

Workplace Watch

Insights for WHS and employment professionals

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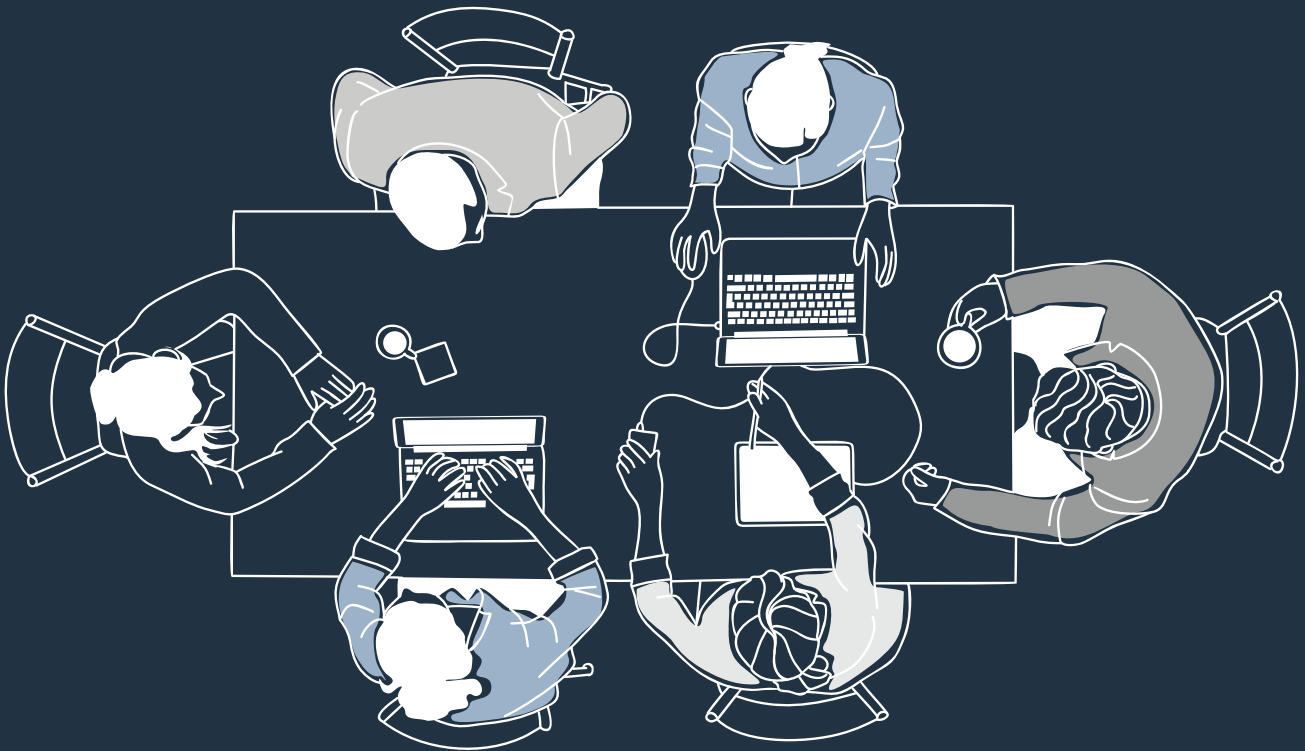
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INTRODUCTION



Catherine Wilkinson

National Practice Group Leader
Workplace

Welcome to the second edition of **Workplace Watch**, where we provide concise and insightful updates on the evolving landscape of employment and work, health and safety law.

The past six months, since the launch of our inaugural edition of [Workplace Watch](#), has seen the labour market impacted by pressures on the cost of living and global uncertainty. Job vacancies remain well above pre-pandemic levels in health, education, construction, logistics, and professional services, while underemployment has begun to rise as employers moderate hiring and hours of work. This is shaping WHS outcomes: sectors with persistent labour shortages and high turnover are also those recording the highest rates of serious injuries and psychological harm.



Psychosocial risk continues to dominate the WHS landscape. Rising job demands, fatigue, reduced supervision, and increased reliance on inexperienced workers are contributing to sustained growth in mental health-related workers' compensation claims. Regulators have responded with more assertive enforcement, focusing on organisational systems and employment practices.



Employers are often now faced with increasing agitation in the workplace and the number of grievances and complaints arising from workplace interactions is continuing to grow. A timely and thought response is needed and in this edition we explore best practice for investigations.



