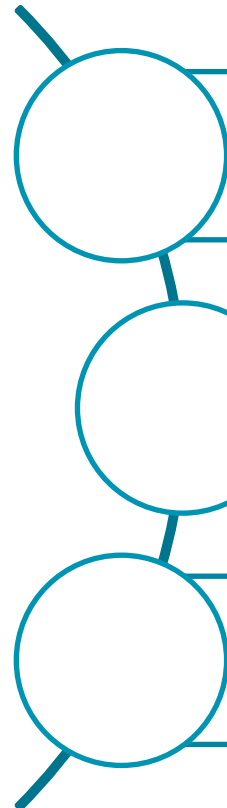
Must assess the real substance, practical reality and true nature of the relationship between the parties

If in practice the relationship looks and operates as one of employment then it will be considered an employment relationship (regardless of contract)

Does not interfere with definition of 'contractor' in tax, superannuation and workers' compensation contexts

Penalties for sham contracting

# What Should you be Doing?

- 
- Review existing contractor arrangements against the multi factorial test
  - Consider benefit and risks of 'opt out' notices
  - Review terms of contractor agreements against multi factorial test

# Contacts



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