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Insights for WHS and
employment professionals

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Welcome to Issue 3 of *Workplace Watch*

This is my first edition as National Practice Group Leader, and I would like to acknowledge and thank my predecessor, Catherine Wilkinson, who established Workplace Watch as a trusted source of insight on the ever-changing workplace relations landscape. I am pleased to continue that tradition by bringing you updates on significant developments in workplace relations and work health and safety law.

As we outlined in the last two editions, employers continue to navigate a rapidly evolving workplace landscape shaped by technological innovation, increasing regulatory scrutiny and changing expectations regarding workplace culture and governance. Organisations and employers are being challenged to make sure they are complying with existing obligations and new duties, but to also anticipate and prepare for new and evolving risks.

This edition highlights three themes that are increasingly shaping the workplace relations and safety agenda:



Technology is reshaping workplace risk, with artificial intelligence (AI) and digital work systems changing not only how work is performed, but also how workplace complaints, employment claims and investigations are conducted. While these technologies offer significant opportunities, they also present new challenges for employers in managing risk, ensuring accuracy and maintaining effective oversight. As AI becomes more accessible, organisations are increasingly encountering AI-generated complaints, claims and workplace documents, requiring careful consideration of how these matters are assessed, investigated and resolved.



Regulators are increasingly focused on governance and accountability, particularly in relation to psychosocial hazards, regulatory enforcement, mobile plant and machinery, exposure to hazardous substances and digital work systems. Employers are expected to demonstrate not only that appropriate and compliant systems are in place, but also that those systems are operating effectively, keeping workers safe and creating healthy psychosocial working environments.



Workplace obligations and employee protections continue to expand, with developments in privacy, discrimination and employment status laws reinforcing the need for employers to regularly review workplace practices, systems and decision-making processes to ensure they remain fit for purpose. These developments reflect a broader trend towards greater scrutiny of workplace conduct and a willingness by courts, tribunals and regulators to look beyond labels and focus on the practical reality of workplace relationships and experiences.

Consistent with these themes, this edition explores the increasing use of AI in employment claims and workplace complaints, emerging work health and safety issues associated with digital work systems, significant health and safety developments, proposed reforms to anti-discrimination laws, the growing role of privacy rights in employment disputes, developments affecting casual employment, and the challenges associated with managing complaints that arise in the context of performance management processes.

As always, our aim is to provide practical insights into the legal developments shaping Australian workplaces and to assist you in identifying and responding to emerging risks and opportunities. We hope you find this edition informative and valuable.



Bill Kritharas

National Practice Group Leader

Workplace

WHS and OHS Developments in 2026: governance, technology and enforcement

Authors: Bill Kritharas (Partner) and
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The work health and safety (WHS) and occupational health and safety (OHS) landscape continued to evolve significantly throughout 2026. While traditional hazards such as falls from heights, mobile plant incidents and hazardous substances remained a focus of regulators, the year has been characterised by a broader shift towards governance, accountability and proactive risk management. Developments in psychosocial risk regulation, the enhanced role of Codes of Practice, increasing scrutiny of artificial intelligence and digital work systems, and a series of significant gross negligence prosecutions all reinforced a common theme: businesses are increasingly expected not merely to identify risks, but to demonstrate the effective implementation, monitoring and verification of safety controls.

Psychosocial hazards remain a regulatory priority

Psychosocial hazards continued to dominate the WHS agenda throughout 2026. Regulators across Australia have increasingly treated psychological health as carrying the same significance as physical safety, requiring employers to identify, assess and control psychosocial hazards using established risk management principles.

These hazards include excessive workloads, workplace bullying and harassment, violence and aggression, poor organisational support, fatigue, role ambiguity and poorly managed organisational change. Increasing workers compensation claims involving psychological injury, together with their significant economic and social impacts, have driven heightened regulatory attention. In New South Wales, psychosocial risks remain a key SafeWork NSW enforcement priority, with businesses expected to demonstrate documented risk assessments, meaningful consultation and effective control measures rather than relying solely on wellbeing programs or employee assistance initiatives.

Codes of Practice become central compliance benchmarks

One of the most significant regulatory developments in 2026 is the enhanced status of approved WHS Codes of Practice in New South Wales.

Historically, Codes of Practice operated as practical guidance and were admissible as evidence of what was reasonably practicable, but compliance with them was not mandatory. From 1 July 2026, organisations that choose not to follow an applicable Code of Practice must be able to demonstrate that their alternative approach achieves an equivalent or higher standard of health and safety.

There are over 40 approved Codes of Practice in NSW. The practical consequence is that Codes of Practice have become the benchmark against which regulators, inspectors and courts are increasingly likely to assess health and safety systems. The change is particularly significant in areas including psychosocial hazards, falls from heights, hazardous substances and construction work. Businesses should now review their procedures against applicable Codes and ensure any departures are supported by a clearly documented and demonstrably equivalent alternative approach.