AI is emerging as both an opportunity and a new source of WHS and employment risk. Automation and AI-enabled decision-making may ease administrative load and reduce exposure to some physical hazards, but also introduce risks related to job redesign, surveillance, workload intensification, and the psychological impact of rapid technological change. Regulators are beginning to consider how AI-driven systems fit within existing WHS duties.

Overall, the outlook is one of rising complexity: a labour force under pressure, a workforce facing evolving risks, and a WHS environment increasingly focused on the link between employment practices, technology, and worker wellbeing.

We hope you find this edition informative and thought-provoking as you navigate the shifting landscape of workplace law. If there are future topics you would like to see covered, please do not hesitate to contact me.

THE EVOLVING INFLUENCE OF AI ON THE EMPLOYMENT RELATIONSHIP - A HELPFUL TOOL OR RELATIONSHIP DISRUPTER?

Authors: Thea Price (Partner) and
Anna Stubbersfield (Associate)

The workplace has undoubtedly been reshaped by artificial intelligence (AI) as we witness it transform both the employment relationship and the labour market landscape. With AI tools capable of being trained to wholly perform certain jobs, position descriptions are regularly being revisited alongside organisational and industry wide restructures (as illuminated by the job cuts in the technology industry alone).

AI is also influencing how people are navigating the employment relationship itself from job design and related recruitment decisions to workplace dispute resolution, so much so that the likes of the Fair Work Commission (FWC) altered how it processes employment claims in its jurisdiction. In this article we discuss the transformative impact of AI on workplaces and our key takeaways for business leaders.

In a 2025 global study conducted by a research team at the University of Melbourne,¹ it was found that 58% of employees regularly use AI tools for work. However, various concerning statistics were discovered, including:

- 44% of employees admitting to using AI in ways that contravene organisational policies
- 66% of employees reporting reliance on AI output without evaluating the information it provides
- 56% of employees saying they had made mistakes in their work due to AI, and
- 66% of employees saying they felt they could not complete their work without assistance from AI.

Considering these statistics, it is unsurprising that the likes of the FWC has seen a significant disruption to its operations resulting from the widespread availability of AI. In a February 2026 presentation delivered by Justice Adam Hatcher, President of the FWC,² the President noted that the approximately 31,000 claims the FWC saw in the 2022-2023 period has steadily increased and is anticipated to rise to up to approximately 55,000 claims in the 2025-2026 period, coinciding with the increased widespread use of AI-generated language in the applications being filed with the FWC.

In response to the AI-driven impact on the FWC, the President explained that the FWC has, and intends to, implement various reforms, including:

- 1 Embedding specific wording in all forms to include a requirement that a disclosure be made if generative AI has been used in completing the form (and embedding similar wording in witness statement templates, including a warning that a witness commits an offence if they have sworn or affirmed evidence that is false or misleading).
- 2 Amending application and response forms to require a more rigorous articulation of the Applicant's case and any jurisdictional objections by the Respondent.

1. [Trust, attitudes and use of artificial intelligence](#)

2. [A disrupted future: Artificial and the Fair Work Commission intelligence](#)

The heightened scrutiny of AI taken by the FWC was on full display in a recent 2026 general protections case,³ where it went so far as to invite a costs application (which are rare in the FWC) from the Respondent due to the Applicant's use of AI in preparing his submissions. In this case, the Applicant consistently relied on provisions of his employment agreement and a relevant modern award that did not exist, despite warning from the FWC to not provide false or misleading evidence.

There are also examples of cases in the FWC where the use of AI during the employment relationship has had significant consequences, including:


- 1 In a general protections dispute involving a dismissal,⁴ the Respondent employer using ChatGPT during a period of frustration to draft a letter to the Applicant employee that the employer intended to use to confirm the employee had abandoned his employment. However, the FWC determined that the letter constituted a dismissal at the employer's initiative, allowing the employee to proceed with his application.
- 2 In a recent unfair dismissal dispute,⁵ the FWC was highly critical of the Applicant employee's use of AI in communicating with the Respondent employer. The FWC commented that the employee's AI-produced communications were needlessly detailed, combative, demanding, rambling and generally inappropriate in a workplace setting.

The research and our own experience illustrate that with the uptake of AI in the workplace it is critical for businesses to implement clear governance structures on managing the ethical use of AI to guide not only its responsible use as a tool but also offer transparency on how it will instruct business decisions made by leaders.

