

HR HORRORS

Cilla Robinson, Partner

CLAYTON UTZ

26 October 2022

© Clayton Utz

OVERVIEW OF PRESENTATION

01

Jobs and Skills Summit

02

Post Respect@Work and positive duty

03

Performance Improvement Plans (PIPs)

04

Case studies

05

Questions

1. 2022 JOBS AND SKILLS SUMMIT



Enterprise Bargaining

- Proposed changes for enterprise bargaining in 2022 and 2023
- Multi-employer bargaining
- Details of reforms still unknown



BOOT Changes

- Making the BOOT simple, flexible and fair
- FWC to interpret BOOT in a more flexible manner



Flexibility

- Better access to flexible arrangements and unpaid parental leave
- Policy changes encouraging women to re-enter the workforce
- More funding for TAFE training support

KEY INITIATIVES

A better skilled, better trained workforce

Addressing skills shortages & strengthening the migration system

Boosting job security and wages, and creating safe, fair and productive workplaces

Promoting equal opportunities and reducing barriers to employment

Maximising jobs and opportunities in our industries and communities

FAIR WORK OMBUDSMAN ANNUAL REPORT 2021-22

FWO initiated 137 cases, up 80% from 76 in 2020-21

The FWO recovered \$532 million in 2021-22 for more than 384,000 people

68% of recovered amounts from large corporates resulting from self-disclosures

2. THE CHANGING LANDSCAPE FOLLOWING THE **RESPECT@WORK** REPORT



POSITIVE DUTY MOVING FORWARD



SAFE WORK AUSTRALIA: STEPS TO PREVENT WORKPLACE SEXUAL HARASSMENT



Create a safe physical and online work environment



Create a positive and respectful workplace culture



Provide information and training on preventing sexual harassment



Talk to your workers



Implement safe work systems and procedures

STEPS TO TAKE



Implement workplace policies



Address unwanted or offensive behaviour early



Quickly respond to reports of sexual harassment



Encourage workers to report any sexual harassment

You should provide support, informal, formal, anonymous and/or confidential reporting