Artificial Intelligence and digital work systems

Another notable development during 2026 has been the emergence of artificial intelligence (AI) and digital work systems as a distinct WHS issue.

As organisations increasingly adopt AI-driven technologies, algorithmic management tools and automated decision-making systems, regulators have begun examining the unique risks created by these technologies. These include excessive worker surveillance, unrealistic productivity expectations generated by algorithms, digital fatigue, reduced worker autonomy, inadequate human oversight and technology-driven psychosocial hazards.

The introduction of legislation and guidance specifically addressing digital work systems reflects a growing recognition that technological innovation may create both physical and psychological risks. Businesses implementing AI-enabled systems are increasingly expected to undertake WHS risk assessments and ensure appropriate governance arrangements are established before introducing new technologies into the workplace.

Silica and occupational disease remain key concerns

Hazardous substances and occupational disease also continued to attract considerable regulatory attention throughout 2026.

Silica exposure remains one of the most significant long-term workplace health issues facing Australian industry, particularly within the construction, manufacturing and mining sectors.

At the same time, organisations have been preparing for the transition to Workplace Exposure Limits, which will introduce stricter exposure thresholds for a range of airborne contaminants.

The continued focus on occupational disease demonstrates that WHS regulation extends beyond immediate safety incidents and increasingly encompasses long-term worker health outcomes.

Enforcement trends: the rise of gross negligence prosecutions

Perhaps the most significant enforcement trend during 2026 has been the increasing willingness of regulators to pursue gross negligence and other aggravated offences where circumstances justified such action.

Recent prosecutions demonstrate a growing focus on management awareness of risk, failures to implement known control measures, inadequate supervision and governance shortcomings. Rather than focusing solely on the immediate causes of incidents, courts have increasingly scrutinised whether businesses identified risks, implemented controls, monitored compliance and verified that safety systems were operating effectively in practice.

This trend is evident in several significant prosecutions.

In *NSW Resources Regulator v Young Mining Company Pty Ltd*, the District Court found the company guilty of a Category 1 offence involving gross negligence following an incident in which a worker fell into an unguarded conveyor chute. The Court found that the operator had extensive documented safety systems but failed to implement, maintain, audit or adequately resource them. Importantly, the Court found that the company had actual knowledge of the relevant risks and available control measures yet failed to implement them. The managing director was also convicted of a due diligence offence. The decision is a powerful reminder that safety systems existing only on paper will not satisfy statutory obligations.

Similarly, in *SafeWork NSW v Acon Projects Pty Ltd*; *SafeWork NSW v Adrian Conditsis*, the Court imposed a penalty for a Category 1 offence following a worker's three-metre fall from an unprotected edge at a residential construction site. Unlike *Young Mining*, the issue was not a failure to implement existing safety systems, but the absence of basic documented systems altogether. The Court found deficiencies in risk assessment, inductions, consultation processes, supervision and work sequencing. The sole director was separately convicted for failing to exercise due diligence. The case demonstrates that obvious and foreseeable fall risks continue to attract significant regulatory and judicial scrutiny.

At a national level, the most significant prosecution was the industrial manslaughter conviction of Mastermyne Crinum Operations Pty Ltd following a fatal roof collapse in Queensland. The matter resulted in a record penalty of \$7 million and reflects the continuing willingness of regulators to utilise the most serious offences available where catastrophic workplace incidents occur.

The Industrial Court of NSW continues to shape WHS jurisprudence

Beyond prosecutions, 2026 also saw important developments in WHS jurisprudence from the reconstituted Industrial Court of New South Wales.

In *Richard Crookes Constructions Pty Ltd v SafeWork NSW*, the Court considered whether a WHS prosecution was impermissibly duplicitous because it allegedly involved multiple risks. The Court rejected that argument and confirmed that multiple failures directed towards the management of a single risk may be charged as one offence where they arise from the same factual circumstances. The decision provides important guidance regarding the operation of s 233 of the *Work Health & Safety Act 2011* (NSW) (WHS Act) and the proper characterisation of risk in WHS prosecutions.

The Court also provided significant procedural guidance in *SafeWork NSW v Chess Engineering Pty Ltd*. The decision confirmed that amendments to WHS pleadings may be permitted even after the expiry of limitation periods where the amendments clarify and better particularise the prosecution case rather than introduce fundamentally new allegations. The judgment reinforces the continuing importance of precise pleadings and provides useful guidance regarding the application of Kirk principles in modern WHS prosecutions.

Looking ahead



The defining lesson of 2026 so far that WHS obligations continue to expand beyond traditional notions of workplace safety. Psychological health, artificial intelligence, digital work systems, occupational disease, compliance with Codes of Practice and organisational governance have all become central compliance considerations.

At the same time, regulators and courts are increasingly focused on implementation rather than documentation alone. Whether through psychosocial hazard enforcement, industrial manslaughter prosecutions, gross negligence charges or officer due diligence obligations, the common expectation is that organisations must be able to demonstrate that their safety systems are operating effectively in practice. Businesses that proactively manage both physical and psychological risks, align their systems with applicable Codes of Practice, assess emerging technological risks and maintain robust governance frameworks will be best positioned to meet evolving regulatory expectations in 2027 and beyond.