Key takeaways

The adoption of AI as a business tool is moving beyond task or analytical productivity benefits and directly influencing how conversations are held by employers and employees about all aspects of the employment relationship, from job design, performance management, career progression, handling grievances and the pathways for resolution that are activated.

With AI here to stay, businesses are encouraged to:

-  Update existing policies or develop new policies to provide clear governance frameworks on the appropriate use of AI in the workplace, including circumstances an employer may rely on AI as a tool to instruct employment processes or decisions and conversely when it may require an employee to disclose their use of AI.
-  Train employees and leaders on AI literacy, especially as it relates to managing the ethics and risks of the use AI such as data privacy.
-  Ensure key business decisions (including those relating to critical employment matters such as recruitment and dismissal decisions) are made by humans, and subject to external legal review where necessary.

Adopting these key recommendations will serve to temper the role of AI as both a tool and disrupter to the employment relationship and labour market, particularly as we can expect AI technology to continue to evolve for some time yet.



Disclaimer

This article has been drafted without the use of AI by Thea Price, Partner and Anna Stubbersfield, Associate.

3. *Reece Hoverd v M & J D Pty. Ltd.* [2026] FWC 1013
 4. *Daniel O'Hurley v Cornerstone Legal Wa Pty Ltd* [2024] FWC 1776
 5. *Mr Marcus Wibmer v Fujifilm Data Management Solutions Pty Ltd* [2026] FWC 835

'CLOSING LOOPHOLES' AMENDMENTS: A REVIEW IN PROGRESS

Author: Felicity Edwards (Partner)

In late 2023 and early 2024, the 'Closing Loopholes' amendments were enacted. These laws were said to fix deficiencies in our industrial relations legislation which were negatively affecting Australian employees. Built into that legislation was a mandatory requirement that a review be conducted after a period of time.

What changes were made?

The Closing Loopholes legislation introduced a raft of amendments to the *Fair Work Act 2009* (**Fair Work Act**) which were said to be intended to strengthen employee and union rights, and close gaps in the legislation which were purportedly being, or had the potential to be, exploited.

Wage theft

One of the most significant amendments was the introduction of a criminal offence for the intentional underpayment of employee's wages and certain entitlements, including superannuation contributions with penalties now imposed against employers and certain individuals. These penalties include a maximum of 10 years' imprisonment and/or a fine, being the greater of:

three times the amount of the underpayment, or

for an individual, up to \$1,565,000, or for a body corporate \$7,825,000.

Gig economy workers

One of the issues the current Government sought to address through the reforms was the rise of the gig economy, and the lack of protections for those workers under the Fair Work Act.

The amendments provide the Fair Work Commission with the ability to set minimum employment standards for 'employee-like' workers who work for, or through, a digital labour platform. An employee-like worker is someone who can satisfy at least two of the following conditions:



Low bargaining power



Low authority over the performance at work



Receives remuneration at, or below, the rate of employees performing comparable work

While the Commission has broad discretion to determine which terms and conditions to set as minimum standards, certain terms such as penalty rates and minimum periods of engagement, can only be included where it is appropriate for the type of work performed.


Casual employee


The Closing Loopholes legislation also amended the definition of casual employee to state that an employee is only casual if:


- a. there is no firm advance commitment to continuing and indefinite work, and
- b. they are entitled to a casual loading or a specific rate of pay for casuals under a Fair Work instrument or their employment contract.


Other changes


Other changes included:

- 

a. Enhancing the rights of workplace delegates to grant reasonable access to communicate with members and potential members about industrial relations matters.
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b. Introducing a general protection for workplace delegates carrying out their role and preventing an employer from unreasonably refusing to deal with them or otherwise hindering the exercise of their rights as delegates.
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c. Introducing being subject to family and domestic violence as a protected attribute, preventing an employer from taking adverse action and/or discriminating against someone on this ground.
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d. Allowing employees, unions and host employers to apply to the Fair Work Commission for an order requiring that labour hire workers are paid the same as they would receive from the enterprise agreement covering the host employer.
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e. A right to disconnect, meaning an employee cannot be required to monitor, read or respond to their employment outside of their usual contracted hours.



The review

The Minister has now caused a review to be conducted. The purpose of the review is to:

- Consider whether the changes were “appropriate and effective”.
- Identify any unintended consequences of the changes.
- Consider whether any further amendments are necessary to improve the operation of the Fair Work Act of rectify any unintended consequences of the Loophole Acts.

