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Workplace Watch

Insights for WHS and employment professionals

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IN THIS ISSUE

INTRODUCTION

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

Australia's workplace laws have undergone sweeping changes over the past year, reshaping the responsibilities and risks faced by employers. Wage theft is now a criminal offence, employees now have a legal right to disconnect outside of working hours, and employers must focus on eliminating psychosocial hazards in the workplace. Fixed-term contracts are under tighter regulation and labour hire workers are entitled to equal pay under the 'Same Job, Same Pay' laws. Discrimination protections have been expanded and there is growing scrutiny around the use of artificial intelligence in workplace decision-making. Claims related to unfair dismissal and psychological injuries are on the rise, influenced by shifting cultural expectations and the complexities of hybrid work.

For employers, the compliance landscape is becoming increasingly challenging. Upcoming reforms – such as limitations on non-compete clauses and expanded leave entitlements – are likely to increase costs and necessitate substantial policy overhauls. All of this is unfolding within a fragmented regulatory environment, where the overlap between federal and state or territory legislation makes it more difficult than ever to stay compliant.

Our feature article is an interview with the Hon. Sophie Cotsis, MP, the NSW Minister for Industrial Relations and Workplace Health and Safety. The Minister discusses the goals of recent legislative changes to WHS laws and provides some personal insights into why she is so passionate about her role.

Other topics we explore in this issue include:

- Key considerations when an employee makes an unfair dismissal claim alongside a workers' compensation claim for a psychological injury which prevents them from working.
- The introduction of a new statutory tort for serious invasions of privacy and strategies to mitigate the risks.
- Recommendations from the Victorian Sentencing Advisory Council's review of Occupational Health and Safety offence sentencing.
- The impact of the proactive duty to manage psychosocial safety on workplace investigations.
- What the NSW Government's June 2025 legislative reforms to the WHS Act and IR Act will mean in practice.
- The rapid rise of AI and automated decision-making in the workplace—examining both opportunities and risks for employers and workers.
- A case on absenteeism that raises the question: How many days off is too many?

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.

INTERVIEW WITH THE HON. SOPHIE COTSIS, MP

The Hon. Sophie Cotsis, MP

Minister for Industrial Relations and
Minister for Work Health and Safety

The Hon. Sophie Cotsis, MP, the NSW Minister for Industrial Relations, and Minister for Work Health and Safety, visited Sparke Helmore's Sydney office to discuss the recently passed I*ndustrial Relations and Other Legislation Amendment (Workplace Protections) Bill 2025* with member of the public sector. During her visit, she took the time to answer a few questions about the Bill and her journey into politics.

You have obviously had an interesting and diverse career. What inspired you to go into politics?

I often pinch myself to realise that I am in this position. I never grew up wanting to be a politician, but throughout school, I was very involved in student activities. When I went to university, I became active in politics. I worked at Sydney airport, where I became heavily involved with the Liquor Trades Union and later worked for that Union. I guess that was the start of what led me to where I am today.

What advice would you give to a young person looking to pursue a career in public life?

I represent a very multicultural, low socio-economic community, and I see young people working hard to help their families. I believe today's young people are smart and resilient. For anyone looking to enter public life, my advice is to involve themselves with local groups, such as the Lions Club and Rotary Club or sporting clubs – even joining the P&C whether or not you are a parent.

Being a politician is not without its challenges; it is very competitive, and you have to fight hard for what you believe in. Developing a thick skin is essential, as I often get bailed up on the street by people who are ready with their feedback, positive and negative. It's important to take into consideration people's criticisms as it can be very valuable.

Can you tell us what the goals of the new Workplace Protections Bill that has just passed NSW parliament are?

The main goal is to eliminate bullying and harassment. The Government has no tolerance for these issues and we are dedicated to stamping them out. We still see very high numbers of individuals being bullied and harassed, which is unacceptable. We need to work with employers to ensure that their employees are free from these behaviours. Following extensive consultations with agencies, local government and industry, we have established a new jurisdiction for bullying and sexual harassment, similar in practice to the Fair Work Act. In NSW, there will also be provision for damages. This change has been a long time coming.

Is there a message you would like to convey about what the intentions of the changes are?

The NSW Government comprises numerous agencies with 430,000 employees, many of whom are female. We want to send a strong message that their work is valued. The focus is on resolving issues at the ground level. We have amazing public servants undertaking world-class work, and it is essential to protect them.

What further changes can employers expect down the track?

We need to grapple with the high number of workers being diagnosed with silicosis, which is a huge issue affecting many younger workers, particularly men. We are currently working through an action plan. The NSW Government was one of the first to call for the banning of engineered stone, which has been implemented. However, there is still a lot of work to do regarding screening and monitoring. We have introduced a silicosis register and are ensuring that government agencies are working with industry for a streamlined approach. We have also had a lung bus that visits regional towns, but more needs to be done.

What has been your greatest achievement since joining parliament?

There have been many. Being elected to the NSW Parliament was a significant honour, and I am humbled by the opportunity to help those who don't have a voice. For instance, we had a woman come into our office who was homeless with two children; being in government allowed us to fast-track her case for crisis accommodation. Another example is leading a local campaign for investment into Canterbury Hospital and now we have been elected, we see this happening. I also work closely with the indigenous community in my electorate, including the local elders, to build pathways for our indigenous youth to pursue education and careers in fields such as health and STEM.

I can imagine your role is time consuming and stressful, similar to lawyers. What advice would you give to lawyers or others with stressful roles to help them detach from work?