Changes to the Privacy Act used against employers

Authors: Ben Burke (Partner) and Levin Reece (Senior Associate)

In our [inaugural edition of Workplace Watch](#), we discussed risks that employers face in relation to the new statutory tort of serious invasion of privacy. In July 2026, the New South Wales District Court considered the new tort and handed down an interesting decision in *Nehme v The Art Scene Pty Ltd* [2026] NSWDC 315.

Background

Ms Nehme created a Canva Pro account using her personal email address, which was paid for by her employer, The Art Scene, between July 2023 and July 2025. She used the account for both personal and work purposes and stored various sensitive personal documents and files on the platform.

While on parental leave, Ms Nehme granted access to a work colleague to a shared team folder in her Canva Pro account for employment-related purposes. However, she did not grant the work colleague access to any personal documents or to her personal folder. She also did not grant any person associated with The Art Scene 'administrator' or 'owner' rights in relation to the account.

Ms Nehme's employment ended in July 2025, following which there was a dispute between her and The Art Scene regarding the termination of her employment.

After her employment ended, Ms Nehme continued to use her Canva account until July 2026, when she was notified that she was denied access to her account, including to her personal folder, apparently at the instigation of The Art Scene.

The decision

Ms Nehme subsequently sought an ex-parte injunction against The Art Scene in the District Court of NSW alleging that there had been a serious invasion of her privacy relating to the former employer's access to her Canva account. The Court granted the injunction, finding that it had the power to do so under the new provisions of the *Privacy Act 1998* (Cth) and that Ms Nehme had a reasonable expectation of privacy in respect of the personal documents stored within the account.

As set out in our Workplace Watch article in 2025, the new tort of serious invasion of privacy presents risks for employers in relation to personal and sensitive information held or accessed by employers regarding their employees.

In this case, the risk related to a 'shared' account which was used for a mix of employment and personal uses. The Court concluded that by altering the Canva account, The Art Scene misused information relating to Ms Nehme, and a person in her position would have had a reasonable expectation of privacy.

The Court also concluded that, as access to the Canva account was apparently changed by the former employer, the invasion of privacy was intentional and, having regard to the history of limited access to the Canva account, it was arguable that the former employer knew, or ought to have known, that this would cause offence, distress, or harm to the dignity of the employee.

Key takeaways

This case is not the first use of the new tort in an employment matter. The Melbourne Football Club recently settled a claim in the Federal Court by a partner of a retired player who alleged that staff at the Club breached the tort of serious invasion of privacy. In that case, staff members at the Club allegedly shared information about the player's partner. The Club issued an apology following the settlement.

Employers often handle personal and sensitive information relating to employees for a range of different reasons. Personal and sensitive information may be in documents stored or used by an employer, or held in social media accounts or technology platforms used by employees.

An employer must take reasonable steps to securely manage personal and sensitive information and ensure that employees' personal accounts are not accessed or used for matters relating to the employer's business. Further, employers should consider inserting clauses into their standard employment contracts dealing with the use of an employee's personal information.

We expect to see more cases relying on the new tort and it is likely that employees will include breaches of the tort of serious invasion of privacy as part of broader proceedings.



Amending the ADA – review underway to consider changes to state discrimination laws

Author: Felicity Edwards (Partner)

The NSW Law Reform Commission (the **Commission**) is currently undertaking a review of the *Anti-Discrimination Act 1977* (NSW) (**ADA**) which is being overseen by three commissioners – The Honourable Tom Bathurst AC KC, the Honourable Justice Anna Mitchelmore and Kate Eastman AM SC.

Complainants can bring discrimination claims in either the federal jurisdiction under federal laws or the state jurisdictions, including under the ADA (if in NSW). Therefore, the ADA remains important legislation for ensuring the rights of persons who may have been discriminated against are upheld. The ADA has not undergone significant change since its commencement in 1977. While the review is still at consultation stage, some of the changes being considered, if implemented, would see significant amendment to the ADA. Such amendments may address some commonly raised limitations or frustrations expressed by our clients in responding to claims made under the ADA - and potentially create others.

Terms of reference

Among other things, the review is considering whether the ADA 'could be modernised and simplified to better promote the equal enjoyment of rights and reflect contemporary community standards'. In addition, the review is also considering:

1. whether the range of attributes protected against discrimination requires reform
2. whether the areas of public life in which discrimination is unlawful should be reformed
3. whether the existing tests for discrimination are clear, inclusive and reflect modern understandings of discrimination
4. the adequacy of protections against vilification, including (but not limited to) whether these protections should be harmonised with the criminal law
5. the adequacy of the protections against sexual harassment and whether the ADA should cover harassment based on other protected attributes
6. whether the ADA should include positive obligations to prevent harassment, discrimination and vilification, and to make reasonable adjustments to promote full and equal participation in public life
7. exceptions, special measures and exemption processes
8. the adequacy and accessibility of complaints procedures and remedies
9. the powers and functions of the Anti-Discrimination Board of NSW and its President, including potential mechanisms to address systemic discrimination

10. the protections, processes and enforcement mechanisms that exist in other Australian and international anti-discrimination and human rights laws, and other NSW laws
11. the interaction between the ADA and Commonwealth anti-discrimination laws, and
12. any other matters the Commission considers relevant.

