

GENDER EQUALITY ON THE AGENDA

Date: 8 March 2023

Australia Labor, Employment, and Workplace Safety Alert

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A lot has happened in Australian employment law over the last few months, and you may be forgiven for having missed some of the changes that were passed just prior to Christmas.

What better opportunity than International Women's Day to reflect on some of the key changes introduced by the Labor Government to support gender equality including some important changes that are taking effect this week.

Major developments include:

- The objects of the *Fair Work Act 2009* (Cth) have been updated to promote gender equality and job security;¹
- The introduction of a positive duty on employers to eliminate sexual harassment;²
- A prohibition on sexual harassment now exists in the *Fair Work Act 2009* (Cth) and there are new protected attributes at work;³
- Changes to requests for flexible working arrangements and new powers to arbitrate;⁴
- The introduction of pay secrecy laws;⁵
- The introduction of paid family and domestic violence leave;⁶ and
- The release of the WGEA Report in February 2023 and proposed amendments to gender pay reporting requirements.⁷

POSITIVE DUTY TO ELIMINATE SEXUAL HARASSMENT

The *Sex Discrimination Act 1984* (Cth) now contains a positive duty to eliminate, as far as possible, sexual harassment.⁸ In order to comply with the duty and meet their legislative obligations, employers and persons conducting a business or undertaking are required to take reasonable and proportionate measures to eliminate, as far as possible, certain discriminatory conduct,⁹ including sexual harassment, unlawful sex discrimination, sex-based harassment, work environments that are hostile on the ground of sex, and acts of victimisation.¹⁰

This important addition followed the passing of the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) (Respect at Work Act) in November 2022, which implemented recommendations from the Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces.

A number of factors must be considered to determine what constitutes "reasonable and proportionate" measures, including:

- The size, nature and circumstances of an employer's business or undertaking;
- An employer's resources, whether financial or otherwise; and
- The practicability and cost of measures to eliminate the conduct; or any other relevant matter.¹¹

In practice this positive obligation means that the days of employers waiting for employees to bring complaints before addressing issues are over. Rather, employers are now responsible for taking proactive steps to prevent sexual harassment from occurring in the first place.¹²

This should include steps such as reviewing and updating policies, providing regular and appropriately tailored training and education, considering complaint-handling mechanisms, promoting a culture of zero tolerance and maintaining data on the number and nature of complaints to identify and respond to any trends.

FAIR WORK ACT 2009 (CTH) PROHIBITION ON SEXUAL HARASSMENT AND NEW PROTECTED ATTRIBUTES

Complementing the anti-discrimination amendments to the *Sex Discrimination Act 1984* (Cth), the *Fair Work Act 2009* (Cth) (FW Act) has also been amended such that it now expressly prohibits sexual harassment in connection with work.¹³ These provisions took effect on 6 March 2023.

The new provisions enable workers (including employees, contractors, work experience students and volunteers) who experience sexual harassment in connection with work to bring a dispute in the Fair Work Commission. By consent of both parties, the Commission will be able to arbitrate the dispute and make orders relating to compensation, financial penalties and other orders against perpetrators of sexual harassment. Employers who do not take reasonable steps to protect workers against the risk of sexual harassment may also be vicariously liable for unlawful sexual harassment engaged in by their workers.

The FW Act prohibition will apply to sexual harassment that occurs on or after 6 March 2023, being the day the new provisions commenced. The new provision will not apply to sexual harassment that occurred before 6 March 2023 or to conduct that is part of a course of conduct that began before the commencement date, even if the harassing conduct continues after the commencement of the new provisions.

Similar prohibitions already exist in state and other federal legislation and the introduction of a prohibition in the FW Act is designed to provide another avenue for harassed workers.

As well as the new prohibition on sexual harassment, it is also worthy to note that on 7 December 2022, three new protected attributes were inserted into the FW Act which again seek to support gender equality at work:

- Breastfeeding;
- Gender identity; and
- Intersex status.

This means from 7 December 2022, employers are prohibited from taking adverse action against current or future employees because of these attributes.

CHANGES TO FLEXIBLE WORK

A number of changes will be introduced to the National Employment Standards (NES) right to request flexible work on 6 June 2023.¹⁴

In particular:

- Employers will have increased obligations before they can refuse a request, including, among other things, needing to discuss the request with the employee and making a genuine effort to find alternative arrangements to accommodate the employee's circumstances;
- More employees will be eligible to request a flexible working arrangement, including where an employee is pregnant or where they, or a member of their immediate family or household, experiences family or domestic violence; and
- The Commission will be able to conciliate and arbitrate disputes about requests for flexible working arrangements and make orders requiring employers to grant such requests.

PAY SECRECY NOW PROHIBITED

Pay secrecy clauses, which used to operate to prevent employees from disclosing their salary, bonuses and other financial incentives, are also now prohibited by the FW Act.¹⁵ These changes came into effect on 7 December 2022.