I have great admiration for lawyers because of their extensive training. Every lawyer I know is super smart and able to comprehend complex information in remarkable ways. I have been fortunate to have had students who are lawyers do work experience with me, and they have been amazing.

My generation is often referred to as the 'sandwich generation', meaning we have the pressures of caring for children and parents. I learned the hard way that I need to take care of myself. Seven years ago, I was diagnosed with breast cancer. and underwent a lumpectomy followed by chemo and radiation. After my treatment, I had to go on a health journey to take better care of myself. I took up yoga, which has been extremely beneficial. These things happen but it's so important to look after your health. Make time for activities like going for a run or a walk, and don't forget to pamper yourself! Remember, there is only one of you.

THE INTERSECTION BETWEEN PSYCHOLOGICAL INJURY AND TERMINATION OF EMPLOYMENT

Seamus Burke, Partner, outlines key considerations for employers facing the common scenario of an employee claiming a psychological injury coinciding with a workers compensation claim.

A common situation we encounter involves an employee who claims to have suffered a psychological injury due to their work, subsequently makes a workers compensation claim, and then remains absent from the workplace for months of time. Frequently, the employee is either on a performance improvement plan or one was in the process of being implemented. In these cases, the employer seeks advice about their ability to terminate the employee's employment

This involves a number of legal considerations, which represent risks that the employer must assess. These include:

1. workers compensation, such as liability and the minimum period of time before employment can lawfully be terminated due to the injury
2. general protections, including reference to workplace rights, temporary absence and discrimination protections, and
3. unfair dismissal, relating to capacity to perform the inherent requirements of the employee's role.

These legal considerations can involve potentially overlapping obligations so it's important to assess the best course of action – typically, though not always, the one that carries the least risk.

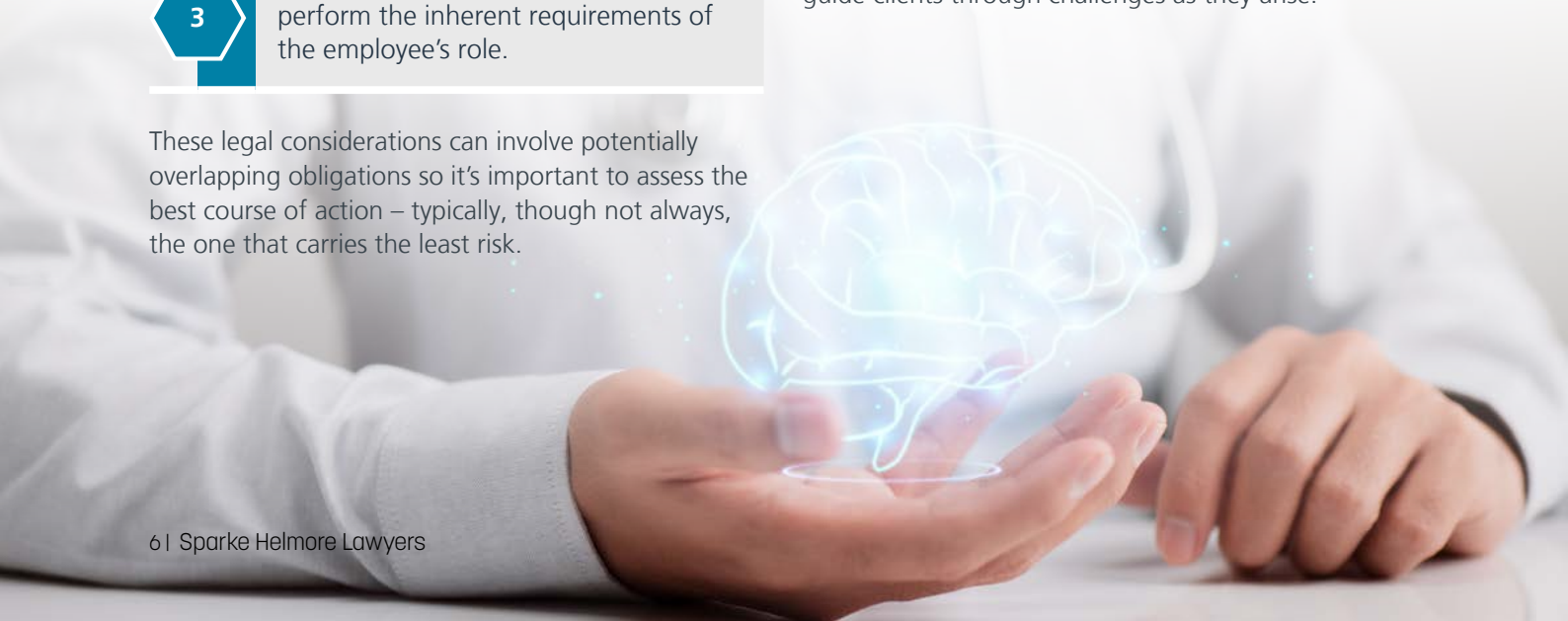
We recently finalised a prolonged strategy for a professional services client whose employee had a serious mental health episode at work. This resulted in:

1. A workers compensation claim.
2. The termination of the employee's employment based on their inability to perform the inherent requirements of the role, which required obtaining an independent medical report from a psychiatrist.
3. An unfair dismissal claim, which settled at conciliation for a modest payment.

The entire process took approximately 10 months.

The independent medical report was essential in the process as it provided a valid reason to support the termination, namely the employee's inability to perform the inherent requirements of their role. It also helped minimise the risks arising from termination.

This matter demonstrates the significant advantages of being involved early in the process, enabling us to guide clients through challenges as they arise.