Current status of review

The review is now up to the second round of consultation. In the first round, the focus was on conduct that is (or should be) unlawful under the ADA.

The second round of consultation focuses on key procedural aspects of the ADA. A consultation paper has been released which sets out options for reform informed by developments in other jurisdictions, research conducted and also submissions from the first round of consultation. As part of the consultation, the Commission has sought views on:

- whether the ADA should have a statement of objectives that could, among other things, inform the exercise of powers and functions under the ADA
- the ADA's structure
- the complaints process
- pathways to the NSW Civil and Administrative Tribunal (NCAT) to hear and determine complaints
- remedies, enforcement mechanisms and costs model
- the procedure for seeking exemptions to the ADA, and
- whether new proactive and/or preventative measures should be introduced.

Potential options for reform

Some of the more notable options for reform on the procedural and enforcement aspects of the ADA set out in the consultation paper, and which feedback is sought on, are:

13. Legal Representation. Currently, parties must obtain permission from Anti-Discrimination NSW (ADNSW) to be legally represented by a lawyer. The purpose of this is to make the process as informal as possible. The review has sought feedback on whether this requirements should remain or whether parties should still be required to obtain permission. Some of the submissions raised against legal representation include that lawyers may cause delay, formalise the dispute resolution process, lessen parties' control and increase costs.

14. More flexible dispute resolution model and direct access to NCAT. Currently, the ADA uses an 'investigation and conciliation' model whereby (generally) ADNSW must investigate and conciliate a complaint before it can proceed to NCAT for arbitration. The review has sought feedback on whether this remains appropriate or whether a more flexible model was preferential, which allows complainants to bypass ADNSW and make complaints directly to NCAT. Reference is made to the Victorian model that allows complainants to bring claims in VCAT before going to VEOHRC if they wish. It is said that this model was enacted in response to a review of Victoria's discrimination legislation which concluded that VEOHRC's early intervention and dispute resolution processes were not always appropriate, effective or efficient. Whereas an argument against implementing a direct access model is that ADNSW plays an important role in filtering complaints although it is also said that unmeritorious and vexatious claims could be addressed through NCAT's case management procedures.

15. Confidentiality clauses in settlement agreements. Unsurprisingly given developments in other jurisdictions, the review is considering whether limitations should be placed on parties to settlement agreements requiring confidentiality regarding the terms or subject matter of the agreement, or even the existence of the agreement as well as non-disparagement clauses which prevent parties from speaking negatively about one another. It is said in the paper that confidentiality may give complainants bargaining power and incentivise respondents to settle, meaning complaints are resolved faster and respondents may also want to avoid publicity or keep sensitive and commercial business information confidential. On the other hand, it was noted that confidential settlements can have disadvantages as they may reduce accountability for discrimination, reduce public awareness and understanding of discrimination, create a culture of silence and cover-up that enables repeat ADA breaches, negatively affect the wellbeing of victims, reinforce power imbalances between complainants and respondents, and limit the development of discrimination law. For these reasons, the review is considering whether the use of confidentiality clauses in settlement agreements should be limited and, if so, how. Submissions have been sought on whether the ADA should include conditions that must be met before a confidentiality clause in a settlement agreement is enforceable and, if so:

- a. what should those conditions be?
- b. should they apply to all types of unlawful conduct under the ADA, or only some?

4. Potential new remedies. The review is considering whether NCAT's existing powers to order specific remedies in ADA matters should be replaced with a broad power to make any orders 'as it sees fit'. This would significantly broaden NCAT's powers. Feedback has been sought on whether the ADA should be amended to expressly provide for NCAT having the power to:

- make declarations
- make specific orders for training and employment
- make specific orders in sexual harassment cases
- award civil penalties, or
- make any other orders currently not provided for?

5. Costs. NCAT is generally a 'no costs' jurisdiction. Except in special circumstances, parties pay their own legal costs regardless of whether NCAT substantiates the complaint. One criticism of this model is that it encourages people to make complaints that may be frivolous, vexatious, misconceived or without substance and respondents must pay their own costs even if a complainant is unsuccessful in NCAT. The alternate view is that the model is appropriate because a different model may discourage people from making meritorious complaints. Given the differing views, submissions have been sought on whether the NSW model is fit for purpose and whether an alternate model is more appropriate such as the (relatively new) federal "equal access"/asymmetrical costs model which is weight more in favour of complainants.