Stakeholder submissions on the review have now closed.

Generally speaking, many of the submissions acknowledged that the issues that the reforms were seeking to address needed to be remedied. However, a number of submissions were made by employers and industry bodies raising concerns about how the reforms were operating in practice, including:



Compliance Concerns: Many industry-specific bodies raised concerns about taking a one-size fits all approach to industrial relations and applying that to all workplaces and industries across Australia, noting that the various complexities of certain industries made the changes unworkable and rigid.



Affordability: Submissions were made about the increased cost businesses have faced because of the reforms, particularly in relation to the requirement to pay labour-hire staff the same rates as employees otherwise performing the work.



Uncertainty: Changes to the definition of a casual employee are said to have created ambiguity and uncertainty, which risks undermining legitimate employment practices or contractor arrangements, and may dissuade employers from taking on casual staff.



Operational friction: Concerns have been raised about the operation of the right to disconnect, particularly in industries which require employees to be available to receive and respond to information at short notice, and outside of work hours where there are operational reasons to do so (such as for weather-dependent work or unexpected incidents).



Disproportionate impact: Employers have raised concerns about the disproportionality the reforms have had on certain industries and/or small employers. For example where expanded delegate rights disproportionately affect employers with historically low union density or small employers without sophisticated HR or ER teams.

The preliminary findings and draft recommendations are due to the Minister by 15 May 2026, and many employers and industry bodies will be hoping to see proposals for further reforms to address the concerns which have been raised.

PAYDAY SUPERANNUATION REFORM: WHAT DO EMPLOYERS NEED TO KNOW?

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*Authors: Peter Charteris (Partner) and
 Seamus Burke (Partner)*

In short

The Federal Government has amended the superannuation guarantee legislation so that superannuation is payable by reference to paydays rather than quarterly. These changes commence on 1 July 2026.

The superannuation guarantee amount remains calculated at 12% of the 'qualified earnings', a new term which replaces 'ordinary time earnings'.

To avoid liability to the superannuation guarantee and penalties, an employer must make sufficient eligible contributions within the required time.

The details

From 1 July 2026, employers will have a superannuation liability each time an employee is paid qualifying earnings (QE). To avoid liability to the superannuation guarantee and penalties, an employer must make sufficient eligible contributions within the required time.

QE is a new term which replaces 'ordinary time earnings' and includes payments that are part of the current ordinary time earnings base.

An eligible contribution is a contribution that is not only made by the employer, but the trustee is also able to allocate it within the fund for the benefit of the employee.

The superannuation guarantee amount is calculated at 12% of the QE paid on the 'QE day', this being the day when an employer makes a payment of QE to the employee.

The eligible contribution must be received by the fund within the 'standard periods', the main periods being:

- 1 the 'usual period', this being the period within seven business days after the employee's QE day, or
- 2 up to 12 months in advance.

The superannuation guarantee charge (SGC) is imposed on an employer's superannuation guarantee shortfall for a QE day. An employer will have a superannuation guarantee shortfall if it has one or more (individual) superannuation guarantee shortfalls. The employer will have an individual superannuation guarantee shortfall if the superannuation contributions for the QE day made during the standard period are less than the individual superannuation guarantee amount for the employee for the QE day. The superannuation guarantee shortfall is the total of the individual final superannuation guarantee shortfalls for the QE day, plus the total of the individual notional earnings, the administrative uplift and any choice loadings.

Unlike the current legislation, the superannuation guarantee shortfall can be reduced by eligible contributions made in the 'late period'.

Change in the way contributions and penalties applied

As well as on time contributions, eligible late contributions are tax deductible. The SGC, which includes notional earnings, are now tax deductible although penalties are not deductible. Penalties include the general interest charge (**GIC**) and assessment penalties.

There is also a new penalty regime. There is an administrative uplift, which is $60\% \times$ total individual final superannuation guarantee shortfalls. This is subject to reduction in the Regulations, which are yet to be released at the time of this article.

The exposure draft regulations provided as follows:

1

there is a reduction of 20% when an employer does not have an ATO initiated assessment in the previous 24 months, and lodges a voluntary disclosure statement, and

2

there is a reduction of up to 40% when an employer lodges a voluntary disclosure statement regardless of whether the employer has an ATO initiated assessment in the previous 24 months, so long as there is no ATO initiated assessment for the amounts in question.