HOW RECENT CHANGES TO THE PRIVACY ACT IMPACTS EMPLOYERS

Levin Reece, Senior Associate and Beza Eyoel, Associate, provide an update about the statutory tort and outline steps to take to minimise the risk of liability for serious invasions of privacy.

The *Privacy Act 1998* (Cth) (**Privacy Act**) was established to safeguard individuals' personal information and regulate how Australian Government agencies and certain organisations – particularly those with an annual turnover exceeding $3 million – collect, use and manage that information.

On 10 June 2025, a broad ranging statutory tort was introduced under schedule 2 of the Privacy Act creating a new cause of action for serious invasions of privacy. This statutory tort captures conduct that occurs outside the workplace.

The tort

To establish that a serious invasion of privacy has occurred, a plaintiff must prove:

- Their privacy was intruded by for example disturbing their seclusion or misusing their information.
- A person in the plaintiff's position would have had a reasonable expectation of privacy.
- The invasion of privacy was intentional or reckless and was serious.
- The public interest in the plaintiff's privacy outweighs any other public interest.

An employer can be held vicariously liable for their employee's acts under this new statutory tort.

There are various defences and exemptions available to defendants including that the employee consented to the invasion of privacy and/or that the disclosure of information was authorised or required under an Australian law. Courts can order a range of remedies if the tort is established, including injunctions and orders for payment of damages.

Issues for employers

Maintaining information about employees is a key aspect of the employment relationship, and employees have a reasonable expectation of privacy regarding this information. Many employers collect employee's personal information that may be captured by the statutory tort, and which is generally lawful, such as their gender identity, religion, or sexuality.

However, the unauthorised disclosure of such information could make an employer liable. For instance, if an employee shares sensitive information about a personal illness with a manager and that manager intentionally or recklessly discloses this sensitive information without the employees consent. The employer may also be vicariously liable for serious invasion of privacy.

Furthermore, employers may be liable if they fail to implement appropriate measures to protect personal and/or sensitive information from access by unauthorised individuals. Importantly, the employee records exemption in the Privacy Act does not apply to the statutory tort.

A final word of warning

Employers typically have policies dealing with private information, but with the introduction of the statutory tort, these should be reviewed and updated. Employers must ensure employee data is securely managed and only disclosed with consent or under a legal obligation. Failure to do so could result in liability for damages if an employee suffers loss.

VICTORIAN SENTENCING ADVISORY COUNCIL RECOMMENDS INCREASES TO OHS ACT FINES AND INCREASED EXPOSURE FOR DIRECTORS: UPDATE FOR EMPLOYERS

Levin Reece, Senior Associate and Beza Eyoel, Associate, discuss the recommendations made by the Victorian Sentencing Advisory Council in its review of the sentencing of OHS offences, which employers should be aware of.

The Victorian Government has tasked the Victorian Sentencing Advisory Council (**Sentencing Council**) with reviewing the sentencing of occupational health and safety (**OHS**) offences under the *Occupational Health and Safety Act 2004* (Vic) (**OHS Act**).

Earlier in the year, the Sentencing Council released its report and recommendations titled '*Sentencing Occupational Health and Safety Offences in Victoria: Report and Recommendations*'. The report recommended twelve changes to the sentencing rules governing Victorian OHS matters, which if implemented, could have a significant impact on employers.

Recommendation 1: Impact statements in OHS cases	A framework for impact statements in OHS cases, allowing input from all affected individuals, not just the direct 'victim'.
Recommendation 2: A framework for restorative justice	As there is growing interest in the potential role for restorative justice processes as a complement or alternative to criminal justice, conferences between those harmed and those responsible, with potential for healing.
Recommendation 3: Pilot and evaluate restorative justice conferences	A pilot to gather ongoing feedback on the effectiveness of these conferences.
Recommendation 4: Reforming health and safety undertakings	Fines remain the primary penalty in OHS prosecutions, while courts rarely use alternatives like enforceable undertakings or adverse publicity orders, despite strong stakeholder and public support to do so. To expand the use of undertakings, legislative changes are needed to enhance their flexibility and impact.
Recommendation 5: Increased use of health and safety undertakings	The development of a policy that promotes greater use and supports courts in setting appropriate conditions for undertakings.

Recommendation 6: Increased use of adverse publicity orders	Greater use of adverse publicity orders, which require offenders to publish details of their offences. Despite their common use in other states, only two have been issued in Victoria over the past 20 years.
Recommendation 7: Maximum penalties for breach of duty offences	Increased maximum penalties for 'worst-case-scenario' offences under the OHS Act. Company fines would rise from 9,000 to 50,000 penalty units (approx. $1.78m to $9.89m), and individual fines from 1,800 to 10,000 penalty units (approx. $335k to $1.98m).
Recommendation 8: Reckless endangerment offence	Consideration should be given to the relevance of s 32 of the OHS Act. Originally introduced as a compromise to industrial manslaughter laws, this offence – covering reckless conduct endangering others – has only resulted in seven convictions since 2005. The proposal is to repeal s 32 and replace it with a revised offence applicable only to individuals, retaining the current penalty of 10,000 penalty units but also carrying a maximum of 10 years' imprisonment.
Recommendation 9: A legislated sentencing guideline	Develop and consult on a draft sentencing guideline for inclusion in the OHS Act.
Recommendation 10: Distribution of paid court fines	Direct all OHS fine revenue to WorkSafe, replacing the current ambiguous provision that can directs funds to either WorkSafe or consolidated revenue.
Recommendation 11: Declared director provisions	The ability of Fines Victoria to issue 'declared director' notices, making a company director jointly and severally liable for OHS penalties if a company is deregistered, in administration, or cannot pay the fine imposed.
Recommendation 12: Successor liability	A separate inquiry by the Victorian Law Reform Commission into the introduction of a legislative framework for successor liability, where a company has been deregistered and its business is subsequently resurrected through a new entity - commonly referred to as 'phoenixing'. Under the proposal, a new company that is essentially a continuation of the old one would be held financially responsible for its predecessor's liabilities.