Next steps



The review is continuing and there are opportunities to provide submissions. It is likely that the review will continue for some time before being finalised. Once finalised, any proposed amendments to the ADA would need to be considered by the legislature before being proposed, and potentially enacted. Therefore, while amendments to the ADA seem likely following this review, they may still be some way off.

Lowering the barrier to entry for permanent employment - cases on casuals in the Fair Work Commission

Authors: Ben Burke (Partner) and Beza Eyoel (Associate)

In 2024, the definition of casual employment in the Fair Work Act (**Act**) was changed, as part of the suite of the 'Closing Loopholes' changes introduced by the Labor Government.

Before this change, a person was considered to be a casual employee if the person knowingly accepted an offer for a job that did not include a 'firm advance commitment to work that would continue indefinitely with an agreed pattern of work'.

While there still must be no 'firm advance commitment to continuing and indefinite work', the new definition inserted in s 15A of the Act requires that an assessment must be made of whether an employee is genuinely a casual employee having regard to the real substance, practical reality and true nature of the employment relationship.

This article examines how the Fair Work Commission has applied the new definition in two cases recently brought by employees in the education sector. Together, these decisions are a reminder that casual employees are now defined not only by what their contracts say, but by the practical reality of their work.

Tests in the Fair Work Commission

Baker v Macquarie University

In August this year Gregory Baker successfully challenged the classification of his employment status in the Fair Work Commission. This was the first decision in the Fair Work Commission (**FWC**) to consider the new provisions dealing with casual employment.

Mr Baker had been employed by Macquarie University as a computing teacher since 2023, teaching various classes and performing other tasks such as lecturing and supervising PhD students. In November 2025, Mr Baker made a written notification to Macquarie University under s 66AAB of the Act, which was rejected by the University.

Section 66AAB was introduced in 2024 and creates a pathway for casual employees who believe they no longer meet the definition of a casual employee, to provide written notification of this to their employers (subject to service requirements). Before this provision was introduced, the onus was largely on the employer to review the employment status of employees and make offers to relevant employees.

Mr Baker argued that he had a firm advance commitment to ongoing work because he consistently taught one computing subject, he lectured in both semesters of 2025, and he was allocated lectures in both semesters of 2026. In making his decision, Commissioner Crawford relied on evidence of these matters, in addition to evidence that that Mr Baker had little ability to reject this work; the subject he taught was a core part of the computing education program; and permanent employees of the University performed the same type of work that Mr Baker performed. Commissioner Crawford reached this conclusion notwithstanding that Mr Baker's pattern of work fluctuated each semester (a matter which was not in dispute between the parties).

Macquarie University relied on provisions of its enterprise agreement which did not allow for part-time arrangements for teachers. The FWC rejected Macquarie University's argument on the basis that the enterprise agreement could not provide conditions that were less favourable than the National Employment Standards.

The FWC ordered that Mr Baker be treated as a part-time employee and provided with additional payments under the enterprise agreement (in addition to other benefits of permanent employment).

Fedele v Technical and Further Education Commission (TAFE)

A month later, in September 2026, the FWC decided another casual employment dispute in favour of another employee in the education sector.

Mr Fedele performed teaching work for TAFE in painting and decorating classes on a consistent basis since 2022. After giving a written notice to TAFE pursuant to s 66AB, which was not accepted, Mr Fedele filed an application with the FWC to deal with the dispute.

Mr Fedele's contract stated that there was no guarantee regarding the days or hours he would be employed. This would have been more persuasive prior to 2024, but Commissioner Crawford nevertheless came to the (preliminary) view that Mr Fedele did not come within the definition of a casual employee under ss 15A of the Act (i.e., which meant he was actually a part-time employee).

The Commissioner came to this view notwithstanding that Mr Fedele's work had fluctuated during semesters and he was not required to work between semesters. The Commissioner considered evidence that Mr Fedele was given responsibility to teach classes at regular times set by TAFE. Commissioner Crawford also pointed to evidence that a permanent painting and decorating teacher was due to retire and another casual employee resigned in early 2025. These factors indicated that Mr Fedele did not come within the definition in s 15A.

The parties were directed to attempt to resolve the issues between themselves, but the matter will return to the FWC for a hearing if this is not successful.

Key takeaways



While we are now seeing the first decisions under this new framework, employers with long-term casual arrangements should consider whether their employees come within the definition set out in s 15A. Being proactive can reduce the risks of disputes in the future, particularly as employees now have greater access to information about their employment rights.

Workplace complaints in modern performance management: emerging challenges

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

Today's business leaders are increasingly faced with complex workplace scenarios, especially with the continued rise of AI and AI-generated grievances. One such challenging scenario that sometimes arises is when an employee who is the subject of performance management raises a complaint against the other employee/s involved in conducting that process. The complaint may involve allegations of bullying, victimisation, unfair management action, and the like, and can quickly muddy what was expected to be a relatively straightforward performance management process. The result is that the employer is required to manage the various additional layers of complexity that come with simultaneously managing both processes, such as procedural fairness, psychosocial safety, and increased legal risk.