Where an employer meets the criteria these reductions in penalties are cumulative.

Notices to pay can be issued if the SGC is unpaid the day after the 28 day period that started on the day the charge became payable. This can be amounts of the SGC assessed on the superannuation guarantee shortfall and the GIC. The Notice must specify a date for payment ending 28 days after the day specified in the Notice, and if any amount is unpaid on the day specified in the Notice an assessment is to be issued. The assessment will include penalties for failing to pay in accordance with the Notice. There is a sliding scale depending on whether it is a first Notice in the last 24 month or not. If a Notice was issued within 24 months, the penalty is 50%, and otherwise the penalty is 25%. However, the penalty is nil if exceptional circumstances exist.

Every employer will need to understand the consequences of the changes, especially where contributions are returned because they are not able to be allocated as required.





Maximum contribution base - This is to be applied on an annual basis rather than quarterly.



Defined benefits - The provisions that apply to defined benefit members who are unable to choose a fund remain unchanged.



Fund choice - The penalty cap for failure to comply with fund choice increases from \$500 per quarter to \$1,200 per payday.



Change in penalty - Prior to these changes, the superannuation guarantee (which includes notional earnings) was not deductible. Non deductibility of tax penalties does not change.

The new approach is to encourage payment before assessment issues. Once payment is late, there is an automatic increase in the amount payable. The shortfall includes notional earnings on the base amount, regardless of the amount outstanding from time to time, plus the administrative uplift.

In the case of late payment, if an employer does not want to wait for a Notice from the Commissioner, the employer will need to calculate the administrative uplift to work out the amount to pay to stop the notional earnings accruing, as well as calculating the notional earnings. There will be a need for calculation tables to assist in this calculation.



Transitional issues - The first quarter in financial year 2027 will have the old obligation for the last quarter of 2026, and the first paydays of 2027. Contributions may exceed the concessional contribution cap because of the double up. This has not been addressed in the legislation.



New timeframes for trustees handing employer contributions – draft Regulations -

The trustee must validate the new member information in two business days (down from three). If validation fails, the funds have two business days (down from five) to request the information. Contributions that cannot be allocated must be refunded within three business days. Funds must allocate within five business days.

Under the current legislation, the trustee has 30 days, which is usually enough time to correct errors without having to refund contributions.

If contributions cannot be allocated in three business days of the request of the information, the contributions must be refunded.

Amounts refunded are deemed not to have been contributed. This puts the employer in breach unless they can be recontributed and allocated within seven business days of the payday, noting this is a highly unlikely timeframe.

Final takeaways for employers

The updated superannuation guarantee legislation leaves employers with far less room for delay or error. More frequent payments and stricter oversight mean breaches will be identified sooner and penalised more heavily. Acting now – by tightening systems and processes – is the simplest way to stay compliant.

Remember:

1

The superannuation guarantee (which includes notional earnings) is now deductible. Non deductibility of tax penalties does not change.

2

The new approach where payment of superannuation contributions has not been made on time is to encourage employers, on becoming aware of the failure to pay on time, to make payment of the contribution and any shortfall amounts calculated in accordance with shortfall regime and make the disclosure to the Commissioner before an assessment is issued.

3

Underpayment can result in a cascading list of penalties. Where there is an underpayment and this is not corrected, each payment intended to comply with a payday will instead be applied to the underpayment thereby putting the employer in breach of the payment obligation for the intended payday and so attracting additional penalties.

4

In the case of late payment, if the employer does not want to wait for a Commissioner payment Notice, the employer will need to calculate the administrative uplift to work out the amount to pay to stop the notional earnings accruing. There will be a need for calculation tables to assist in this calculation.

5

It is important to note that the contribution must be received by the fund within the standard period as defined. It is not sufficient that it is paid to a clearing house in this timeframe. In addition it must be able to be allocated by the fund. Rejected contributions will require action.

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Please note

This article does not constitute legal advice and should not be relied upon as such. Formal legal advice should be sought in particular matters.

HOW TO CONDUCT WORKPLACE INVESTIGATIONS: A FIVE-STEP PLAN

Author: Seamus Burke (Partner)

There is a five-step plan we suggest to promote an accurate, reliable and procedurally fair workplace investigation.

Assessment

The first step arises following the receipt of a complaint. When this occurs, an employer should always acknowledge receipt of the complaint and ensure support, such as EAP, is offered to the complainant.