Looking ahead

If the Sentencing Council's recommendations are implemented, the risks faced by employers and company directors regarding OHS prosecutions will significantly increase. Employers should review their OHS policies and procedures now to ensure they are well prepared for the expected psychosocial safety regulations and significant changes to OHS sentencing laws.

THE IMPACT OF MANAGING PSYCHOSOCIAL SAFETY IN WORKPLACE INVESTIGATIONS

Thea Price, Partner, and Anna Stubbersfield, Associate, discuss the impact of the proactive duty to manage psychosocial safety in the workplace on the investigation process.

Workplace investigations can be an inherently stressful process for employees, and it is unlikely that the psychosocial risks associated with the process can be fully eliminated. Increasingly, investigations undertaken by our team involve multiple factors that aggravate or complicate the process, such as:

- The complainant or respondent (or both) commencing personal leave or lodging a claim for workers compensation.
- The receipt of counter complaints or new allegations being raised as the investigation progresses.
- The challenge of managing workplace rumours that may already exist before any formal process is initiated or are generated during the investigation progress.
- The potential for leadership interference in the investigation process, which can be perceived as seeking to influence the outcome.

While these challenges can add additional complexity to managing psychosocial risks for investigation participants, they can be mitigated through proactive measures, such as:

Early consultation with the complainant and respondent to support their psychologically safe participation, including discussing any reasonable adjustments that could facilitate their involvement in the investigation process.

Clearly defining the investigation's terms of reference to ensure it is focused and comprehensive, and adequately aligned with relevant policies or employment instruments.

Maintaining timely and transparent communication with participants throughout the process, providing consistent updates on the progress of the investigation, especially to complainants and respondents who are likely to be particularly anxious about the investigation.

Ensuring clarity of roles between leadership and the investigator, to minimise perceived interference from the business which could be perceived to be steering toward a specific outcome and to ensure a clear communication strategy is implemented to manage workplace discourse regarding the investigation and its participants.

Appointing an investigator who is adequately trained in handling sensitive subject matters, as well as trained in psychosocial harm and trauma informed interviewing techniques.

Key takeaway

Seek advice as early as possible when managing employee grievances that may lead to a workplace investigation. Whether the investigation is conducted internally or by an external agent, careful planning and appointing a qualified investigator to run the process enhances the experience of the participants, improves the timeliness of the process, and ultimately the integrity of the investigation and its findings.

NSW GOVERNMENT PASSES BILL TO AMEND WORKPLACE LAWS

Felicity Edwards, Partner, Bill Kritharas, Partner, and Catherine Wilkinson, Partner, explore the bill that passed both houses of parliament on 25 June 2025 and what the reforms mean in practice.

The *Industrial Relations and Other Legislation Amendment (Workplace Protections) Bill 2025* (the **Bill**) proposes significant changes to the industrial relations and workplace health and safety laws in New South Wales. The Bill passed both houses on 25 June 2025.

The Bill has an industrial relations component and a work health and safety component and builds on the reforms that were commenced in 2023. These reforms saw, amongst other things, the re-establishment of the Industrial Court of NSW and establishing SafeWork NSW as a standalone agency. These amendments continue the State Government's commitment to introduce a raft of changes to workplace laws in NSW.

Key amendments to the WHS Act

Powers of Unions to investigate and prosecute: Union officials will have the power to collect evidence related to suspected contraventions of the WHS Act. At this stage the power extends only to conducting tests and taking measurements, photos, and videos related to a suspected contravention of the WHS Act. The Bill provides that SafeWork NSW (**SafeWork**) may enter into an arrangement with Unions to share or exchange information held by them and that confidential information and documentation obtained by SafeWork during an investigation can be disclosed to a Union. What this means is that information obtained by SafeWork pursuant to their coercive powers could be obtained by a Union. Unions will also have the power to commence prosecutions under the WHS Act if the Union has consulted with SafeWork and SafeWork has declined to bring proceedings. The Bill also allows for a prosecuting Union to receive part of the fine imposed by the court if the prosecution is successful.

Easing of the two-year limitation period: The courts will be empowered to allow prosecutions after the two-year limitation period has expired if it is in the 'interest of justice' to do so. The Bill does not define or give examples of what this entails, leaving it to the courts to determine on a case by case basis. This amendment was in response to the difficulties faced by the regulator in prosecuting occupational exposure incidents, but the 'interest of justice' appears to be broader than that.

Codes of Practice becoming legally binding: The amendments will see Codes of Practice become legally binding when approved by the Minister. Persons Conducting a Business or Undertaking (**PCBUs**) will be required to comply with the approved Codes unless they can demonstrate that they have managed hazards and risks in a manner that, although differing from the requirements of the approved Code, provides a standard of health and safety that is equivalent or higher than the standard required by the approved Code.

Establishment of direct line to Industrial Relations Commission: This amendment allows PCBUs, workers, health and safety representatives and Unions to bypass the involvement of a SafeWork inspector and take a dispute about a 'WHS matter' directly to the Industrial Relations Commission (the **Commission**). 'WHS matter' is defined in the Bill to include matters such disputes regarding work group determinations and variations, access to information by a health and safety representative (**HSR**), and requests by HSRs for a person to assisting the HSR to have access to a workplace, for example. The Commission can address the dispute as they see fit (such as by mediation, conciliation, or arbitration).