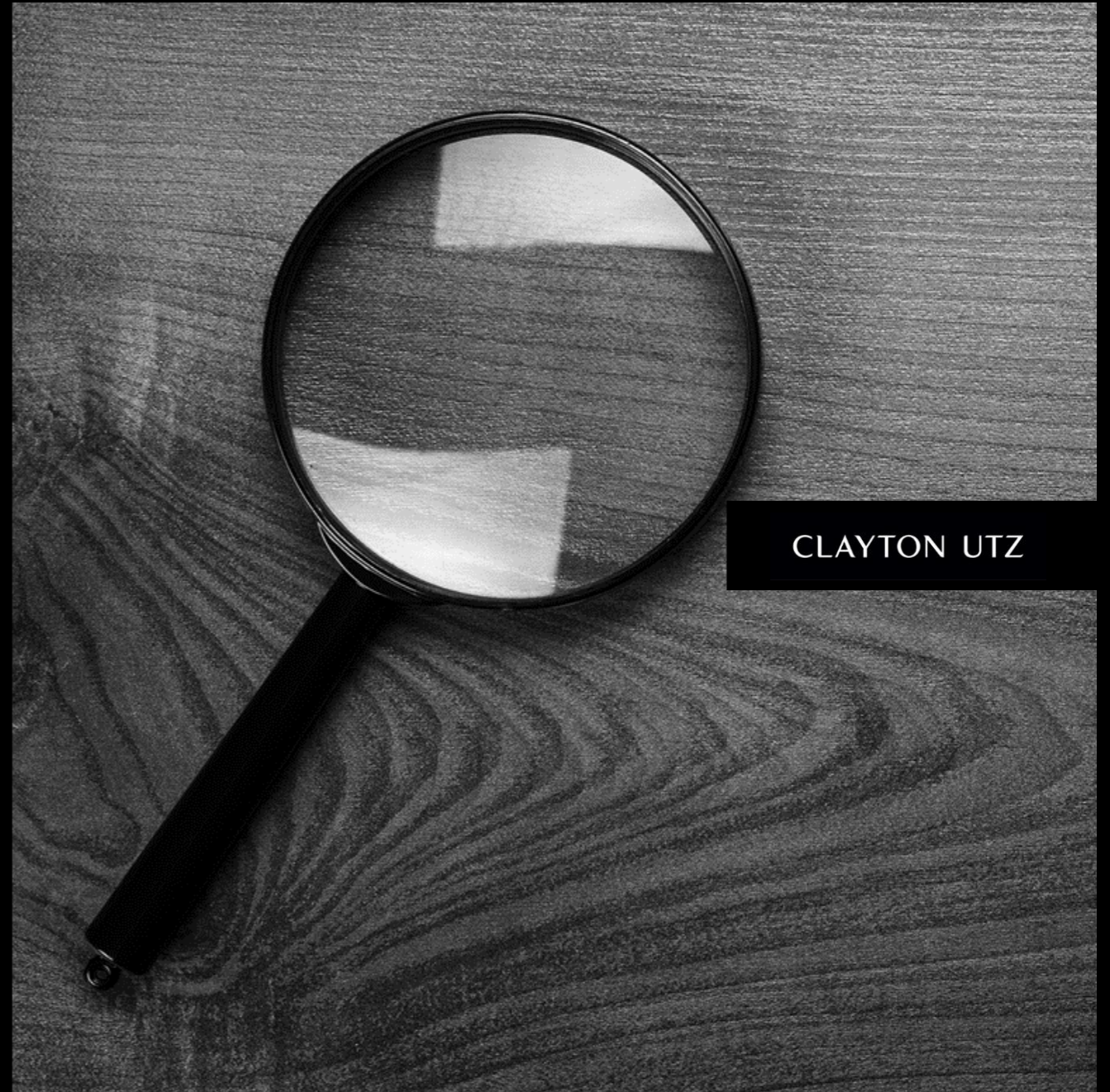
SCENARIO

CEO of Crazy Hats Pty Ltd, Joanna, is notified by HR of a complaint of sexual harassment against a Senior Executive alleging that she was touched inappropriately at a client function. Joanna wants to do something about the complaint, but thinks it best to consult HR and Public Relations for specialised advice

To Joanna's surprise, the Public Relations team advise that the complaint remain confidential to avoid reputational damage and that "*whatever happens, there must be strict confidentiality in place*". HR say that action can only be taken if the complainant consents to an investigation and even then, it would take weeks. Plus, the payout to terminate the Senior Executive's contract would be significant. Joanna decides to note the complaint but not take it any further

What are the risks with this approach?

**3.
HR HORRORS:
PERFORMANCE
IMPROVEMENT PLANS**



CLAYTON UTZ

WHAT ARE YOU DEALING WITH?



Misconduct

Eg failure to comply with law, company policy or management directions

Apply your usual disciplinary process

- eg refusing lawful & reasonable directions to return to the office
- eg not undergoing medical examination or providing medical certificate as required



Performance

Not achieving outcomes or standards required

Apply your usual performance management process

- eg not meeting agreed revenue targets; eg failure to meet work deadlines; eg poor communication with colleagues



Medical Condition

Can't perform usual role due to medical condition and/or COVID-19 vaccination status

Assess fitness for work against inherent requirements of the role

- eg valid medical exemption to receive a COVID-19 vaccination
- eg other physical or mental health illness, injury or condition (work or non work related) that impacts ability to return to the office and/or perform role