Why complaints often arise during performance management

Being subject to a performance management process, even a completely valid and reasonable one, can naturally be an unsettling experience for an employee, and bring up feelings of stress, embarrassment, betrayal, concern regarding job security. These heightened emotions can affect how workplace interactions are perceived. For example, constructive feedback may be perceived as unjust criticism, and increased supervision and requests for accountability may be perceived as micromanagement and unreasonable pressure.

In some cases, the employee may genuinely conclude (with or without the assistance of AI advice) that they have been the victim of bullying, victimisation, or other unlawful conduct. This may culminate in the employee lodging a grievance against the other employee/s involved in providing feedback or administering the performance improvement process.

Practical consequences of grievances being raised during performance management processes

Some complaints may identify legitimate concerns that warrant a formal investigation. Conversely, others may arise primarily from disagreement with, or distress surrounding, the performance management process.

Regardless of whether the complaint raises genuine concerns, the practical consequences are that:

- focus can shift away from the original performance concerns
- significant time and resources may be diverted into handling the complaint, and
- there may be increased litigation risk, particularly where workplace rights are asserted or exercised.

Managing the overlap between the performance process and the complaint

A key initial consideration is whether the performance management process should be paused while the complaint is considered. The answer will not necessarily be that the performance management process should be paused, but will involve consideration of a variety of factors, such as:

- when the complaint was made
- the nature of the allegations
- whether the allegations directly concern any of the employee/s involved in the performance management process
- psychosocial safety considerations, and
- any relevant policy guidance.

A further key consideration will be whether any interim arrangements should be put in place to ensure the integrity of both processes and the psychosocial safety of those involved. Specifically, employers may consider:

- engaging an alternative employee to take over the performance process
- temporary changes to reporting lines, and/or
- physical separation, including through utilising work-from home arrangements or paid suspensions.

Common assumptions to avoid

Employers should be mindful to avoid jumping to the conclusion that the complaint has simply been made in retaliation to the performance improvement process and as such lacks merit simply because it has arisen during a performance management process.

While some employees may seek to use complaint mechanisms in bad faith in order to seek to delay the performance process or redirect attention from the performance concerns, it is important that the complaint is still assessed to ensure that:

- procedural fairness has been afforded to the complainant, and
- the employer has effectively discharged its legal obligations, including in relation to work health and safety.

Conversely, employers should avoid assuming that the conduct complained of must be bullying, harassment or other inappropriate conduct just because it has been characterised that way by the employee. It is not uncommon for complaints to include characterisations of certain conduct (e.g., that it amounts to bullying, victimisation) without providing sufficient particulars of what conduct they are specifically concerned about, or in circumstances where the conduct complained of does not actually amount to bullying, victimisation. This is especially so with the rise of AI-generated grievances, which are likely to utilise this sort of legal terminology. When assessing the complaint, employers should avoid accepting these characterisations at face value, and instead assess the complaint with reference to:

- the particulars of the actual alleged conduct of concern
- the context in which it occurred, and
- relevant policies and legal frameworks.

Key takeaways for employers



Employers should ensure that their grievance policies do not apply a one-size-fits-all approach but rather allow employers to retain discretion and flexibility in relation to managing grievances, to ensure that the response is proportionate and tailored to the circumstances of the complaint. For example, policies should allow for:

- preliminary assessment of complaints to allow for early and effective triage
- informal resolution options where appropriate, such as mediation or facilitated discussions
- efficient management of complaints through more informal processes for complaints that do not require a formal investigation, and
- formal internal and external investigations where warranted.

Employers should also ensure that managers feel supported and equipped to provide constructive feedback and undertake effective, legally sound performance improvement processes when justified.

Digital work systems and WHS: new duties or a new expression of existing ones?

Authors: Catherine Wilkinson (Partner) and Susan Withycombe (Special Counsel)

Artificial intelligence, algorithms, automation and digital platforms are rapidly changing how work is performed. Technology increasingly does more than assist workers. It allocates work, sets priorities and deadlines, determines workflows, monitors performance and influences the pace and manner in which work is performed.

In New South Wales, the *Work Health and Safety Amendment (Digital Work Systems) Act 2026* (NSW) responds directly to this development. However, while the reforms are significant, the underlying proposition that the design and organisation of work can create health and safety risks, is not new.

For organisations, that distinction is important. Although the amendments introduce specific provisions relating to digital work systems, many of the underlying WHS obligations concerning the design, allocation and organisation of work are already reflected in the existing legislative framework.

What are the reforms?

The NSW amendments introduce several significant changes to the *Work Health and Safety Act 2011* (NSW).

First, the legislation introduces a new definition of 'digital work system', defined broadly to include an algorithm, artificial intelligence (AI), automation or an online platform.