Psychosocial risks

In line with its commitment to improve psychosocial health in the workplace, the Bill also requires SafeWork to provide six monthly reports to the Minister covering:

- the number and types of complaints received by SafeWork about psychosocial matters
- the number and types of notices issued by SafeWork relating to psychosocial risks
- insights gained, and
- recommendations for improving psychosocial health and safety and reducing psychological injuries.

Changes to the IR Act

The changes to the *Industrial Relations Act 1996* (NSW) (**IR Act**) introduce anti-bullying and sexual harassment jurisdictions to the Commission. These reforms fill gaps for workers in the state public sector and local government who are unable to access similar regimes in the federal jurisdiction.

Under the anti-bullying jurisdiction:

- An employee who 'reasonably believes' they have been bullied at work can apply to the Commission for a stop bullying order. Being 'bullied at work' is defined as:

  When an individual or group of individuals repeatedly behaves unreasonably towards and employee, creating a risk to their health and safety. Reasonable management actions are excluded from this definition.

- The Commission must endeavour, by all means the Commission considers proper and necessary, to settle the application by conciliation. If the matter cannot be settled by conciliation the Commission will hear the application and can either make a stop bullying order or dismiss the application.
- The Commission can make any order to prevent the employee from being bullied at work if it is satisfied that the employee has been bullied at work and there is a risk of the bullying continuing.
- Of particular importance is the power to award compensation of up to $100,000 for loss or damage suffered from the bullying along with other remedies such as a prohibition on continuing or repeating the bullying; the performance of reasonable actions or a course of conduct to redress the employee's loss or damage; the publication of an apology or retraction, and the development and implementation of a program or policy aimed at eliminating bullying.
- Civil penalties apply for the contravention of a stop bullying order, of up to $18,870 for an individual or otherwise up to $93,900.

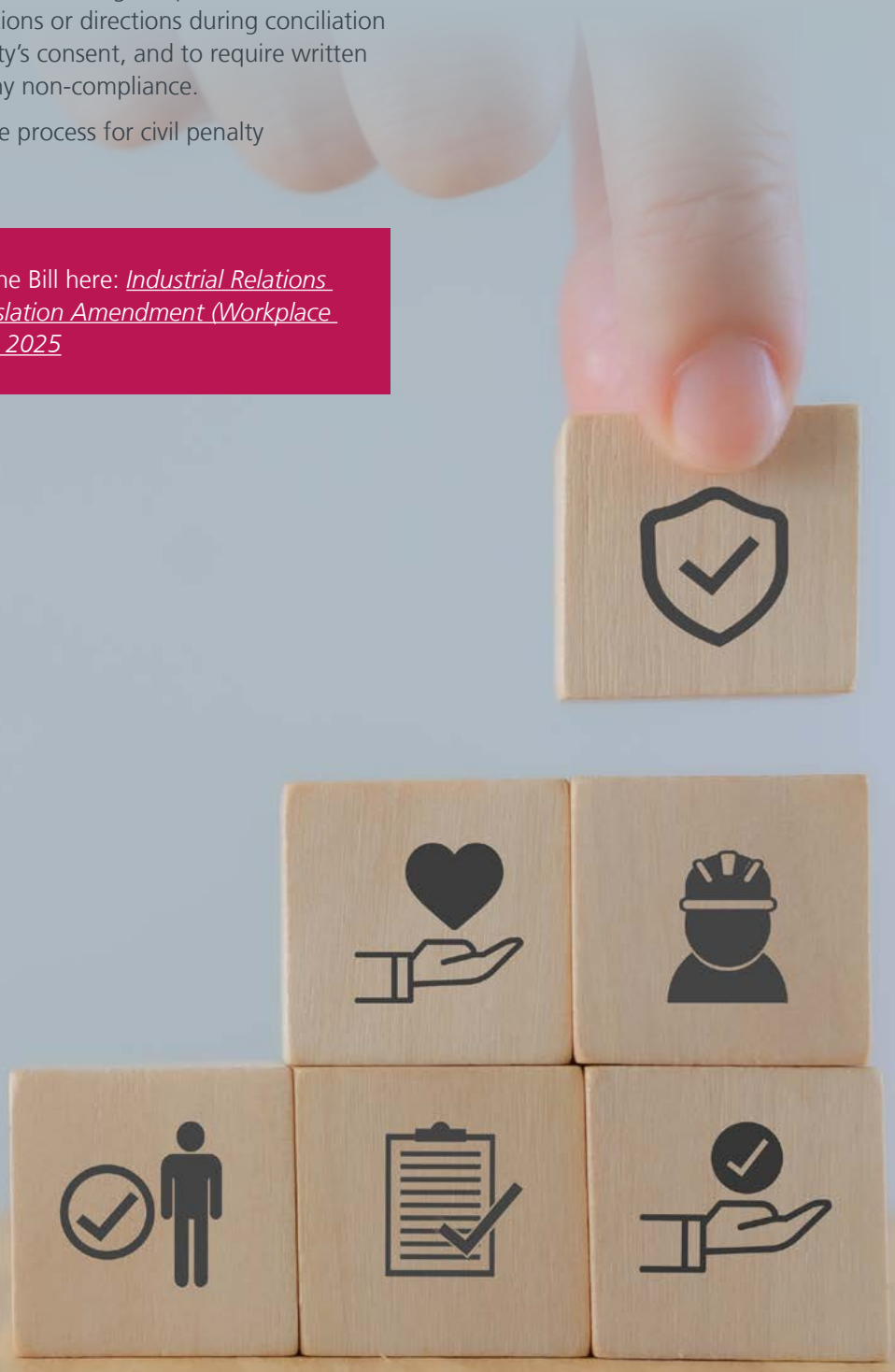
For the sexual harassment jurisdiction:

- 'Sexual harassment' has the same definition as in s 22A of the *Anti-Discrimination Act 1977* (NSW). A person must not sexually harass another person in connection with that person being an employee, a prospective employee, or a person conducting a business or undertaking.
- Vicarious liability applies to employers, unless they can prove that all reasonable steps were taken to prevent the harassment.
- A person who alleges they have been sexual harassed may apply for a sexual harassment order. An application must be made within 24 months of the alleged sexual harassment.
- Like the bullying jurisdiction, the Commission must endeavour, by all means the Commission considers proper and necessary, to settle the application by conciliation. If the matter cannot be resolved by conciliation the Commission can hear the application and make either a sexual harassment order or dismiss the application.
- The remedies that can be ordered by the Commission are broad and can include orders to prevent or remedy the sexual harassment, including for example: compensation of up to $100,000 for loss or damage suffered from the sexual harassment; a prohibition on continuing or repeating the sexual harassment; the performance of reasonable actions or a course of conduct to redress the person's loss or damage; the publication of an apology or retraction, and the development and implementation of a program or policy aimed at eliminating sexual harassment.
- Civil penalties apply for the contravention of a sexual harassment order, of up to $18,870 for an individual or otherwise up to $93,900.

Additional key changes to the IR Act include:

- Expanding the victimisation jurisdiction including additional grounds under which a victimisation application can be brought under s 210 of the IR Act.
- An increase to the monetary cap for small claims in the Commission from $20,000 to $100,000 (through amendment to the *Industrial Relations (General) Regulation* NSW 2020).
- An expansion of the Commission's powers during disputes, including the power to issue recommendations or directions during conciliation without a party's consent, and to require written reasons for any non-compliance.
- Reforms to the process for civil penalty proceedings.

You can view the Bill here: *Industrial Relations and Other Legislation Amendment (Workplace Protections) Bill 2025*



AI@WORK: PARLIAMENTARY REPORT RECOMMENDS AMENDMENTS TO THE *FAIR WORK ACT 2009* (CTH) TO BAN THE USE OF AI

Felicity Edwards, Partner, and Elijah Royal, Associate, examine the rapid development and uptake of AI and ADM in the workplace and consider the positive and potentially negative impacts for workers.

Artificial intelligence (AI) tools like ChatGPT, Claude AI, Gemini AI, DeepSeek, Microsoft Copilot, and Meta AI are widely available in Australia, sparking ongoing debate around their safety, reliability, privacy, and data protection.

Automated decision-making (**ADM**), powered by AI, is also on the rise—seen in technologies like mobile phone detection cameras and airport SmartGates using facial recognition.

As AI and ADM become more integrated into daily life, regulatory frameworks are slowly emerging. For instance, affidavits filed in the NSW Supreme Court must now disclose if AI was used. However, workplace use of AI and ADM remains largely unregulated, though changes may be on the horizon.

The Future of Work report

In April 2024, the House Standing Committee on Employment, Education and Training was tasked with investigating and reporting on the rapid development and uptake of AI and ADM in the workplace. On 11 February 2025, after receiving 66 submissions and holding 11 public hearings, the Committee tabled *The Future of Work* report in Federal Parliament. The report makes 21 recommendations focused on:

- Maximising the benefits of AI and ADM in the workplace, including increased support for employers and employees as well as strengthening workforce capabilities.
- Addressing specific risks associated with AI and ADM, such as work health and safety issues and intellectual property concerns.
- Managing high-risk AI systems in workplaces and supporting proposed guardrails.
- Clarifying legal obligations for developers and deployers (employers) of ADM and AI systems as they apply to workplaces.
- Enhancing employee protections, particularly regarding data and privacy, including protections against excessive and unreasonable workplace surveillance, and safeguarding equality and inclusivity.
- Requiring meaningful consultation, transparency, accountability and procedural fairness in the use of AI and ADM.
- Developing public information campaigns to build trust in these technologies and improve understanding of the relevant frameworks for safe and responsible use.

The report noted that while AI and ADM can boost workplace productivity and enhance roles, many employers haven't fully tapped into their potential. It also warned that digital transformation has revealed major gaps in Australia's regulations and worker protections.

Many submissions recognised the legitimate role of AI and ADM in the workplace but also identified potential negative impacts for workers, including around recruitment, rostering, wage setting and monitoring and surveillance.

It is important for employers to pay attention to Recommendation 15 of the report, which recommended that the *Fair Work Act 2009* (Cth) be amended to:

- require all organisations that use AI or ADM systems to disclose this to existing and prospective workers and customers, and
- ban the use of technologies like AI and ADM systems for final decision-making without human oversight, particularly human resource decisions.

Conclusion

With AI and ADM technologies already widespread in Australian workplaces, significant regulatory changes are on the horizon. Employers should proactively review current and planned uses to avoid potential legal risks – and seek advice if unsure.

We'll share updates on the outcomes of the report as they become available. In line with 'best practice', we confirm that no AI was used in writing this article!

HOW MANY DAYS OFF WORK IS TOO MANY?

Seamus Burke, Partner, considers a recent case regarding absenteeism and poses the question of how many days off work is too many.