As a result, employees and future employees now have a workplace right to:

- Disclose or not disclose information about their remuneration or their employment terms and conditions that would be needed to work out their pay, (i.e. their hours of work);¹⁶ and
- Ask other employees (with the same or a different employer) about their pay and employment terms and conditions that would be needed to work out their pay, such as their hours of work.¹⁷

These measures are designed to increase transparency around the gender pay gap and enable employees to have informed discussions and consider whether their remuneration is fair and reasonable in comparison to their colleagues or industry peers.

Employers with contracts containing pay secrecy clauses should review those agreements and ensure that they are not included in any employment contracts going forward.

PAID FAMILY AND DOMESTIC VIOLENCE LEAVE

The entitlement to family and domestic violence leave under the NES has recently increased from five unpaid days per annum to 10 paid days in a 12-month period.¹⁸

Importantly, and contrary to the treatment of most other leave entitlements under the NES:

- All employees (including part-time and casual employees) will be entitled to the 10 days of paid family and domestic violence leave in a 12-month period;
- Employees do not have to accrue the leave and are entitled to the full 10 days upfront; and
- The leave does not accumulate from year to year if it is not used and renews annually on an employee's work anniversary.

The paid leave entitlement is available from:

- 1 February 2023 for employees working for employers with 15 or more employees; and

- 1 August 2023 for employees working for employers with less than 15 employees.

Pay slip requirements

In an effort to protect employee safety when accessing paid family and domestic violence leave, the Fair Work Regulations now contain specific provisions which address how information about paid family and domestic violence leave must be recorded on pay slips.¹⁹

In particular, they provide that a pay slip must not mention that:

- That an amount paid to an employee is a payment in respect of paid family and domestic violence leave;
- That a period of leave taken by the employee has been taken as a period of paid family and domestic violence leave; or
- The balance of an employee's entitlement to paid family and domestic violence leave.²⁰

Instead, where a period of paid family and domestic violence leave is taken by an employee, the pay slip should confirm the amount paid was:

- For the performance of the employee's ordinary hours of work; or
- Another kind of payment made in relation to the performance of the employee's work, including (but not limited to) an allowance, bonus or a payment of overtime; or
- Where the employee requests, for taking a period of a particular kind of leave as requested (ie annual leave or personal leave).²¹

Importantly, a pay slip will not be considered false or misleading for complying with these requirements.²²

GENDER PAY GAP DATA AND WGEA REPORT

A new report released by Workplace Gender Equality Agency (WGEA) in February 2023 confirmed that the national gender pay gap for full-time working women has decreased to 13.3%, the lowest gap on record. This means that women working full-time now earn on average 87 cents for every \$1 earned by a man.

While the reduction in the gender pay gap is encouraging, it is important to note that the gap does not include an analysis of wages of part-time or casual workers, with significant female representation in these sectors.

Other key points highlighted include:

- The disparity is highest in the professional, scientific and technical services sector at 21.2%; and
- It is significantly higher in the private sector (16.1%) than the public sector (11.2%).