The organisation should then conduct an initial assessment of the grievance to determine the severity of the issues raised. The primary purpose of this assessment is to determine whether conducting an investigation is a necessary and proportionate response to the grievance.

Complaints can generally be categorised into three levels:

- a low-level grievance that can be informally managed;
- a mid-level grievance that could be informally mediated or may warrant a disciplinary response but likely not an investigation; and
- a formal grievance or a complaint that should be formally investigated.

At the initial assessment stage, consideration must be had to the organisation's policies and procedures in relation to workplace grievances and formal investigations to ensure these are followed. However, adopting a trauma-informed approach, being flexible and making reasonable adjustments where appropriate can also be important.

If the assessment results in a conclusion that an investigation is warranted, the context, severity, potential implications of the grievance, and whether the organisation has the resources to conduct an investigation, should inform a decision as to whether it should be conducted internally or externally.

1

Key point

Not every complaint needs to be investigated, but where an investigation is warranted, it must be conducted fairly to ensure a reliable outcome.



Allegations

2

The second step deals with the scope of an investigation, and in this regard the allegations are arguably the most important part of an investigation. Put simply, the allegations set out the 'who', 'what', 'when', and 'where' details that support the grievance.

Allegations should be provided to the respondent in clear and unambiguous language, with as much detail as is available from the grievance. They should be free from emotion and subjectivity.

Where the alleged conduct could potentially result in a breach of an organisation's policy or procedures, the specific section that the conduct may be a breach of should be set out.

Key point

Focus on the 'who', 'what', 'when', 'where' facts – and establish clear objective allegations that directly link to the relevant policy.

Evidence

3

Evidence in workplace investigations is usually direct evidence from a complainant, respondent and relevant witnesses. It can also include documentary evidence such as emails, text messages.

Participants to an investigation should understand and agree to the format in which they will provide their information, how that will be recorded and stored, and whether they will be provided with copies. The need for confidentiality should be explained and maintained throughout the course of the investigation.

All participants should be given the opportunity to have an appropriate support person present for any interviews conducted, and the support person must also agree to the confidentiality provisions being imposed by the employer.

Key point

As this is each investigation participant's chance to be heard in relation to the alleged conduct, remember to ask open ended questions and remain neutral and objective.

INVESTIGATION

Findings

Findings should be made firstly in relation to the factual circumstances, and then secondly in relation to the breach / misconduct alleged.

In order to determine whether the facts set out in the allegations have been substantiated, the civil standard of proof, namely the 'balance of probabilities', is generally applied as the appropriate standard of proof. Meeting this standard involves a comparison of disputed facts to determine what is more likely to have occurred. A fact is proved to be true, on the balance of probabilities, if its existence is more probable than not.

The seriousness of the allegations made, the inherent unlikelihood of an occurrence of an incident or a given description, or the gravity of the consequences flowing from a particular finding, are all relevant to assessing whether this standard has been met. This is referred to as the *Briginshaw* standard.

4

Key point

A fact is proved to be true, on the balance of probabilities, if its existence is more probable than not.

Communication

Once findings have been made, these should be communicated to the decision maker. This is usually someone external to the investigation who reviews the investigation report prepared and considers the appropriate outcomes.

All participants to the investigation should be notified of its conclusion.

Details of any disciplinary action taken against a respondent as a result of the investigation would generally not be communicated to the complainant.

It is also important as an organisation to support participants to an investigation to move forward post-investigation. This may involve facilitated meetings to reset relationships, restructuring reporting lines, setting communication guidelines etc.

5

Key point

The investigation report should generally not be provided to participants. However, communication of outcomes of the investigation should be done in a sensitive and timely manner.

ENTERPRISE BARGAINING - BEGIN 'WITH THE END IN MIND'

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Author: Kim Hodge (Partner)
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A common query we receive from employers is how long will it take to create, or renew, an enterprise agreement?

The answer involves a number of considerations and depends on the resourcing and experience already existing within an organisation. We find the best outcomes are achieved quickly when preparation begins early and there has been a focus 'with the end in mind'. This article discusses the key considerations for employers facing the prospect of creating, or renewing, an enterprise agreement.

To facilitate a successful enterprise agreement, we advise clients to focus on a five-stage process.