We are regularly asked to provide advice to employers about their ability to terminate the employment of an employee who has an unsatisfactory work attendance record. This can be a complex issue, as the reasons for non-attendance may involve an actionable workplace right.

A recent decision[1] in the Fair Work Commission (**Commission**) has addressed this issue and provides valuable insights and lessons for employers considering termination on this basis.

In the case, the Commission was asked to determine if the termination of employment of a long-term employee of Woolworths Group Limited (**Woolworths**), Mr Anthony Clark (**Mr Clark**), was unfair.

Relevant facts of the case

Mr Clark was employed by Woolworths in a warehouse role and had been continuously employed for more than 20 years.

Woolworths terminated Mr Clark's employment on the basis of both his persistent absenteeism, and his failure to comply with repeated lawful and reasonable directions to notify the company of his absences and to provide satisfactory supporting evidence for them. Woolworths argued that Mr Clark was not meeting the inherent requirements of a full-time worker.

From 2022 onward, Mr Clark's employment history included the following notable events:

He had numerous absences from work due to poor health and issues related to his son's drug addiction.

In October 2022, May 2023, and August 2024, Mr Clark received written directions to provide notice of and evidence for his absences with warnings that failure to comply could result in disciplinary action. On many occasions, he did not follow these directions.

In mid-February 2025, Mr Clark was given another direction to give notice and evidence for absences, with a warning that failure to comply could result in dismissal.

Between mid-February 2025 and early April 2025, Mr Clark was absent multiple times without providing any notice or evidence.

On 7 April 2025, Woolworths put to Mr Clark that despite recently being certified fit for work, he was not meeting the inherent requirements of his role. They did not mention his failure to follow directions or of the warning from mid-February 2025. Mr Clark claimed his health had improved and he was committed to doing better, asking for another chance.

On 16 April 2025, Woolworths dismissed Mr Clark on the grounds that he was not meeting the inherent requirements of his role.

[1] *Anthony Clark v Woolworths Group Limited* [2025] FWC 2226 (30 July 2025)

Mr Clark had a total of 92 absences from work in the 12 months leading up to April 2025.

He argued there was no valid reason for his dismissal because, contrary to Woolworths' assertion at the time of the termination of his employment, he was capable of meeting the inherent requirements of his role.

Deputy President Coleman (**DP Coleman**) found that Woolworths had two valid reasons for dismissing Mr Clark.

1. The first was that he was not meeting the inherent requirements of his role as a full-time team member. It is an inherent requirement of full-time storemen to physically attend work and he was not meeting this requirement. Also, Mr Clark had exhausted his paid personal leave and his absences were continuing.

2. Mr Clark had repeatedly failed to follow Woolworths' directions to provide notice of his absences from work, and appropriate supporting evidence to substantiate the reason for the absence, such as a statutory declaration or medical certificate. DP Coleman found that the directions that were issued to Mr Clark in October 2022, May 2023, August 2024, and February 2025 were lawful and reasonable, and Mr Clark's failure to comply, especially after the warning on 12 February 2025, was a valid reason for dismissal related to his conduct.

After consideration of other relevant factors, including Mr Clark's long service and age, DP Coleman concluded the dismissal was not unfair.

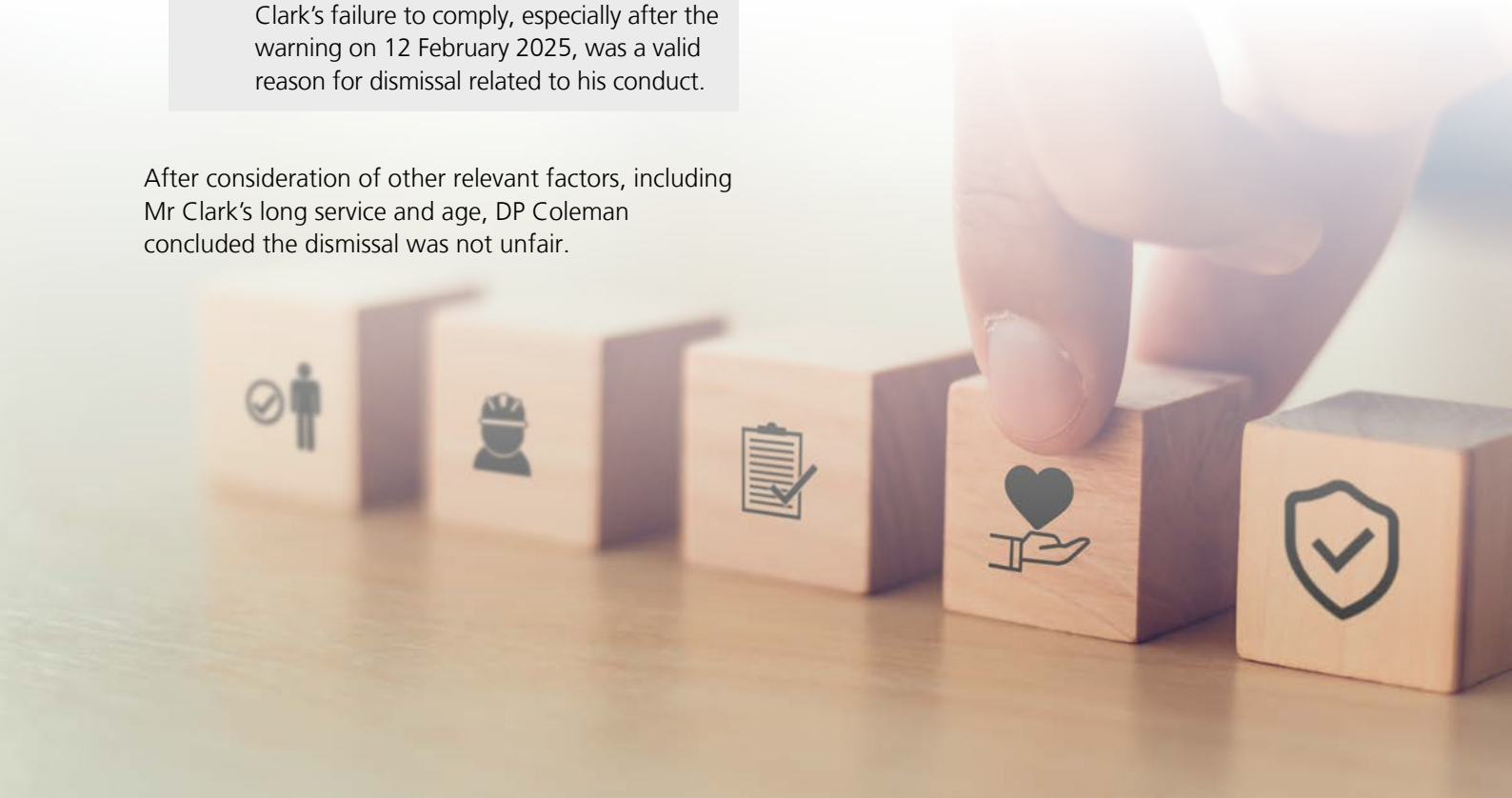
Valuable insights and lessons for employers