The definition is intentionally broad wide and is not limited to AI tools or gig economy platforms. Rostering systems, workflow management software, automated task allocation systems, performance monitoring tools, productivity tracking applications and other technologies that influence how work is organised and performed may all fall within its scope.

Second, the amendments expressly incorporate digital work systems into the existing primary duty of care. Section 19 of the WHS Act now specifically provides that a person conducting a business or undertaking (PCBU) must ensure, so far as is reasonably practicable, that workers' health and safety is not put at risk from the use of digital work systems in the business or undertaking. While the primary duty already required PCBUs to identify and manage risks arising from systems of work, the amendment makes it explicit that those obligations extend to risks created or influenced by digital technologies.

Third, the amendments introduce a new s 21A, which creates a specific duty concerning work allocated through digital work systems. It provides that a PCBU must ensure, so far as is reasonably practicable, that workers' health and safety are not put at risk by the allocation of work through a digital work system used by the business or undertaking.

In complying with that duty, PCBU's must consider whether the digital work system creates or contributes to:

- excessive or unreasonable workloads
- excessive or unreasonable performance metrics used to assess or track workers
- excessive or unreasonable monitoring or surveillance of workers, and
- unlawful discriminatory practices or decision-making.

These prescribed considerations reflect concerns that digital technologies increasingly influence not only what work is performed, but also the pace, intensity, monitoring and evaluation of work.

The reforms also introduce new powers for WHS entry permit holders. Subject to safeguards and supporting guidelines to be issued by SafeWork NSW, entry permit holders will be able to require a PCBU to provide reasonable assistance to access and inspect a digital work system that is relevant to a suspected contravention of the WHS legislation. This is intended to assist in understanding how algorithmic or automated systems operate in practice and how they may affect workers.

Importantly, most of the substantive provisions have not yet commenced. The provisions enabling SafeWork NSW to develop and publish Digital Work Systems Guidelines are already in force, however the new duties and entry permit provisions will commence on a future date to be proclaimed by the NSW Government. Those provisions generally cannot commence until at least one month after the Guidelines have been published. A period of consultation on the Guidelines has taken place.

New duties, or a new expression of existing ones?

The proposition that work design can create WHS risks is longstanding. That is why, despite the introduction of a new definition, an express amendment to the primary duty of care and a specific duty concerning work allocated through digital work systems, the reforms should not be viewed as creating an entirely new category of WHS responsibility.

Safe Work Australia's Principles of Good Work Design, first published in 2015, expressly applies safety principles to the design of work, work processes and systems.



Good work design considers matters such as job demands, workflow, task duration and complexity, workers' capacities and the systems through which work is performed.

Safe design guidance has similarly contemplated foreseeable systems of work, including job demands and workflows at task level. More recent regulation and guidance concerning psychosocial hazards has reinforced the importance of considering matters such as excessive job demands, unrealistic timeframes, fatigue and inadequate worker control.

The technology may therefore be new, but many of the WHS considerations are familiar.

If software allocates an unreasonable workload, creates unsafe scheduling, imposes unrealistic deadlines or removes appropriate worker control, the fact that the decision was generated by an algorithm rather than a human manager does not necessarily alter the underlying WHS obligation.

The better way to understand the reforms is that they confirm and make explicit the application of established WHS principles to digital work systems, while also introducing specific obligations concerning digitally allocated work.

What should organisations look out for?

The critical question is not simply, 'Do we use AI?'. The better question is: How does technology influence the design, allocation, monitoring and performance of work, and can that influence create health and safety risks?

An algorithm that continually increases workloads based on productivity data may create excessive job demands, fatigue or psychological pressure. Automated rostering may result in inadequate recovery periods. Monitoring technologies may influence work intensity. Automated task allocation may fail to account for worker capability, competing demands or changing workplace conditions.

Safe Work Australia's 2026 guidance on AI and digital technologies confirms that these technologies can create or increase physical and psychosocial hazards.

Organisations should also recognise that digital systems are dynamic. Software updates, changes to settings, new datasets or modifications introduced by technology providers may change how work is performed and consequently alter the WHS risk profile.

This is bigger than NSW

NSW is presently at the forefront of expressly regulating digital work systems through WHS legislation, but the underlying WHS issues are not confined to NSW.

Safe Work Australia's 2026 guidance confirms that existing WHS duties can apply to risks associated with AI and digital technologies. Safe Work Australia has also examined WHS arrangements for crowd-platform work, including whether the model WHS laws should be amended to address duties applying to crowd-platform operators.

WorkSafe ACT guidance provides a useful practical illustration of the existing framework. Its guidance for health and safety representatives uses an example involving fatigue caused by excessive workload allocated through an automated system. The example is instructive because the WHS issue is the risk created by the system of work, not whether the workload was allocated by a manager or by technology.

The broader point is therefore not that every Australian jurisdiction requires an equivalent to the NSW amendments. Rather, the NSW reforms sit within an established WHS framework under which the design, organisation and allocation of work can already create risks requiring management.

What should organisations do now?