EFFECTIVE MANAGEMENT AND SUPERVISION OF WORKERS

Clear reporting lines and oversight

Effective communication channels when working remotely

Regular feedback and performance reviews



Open conversations regarding workplace culture and morale

Address any concerns before they escalate

Have compliant and up-to-date company policies

Consider welfare checks as appropriate

RETURN TO THE OFFICE

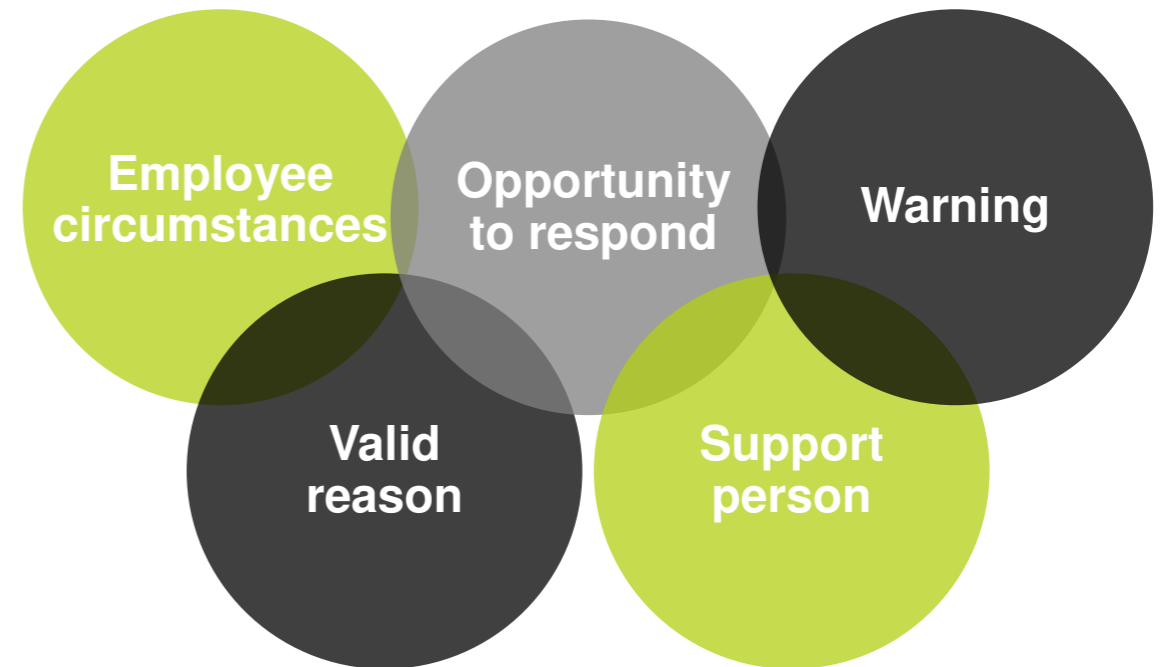
Direction to work in the office must be *lawful* and *reasonable*

When will it be reasonable:

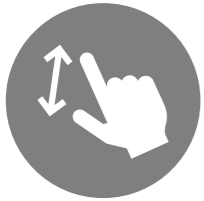
- ▶ What are the person's duties? Do they require face to face contact? What other bases (eg cultural) are there to support face to face contact?
 - ▶ What is the current extent of community transmission of COVID-19?
 - ▶ What is the current company policy regarding COVID-19 vaccinations?
 - ▶ Would there be any difference in performance requirements?
 - ▶ What is the impact on the broader team / resourcing?
 - ▶ Is it a rule of general application or specific?
 - ▶ Is / has the employee made a valid request for flexible working arrangements under the Fair Work Act or do they have a medical contraindication?
-

MANAGING UNDERPERFORMANCE – PERFORMANCE IMPROVEMENT PLANS (PIPS)

- ▶ A process through which an underperforming employee is monitored, supported and given the opportunity to improve
- ▶ Performance management must be **reasonable** and procedural fairness must be afforded to the employee if they have access to the "unfair dismissal" jurisdiction
- ▶ Consider how a PIP should be managed when an employee works remotely and whether in-person supervision is required, how performance concerns can be monitored appropriately and whether any direction to attend the office while on a PIP is reasonable