1

Stage 1 – Pre-bargaining

Employers need to consider what works and doesn't work in their current industrial arrangements. What direction is the business going? What outcomes are achievable and financially sustainable? What are the thoughts and opinions of key stakeholders? What is needed regarding the scope and application of the proposed agreement and is there a guiding principle or strategy that needs to be formulated?

2

Stage 2 – The bargaining process

Assuming the employer has agreed to bargain then the *Fair Work Act 2009* prescribes a series of rules, timeframes and behavioural requirements that the parties need to adhere to.

The best results in this stage (e.g. a successful and early 'yes' vote) are achieved based a strong foundation established from stage 1. That is, a well-developed strategy, an understanding of the end state and clear communications with employees and bargaining representatives.

The worst results occur (e.g. protected industrial action) when the employer has not considered critical issues is ill prepared to respond to claims and has poor or confusing communications.

3

Stage 3 – Access period and voting

We find this can often be the most technically complicated and intense stage of negotiations. In this stage, the onus rests on the employer to prepare a range of explanatory materials and information for eligible employees to consider. This can be challenging when a remote and diverse workforce has limited access to computer terminals. Further, employees must have seven clear days to consider the materials before being asked to cast their vote.

1. s. 188 *Fair Work Act 2009*

4

Stage 4 – Voting

This stage relies on the hard work undertaken in stage 3.

Unlike our compulsory Parliamentary voting system in Australia, the successful vote for an enterprise agreement does not stand on the mere majority of affirmative votes! The Fair Work Commission must determine whether it is satisfied that an enterprise agreement has been **genuinely agreed** to by the employees covered by the agreement. Imagine if a similar power existed within the Australian Electoral Commission.

This means, amongst many other things, that the Fair Work Commission must be satisfied employees covered by the agreement were given sufficient information about the agreement before casting their vote.

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An approved agreement

The time taken for the Fair Work Commission to approve an agreement can vary but will ultimately be dependent upon a number of factors outside of the employers control including:

- the FWC member that is allocated the matter
- the FWC's requirements for undertakings to be provided
- if the application is contested by a union, and
- if a hearing on the application is required.

The entire five-stage process is rarely ever finalised in less than 6-9 months. However, in reality it is possible to achieve an outcome sooner than this, when employer preparations begin early with a clear focus on the desired end result.

5

Stage 5 – Determination and approval

Whilst the 'cut and thrust' of good faith bargaining in Stage 2 can be demanding and at times challenging, we find the demands of the Fair Work Commission in Stage 5 can be equally challenging. The Fair Work Commission requires the employer to provide detailed explanations as to how and why employees will be 'better off overall' under the proposed new agreement. Given this material needs to be filed within 14 days from when the agreement is successfully voted upon – time becomes of the essence!

INTERPRETING MODERN AWARDS

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*Authors: Ben Burke (Partner) and
Levin Reece (Senior Associate)*
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Two recent judgments from the Full Federal Court highlight the complexity of the modern award system and the difficulties many stakeholders have interpreting modern awards.



Fair Work Ombudsman v Torrens University Australia Limited [2026] FCAFC 17 concerned an application for review of a compliance notice issued by a Fair Work Inspector. The compliance notice identified alleged contraventions of the Higher Education Award relating to a 'marking' allowance for casual sessional lecturers.

At first instance, the Federal Court found that the compliance notice should be cancelled because the Inspector who issued the notice did not have a reasonable belief regarding the marking allowance contraventions. The Court found that the Inspector's interpretation of the marking allowance was incorrect. The Court agreed with Torrens University's interpretation that marking was captured by an 'associated working time' allowance under the award in the circumstances where the marking related to a lecture delivered by the casual lecturer.

On appeal, the Full Court unanimously overturned the decision. The Full Court's view, to put it simply, was that because there was a separate allowance for marking under the award, the marking allowance applied to the marking. The Full Court stated that the interpretation of the award needed to consider the entire industry, not only Torrens University's circumstances. Torrens University has sought special leave to appeal this judgment to the High Court.



Fair Work Ombudsman v Jats Joint Pty Ltd [2026] FCAFC 25 also concerned an application for a review of a compliance notice issued by a Fair Work Inspector. The compliance notice identified alleged contraventions of the Social, Community, Home Care and Disability Services Award relating to a night shift allowance in circumstances where a 'sleepover' had occurred.

At first instance, the Federal Court found that the compliance notice should be cancelled because the Inspector who issued the notice incorrectly believed that a sleepover constituted part of a 'shift' and that Jats Joint was required to pay a night shift allowance in certain circumstances when a sleepover occurred.