This case shows, it is possible to address persistent absence from work, including by way of termination of employment. While it may not be necessary to wait for 92 absences in a year, a consistent pattern of absences that prevents a full-time employee from complying with attendance requirements can warrant action.

The process for managing absenteeism must be supported by evidence, such as records of non-attendance, and by issuing appropriately worded directions to the employee. This is particularly crucial when the employee fails to notify of their absences or does not provide evidence to justify them.

Thirdly, it is generally preferable to 'hasten slowly' when dealing with this issue. As stated by DP Coleman in his decision, 'on no view was Woolworths hasty in taking disciplinary action.' This serves as a useful reminder of the importance of allowing sufficient time to ensure the process is fair.

However, this decision should not be interpreted as a 'green light' to justify the termination of the employment of any employee who has attendance issues. Each case should be evaluated on its specific facts and circumstances, and it can be beneficial to seek advice in such situations.



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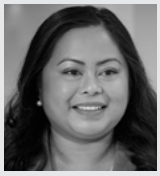

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Employment law

In recent years, we have witnessed some of the most significant changes to occur in workplaces and the way people work. We've continued to work alongside our clients to help them effectively navigate the changing employment landscape.

We advise on the full range of employment issues, with a focus on preventative measures and effective dispute resolution.

General protections and Adverse action claims

Advice, strategy and claim defence

Anti-bullying, harassment, discrimination & positive duty

Policy development and training, advice and claim defence

Employment contracts & disputes

Contract drafting, post-employment restraints, injunctions, and, breach of contract disputes

Employment litigation & dispute resolution

Issue identification, assessment of merits, strategy development and defence

Terminations & unfair dismissal

Advice on process and risk, investigations, claim and dispute management, mediation and litigation

Compliance

Contracts, enterprise agreements, modern awards, policies and procedures, and legislation

Independent contractors

Arrangements and agreements with labour hire firms and contractors, and contractor management systems

Industrial relations & disputes

Enterprise agreement and award coverage, right of entry and workplace rights

Legal briefings and training

Briefings on employment -related issues and training for employees and managers

Managing injured workers

Inherent requirements assessments, return to work plans, and management of dismissal process

Policies and procedures

Codes of conduct and workplace, drug and alcohol, equal opportunity, bullying and harassment, positive duty

Privacy

Policy and procedure, compliance with privacy principles and information provided to third parties

Regulatory prosecutions

FWO investigations and prosecutions, ICAC proceedings and disciplinary proceedings

Restructuring and redundancy

Advice on business restructuring, redundancy entitlements and process

Enterprise bargaining

Development, negotiation, drafting, and implementation of enterprise agreements and dispute resolution

Transfer of business

Advice and strategy on redundancy, continuity of employment, and entitlements, and application of enterprise agreements

Health and safety

We have one of the largest dedicated teams of health and safety lawyers across Australia and provide end-to-end legal support across all health, safety and regulatory issues.

Psychosocial, mental health and wellbeing - Policy development, investigations, training and defence of legal proceedings and prosecutions

Commissions of Inquiry - Royal Commissions and Commissions of Inquiry

Contractor management - Compliance, contract, policy and system reviews, and training

Coronial inquests & inquiries - Investigations, legal proceedings, strategy and litigation management

Fatigue management - Compliance, investigation and enforcement actions, notices, policies and procedures, and legal proceedings / prosecutions

Improvement & prohibition notices - Response, review and appeals

Incident response & management - Safety Incident Response Support Hotline, investigations and crisis management following major workplace incidents, including attending site and dealing with regulators

Legal briefings & training - Tailored training packages, board and executive briefings, training for staff and managers, court and interview simulations

Policies & procedures - Policy and system reviews and document development

Regulatory investigations & prosecutions - Investigation and enforcement actions (including defence of health and safety, environmental, heavy vehicle and other criminal prosecutions), advice on strategy and litigation management

Safety governance & assurance, including training - Due diligence, legal reviews, executive and board briefings, and legal risk management

Transport chain of responsibility - Compliance, investigation and enforcement action, notices, policies and procedures, and legal proceedings

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Putting you at the heart of everything we do.