COMMUNICATION – RAISING PERFORMANCE CONCERNS



Identify performance issues



Identify cause of underperformance



Give employee opportunity to respond



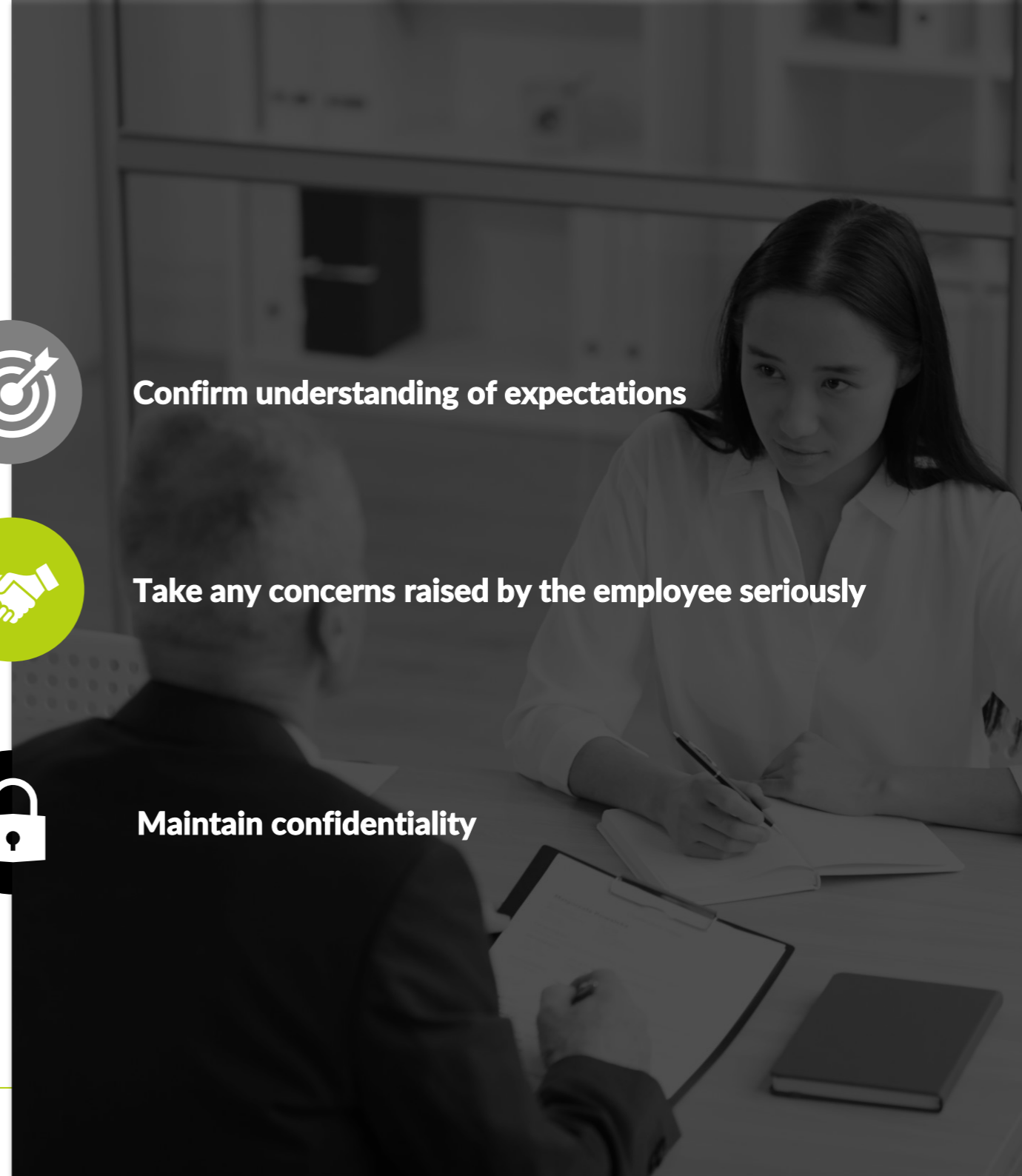
Confirm understanding of expectations



Take any concerns raised by the employee seriously



Maintain confidentiality



CONTENT OF A PIP

A PIP should contain the following information:

- ▶ The **expectations** of the employee and how these relate to their role and responsibilities
- ▶ How the employee's performance will be **monitored**
- ▶ How the **process** will be conducted
- ▶ The **consequences** of failing to meet expectations
- ▶ The **timeframes** for the PIP – what needs to be done by when
- ▶ A PIP should be kept as **simple** and **practical** as possible. This will maximise the chance of an employee complying with the PIP and ensure they understand the process



MANAGING UNDERPERFORMANCE – PERFORMANCE IMPROVEMENT PLANS (PIPS)

McGrath v Waco Kwikform Ltd [2021] FWC 1414

- ▶ The Applicant was spoken to and warned, verbally and in writing, about his poor performance and, in February 2020, placed on a PIP. The Applicant still failed to meet the sales revenue targets set out in the PIP
- ▶ In May 2020, the Applicant lodged a grievance within which they claimed the continuation of the PIP was unreasonable due to COVID-19 and that the targets set within the PIP were unfair as they had not been adjusted to allow for the reduced opportunities due to COVID-19
- ▶ After investigation, the employer considered the PIP had been fair. Following implementation of a second PIP throughout July and August 2020, the Applicant met some elements of the second PIP but failed to meet the sales revenue target. The Applicant's employment was subsequently terminated
- ▶ The Commission held there was a valid reason for dismissal and notably rejected the Applicant's claim his sales had not met targets due to the effect of COVID-19, finding on the evidence that COVID-19 had little effect on the sales of the Applicant's branch

RISKS REGARDING PIPS

- ▶ PIPs can also carry their own **risks** and should be **conducted fairly and consistently** to avoid complications, such as:
 - » Identifying performance issues
 - » Meeting with the employer (and offer a support person)
 - » Providing an action plan in writing and discuss in detail
 - » Monitoring ongoing performance
- ▶ Ensure employment contracts allow for disciplinary action
- ▶ The onus of proof is on the employer to provide evidence for the reason for a dismissal – record keeping is key

Example: *Moretti v HJ Heinz Co Australia Ltd* [2012] FWA 1016: using performance management as an attempt to "manage out" employees: Moretti was told to resign before being entered into a PIP, refused to sign PIP as a result and was later dismissed



4. CASE STUDY – Genuine Redundancy?

Shari Leanne O'Neill v Kristie Bates T/A World Class Hounds [2022] FWC 1350

Case Facts:

- O'Neill was employed by 'World Class Hounds' from May 2020 – February 2022 when she was made 'redundant'
- Weeks after her dismissal, O'Neill received an email from her employer alleging that her redundancy was due to:
 - Ongoing complaints from staff
 - O'Neill's refusal to manage issues and perform expected duties
 - Behavioural issues
- O'Neill was granted an extension of time to make an unfair dismissal claim despite the 21 day time limit being up

KEY TAKEAWAY

“

*"...it appears that 'redundancy' was relied upon to **gloss over** or **avoid having to deal with performance and conduct concerns** in relation to Ms O'Neill. Further, if consultation was required in relation to the redundancy, it **does not appear to have occurred...**"*

Commissioner McKinnon at [13] (emphasis added)

”



Leggett v Hawkesbury Race Club Limited (No 3) [2021] FCA 1658

"In my opinion, the Club's conduct, through Mr Rudolph, effectively destroyed Mrs Leggett's life. She cannot work and, as the joint experts agreed, is permanently incapacitated from doing so because of Mr Rudolph's and the Club's conduct. That conduct caused a very serious psychiatric illness that may never be cured, or ameliorated to any significant degree."