The Fair Work Ombudsman appealed to the Full Federal Court, which unanimously upheld the first instance judgment for similar reasons. Essentially, the Court held that a sleepover was a form of 'break' in between shifts rather than part of a continuous shift.

The direct implications of these judgments are generally isolated to the higher education and care industries, but the judgements show the difficulties that all stakeholders face when interpreting modern awards. In both cases, the Fair Work Ombudsman, a court and the relevant employer were all found to have misinterpreted a modern award.

When an employer is concerned it may not understand a provision of a modern award which applies to their workforce, the employer should seek advice to minimise the risk of inadvertently breaching the award and subsequently facing legal proceedings. This is particularly so when an allowance under a modern award may apply to a significant number of employees and shifts.

LANDMARK SOUTH AUSTRALIAN DECISION OFFERS COMFORT FOR COMMUNITY CLUBS

Author: Luke Holland (Partner)

A recent significant decision by the South Australian Employment Tribunal, *Farrell v Mackay* [2025] SAET 130 (*Mackay*), has provided comfort for community sporting clubs across South Australia. Had the decision been different, it had the potential to discourage the community clubs' use of volunteers – both in South Australia and around the country.

In the *Mackay* decision, His Honour Deputy President Judge Calligeros was asked to determine if a 150-game veteran footballer was able to be prosecuted as a worker following an incident involving kitchen equipment at the local country Football Club.

His Honour determined that the Club involved in this case was not a 'person conducting a business or undertaking' (PCBU) within the meaning of s 5 of the *Work Health and Safety Act 2012* (WHS Act) and accordingly, the footballer could not be prosecuted as a worker.

The case



Mr Quinn Mackay is a senior country football player and a volunteer member of the Hummocks Watchman Eagles Football Club (the **Club**), which is part of the Adelaide Plains Football League.



On 15 September 2022, Mr Mackay in his capacity as a volunteer was mowing grass at the Port Wakefield oval. On the day, another volunteer asked Mr Mackay for his help in moving the club's gas powered deep-fryer. Relevantly, Mr Mackay was a qualified gas fitter who held a restricted gas fitting registration. Mr Mackay assisted with moving the deep-fryer and in doing so, allegedly failed to cap the gas hose assembly after moving the equipment. Some weeks later, the deep-fryer was being used in its new location by people who had hired the Club premises when there was an explosion.



Mr Mackay was prosecuted by SafeWork SA, which argued the Club was 'not a volunteer association within the meaning of the WHS Act because it employs persons, and did employ persons on 15 September 2022'. In making this argument, the regulator relied on the Club's payments to the A-grade coach, trainer and some players, as well as two canteen managers and submitted these 'had the character of payments made to employees'.



Evidence provided in support of Mr Mackay's case highlighted that the contracts by which some of the players were engaged indicated that their involvement with the Club was a hobby or pastime and they do not rely on the payments made for regular personal income. In December 2025, Judge Calligeros dismissed the prosecution as the regulator had 'failed to establish beyond reasonable doubt that the Club was a PCBU'. Among his findings, Judge Calligeros held: 'The contract between the Club and its players and coaches is not a contract of employment and there was no written contract of employment between any person and the Club ...'.



Sparke Helmore successfully acted for the respondent in this matter.

Valuable insights for community clubs

There are a number of insights that volunteer-run clubs can take from the decision:

- 1 Understand whether your community club is a volunteer organisation or a PCBU.
- 2 Be aware of the scope of your safety duty and who it may apply to.
- 3 It is important to ensure that club volunteers are actually volunteers and not performing paid work outside the scope of being a volunteer.

While this decision upheld the voluntary nature of the specific association involved, it should not be interpreted as a blanket rule. Cases turn on their specific facts and circumstances, and it can be beneficial to seek advice from a safety law expert in such situations.

[Farrell v Mackay \[2025\] SAET 130 \(4 December 2025\)](#)



Key contacts

To find out about the ways that we can help you, please contact a member of our Workplace team.



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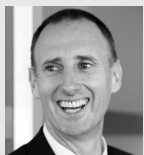
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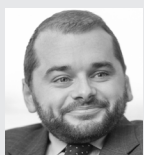
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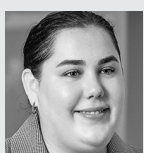
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