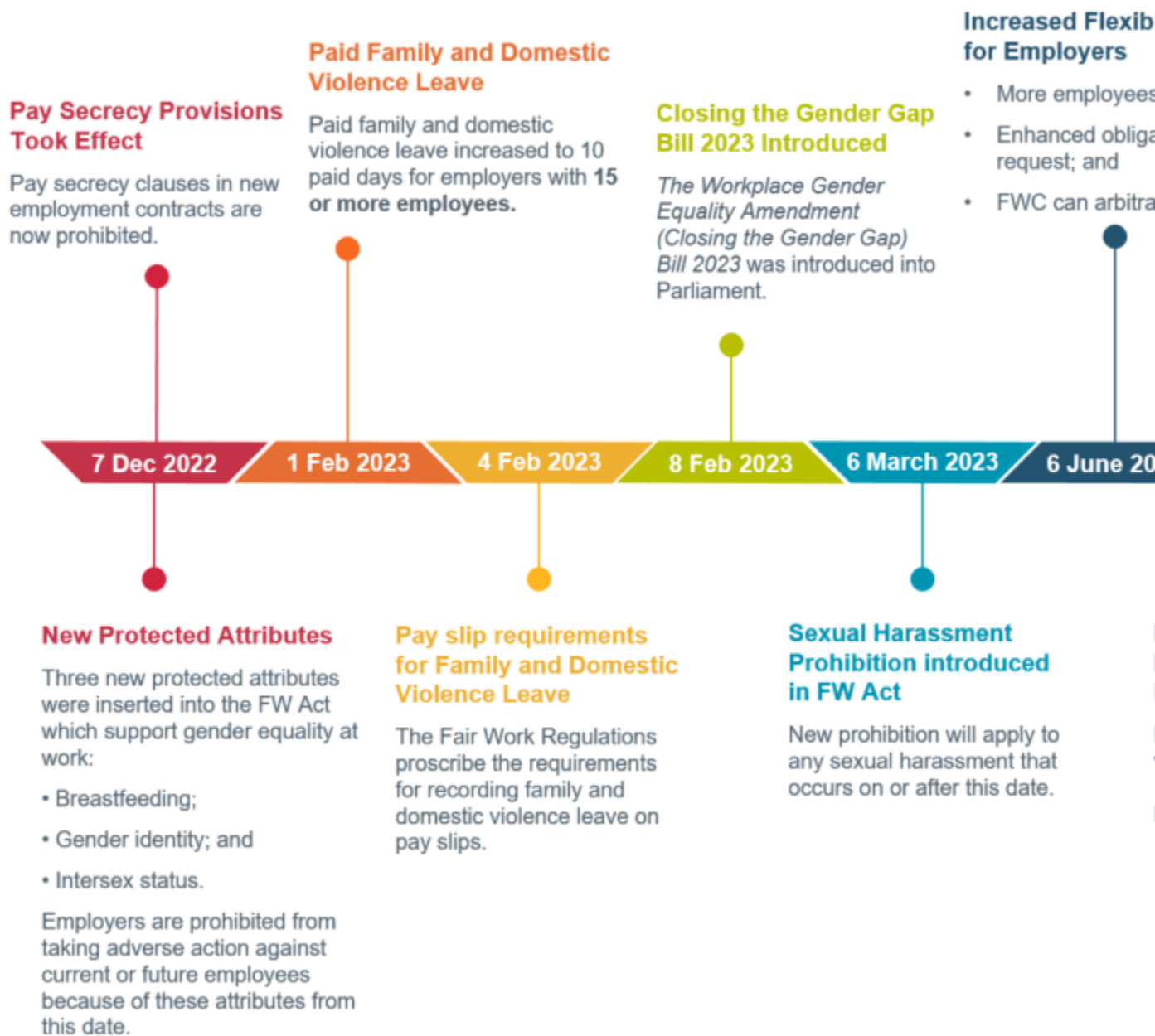
To encourage greater transparency, the *Workplace Gender Equality Amendment (Closing the Gender Gap) Bill 2023* (Bill) was introduced into Parliament on 8 February 2023. The Bill follows the *2021 Review of the Workplace Gender Equality Act 2012* (Review) and progresses the implementation of almost all of the recommendations in the Review.

The Bill proposes to amend the current *Workplace Gender Equality Act 2012* which requires employers with at least 100 employees to provide a report to WGEA across six indicators - including equal remuneration between

women and men. Currently, relevant employers are required to provide a copy of this report to their employees and shareholders. However, up until now, there has been no requirement for companies to make information regarding any gender pay gaps available for public viewing. In fact, there is currently a prohibition on WGEA publishing or using any personal information or information related to remuneration in its public reports, unless it has been consented to by the company.²³

If the Bill is passed, it will mean that from 2024, relevant employers' gender pay gap data will be published on the WGEA website, which will be accessible for public viewing and will enable the public to self-assess an employer's performance and progress in achieving gender pay equity in the workplace.

We will monitor this Bill closely as it progresses through parliament.

KEY DATES: MOVING TOWARDS GENDER EQUALITY

If you have any queries regarding these changes, and the effects they have on your organisation, please do not hesitate to contact us.

FOOTNOTES

¹ *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*, Part 4.

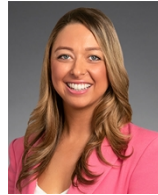
- ² *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth).
- ³ *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*, Parts 8 and 9.
- ⁴ *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*, Part 11.
- ⁵ *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*, Part 7.
- ⁶ *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*, Part 28.
- ⁷ WGEA Report accessible [here](#); Workplace Gender Equality Amendment (Closing the Gender Gap) Bill 2023
- ⁸ *Sex Discrimination Act 1984* (Cth), Part IIA.
- ⁹ *Sex Discrimination Act 1984* (Cth) ss 47B, 47C.
- ¹⁰ *Ibid* s 47C(2).
- ¹¹ *Ibid* s 47C(6).
- ¹² *Anti-Discrimination and Human Rights Legislation (Respect at Work) Bill 2022* (Cth)
- ¹³ *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth), Part 8 and 9.
- ¹⁴ *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*, Part 11.
- ¹⁵ *Fair Work Act 2009*, 333B.
- ¹⁶ *Fair Work Act 2009*, 333B (1).
- ¹⁷ *Fair Work Act 2009*, 333B (2).
- ¹⁸ *Fair Work Act 2009*, 536(2)(d).
- ¹⁹ Fair Work Regulations 2009 - REG 3.47.
- ²⁰ Fair Work Regulations 2009 - REG 3.47.
- ²¹ Fair Work Regulations 2009 - REG 3.48 (2).
- ²² Fair Work Regulations 2009 - REG 3.48 (3).
- ²³ *Workplace Gender Equality Act 2012* (Cth) ss 13C, 14, 15(1).

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