Justice Rares at [218]

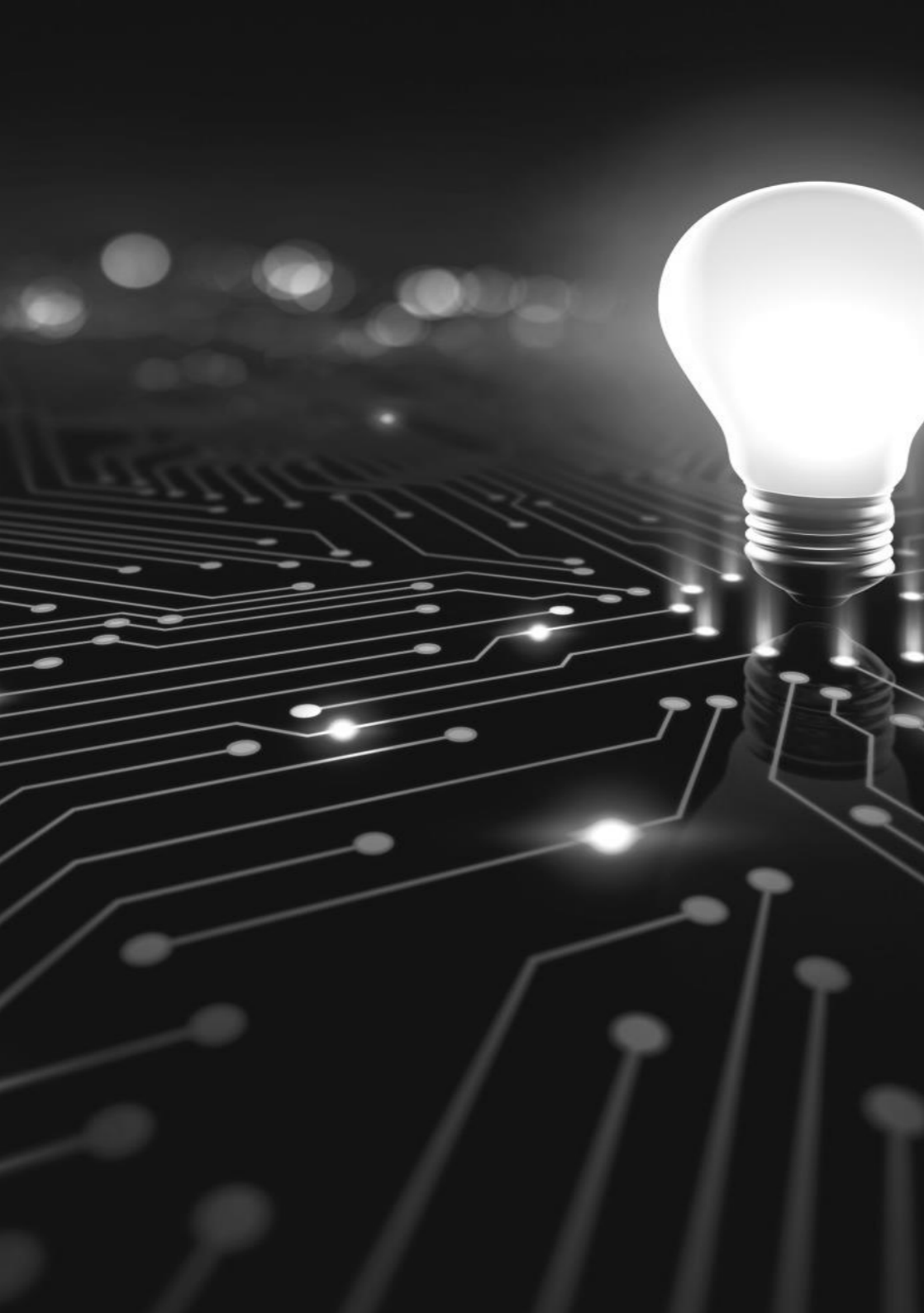
KEY TAKEAWAYS

-  Workplace Bullying
-  Employee claims
-  Investigating complaints
-  Sexual Harassment

Take these seriously!

5. QUESTIONS?





GET IN TOUCH



Cilla Robinson, Partner



(02) 9353 4624



0400 100 557



crobinson@claytonutz.com

www.claytonutz.com

Disclaimer

Clayton Utz communications are intended to provide commentary and general information. They should not be relied upon as legal advice. Formal legal advice should be sought in particular transactions or on matters of interest arising from this communication. Persons listed may not be admitted in all States and Territories.