Affected organisations should take proactive steps rather than wait for the new provisions to commence.

1. First, map existing digital work systems. Look beyond systems labelled 'AI' to rostering, workflow, monitoring, performance management, automated decision-making and third-party technology.

2. Second, assess how those systems affect work design. Consider workloads, deadlines, work sequencing, worker control, fatigue, physical risks, psychosocial hazards and the interaction between automated decisions and human judgement.
3. Third, consult workers and health and safety representatives. Workers may identify unintended consequences, workarounds or pressures that are not apparent from the technical specifications of a system.
4. Fourth, establish appropriate human oversight and governance. Organisations should understand what their systems are doing, what information drives automated decisions, who is responsible for reviewing those decisions and how unsafe outcomes can be overridden or escalated.
5. Fifth, review procurement and contractual arrangements. Organisations should consider whether technology providers supply sufficient information to allow WHS risks to be identified and controlled. Outsourcing the technology does not necessarily outsource WHS responsibility.
6. Finally, review controls when systems change. Updates to software, algorithms, settings, data or business processes may introduce new risks.

What comes next?

The NSW reforms point towards greater regulatory scrutiny of the relationship between technology and work design. As digital systems increasingly perform functions traditionally undertaken by managers, regulators are likely to be interested not only in whether the technology itself is safe, but in the work it produces.

The questions will increasingly concern how work is allocated, how targets and deadlines are generated, whether workers can challenge or override automated outcomes, whether adequate human oversight exists and whether workers are properly consulted when systems affecting their health and safety are introduced or changed.

The central message for organisations is simple: digital work systems are not merely an IT issue. They are a work design and WHS governance issue.

The NSW reforms make that connection explicit, but the underlying obligation to provide safe systems of work and manage risks associated with work design predates them. The question for organisations is therefore not simply when the new provisions commence, but whether the digital systems they use today are already creating risks that existing WHS duties require them to address.



AI in employment claims: a useful tool that increases access to justice, or AI 'slop' increasing costs and delays?

Authors: Sam Jackson (Partner) and Cait Gibbs (Associate)

In our [last edition of Workplace Watch](#) we explored the impact of AI on the employment relationship and the labour market. In this edition, we dive into the impact of Generative-AI on employment disputes and litigation, including how the Fair Work Commission and the courts are attempting to keep pace with the technology.

Earlier this year, Chief Justice Debra Mortimer observed that a spike in self-represented litigants using AI for legal advice and assistance had resulted in '*expanding workload issues and errors*' for the Federal Court of Australia.

Similar concerns have emerged from research commissioned by the Fair Work Commission (the **Commission**), reporting an increase in workload of more than 70% over the past three years.

In practice, the impact we are seeing of this increased workload on the Commission and the courts includes:

- **Longer delays** in resolving disputes, including tightened access to meaningful conciliation conferences at the Commission.
- **Diversion of judicial and tribunal resources** to procedural and interlocutory disputes over AI-generated material, rather than determining substantive issues.

- **Increased costs for employers**, as responding to often quite lengthy AI-driven internal employment disputes and then Commission or court applications requires additional time identifying errors, hallucinated authorities, or unsupported allegations.
- **A reduced opportunity for parties to be heard.** As more matters are determined on the papers, parties have fewer opportunities to explain their case orally, respond to issues as they arise, and answer questions from the Commission or court.

While on the surface, an increased use of AI in litigation gives the illusion of demystifying the legal system and enhancing access to justice for aggrieved workers, in our experience it is currently not achieving these objectives.

Recently, Judge Symons of the Federal Circuit and Family Court of Australia discussed the concept of AI '*sycophancy*'. Her Honour explained this as the '*tendency of large language models to prioritise user approval over truth*'.¹ By validating the user's preferred narrative, AI appears to be encouraging litigants to pursue claims that are factually and/or legally unsustainable, rather than confronting the weaknesses in their case. The result is that litigants are deprived of the frank and fearless advice a lawyer might otherwise provide, leading to the continuation of vexatious applications.

How are the courts and Commission responding?

Some of the more recent developments include:

- Implementing AI-specific Practice Notes/ Guidance Notes.²
- Providing litigants with a '*Prompts to help GenAI get it right*' template to use,³ designed to reduce the risk of AI sycophancy and improve the quality of AI outputs at the source by teaching litigants how to interact with AI tools effectively and critically, rather than accepting the first answer generated.
- Introducing mandatory disclosure of AI use in preparation of Commission documents, which comes into effect on 20 October 2026. The Federal Court similarly requires disclosure in certain circumstances.
- Reforming processes, including giving the Commission authority to handle cases faster, decide simple matters on the papers without a full hearing, and throw out frivolous or vexatious claims.⁴
- Reminding applicants (through published decisions) of the costs consequences for making or continuing unmeritorious claims, particularly where AI has been extensively used. This occurred very recently in a matter where an applicant was ordered to pay some of the costs of his former employer after he was continually warned by the Commission that his unfair dismissal application was doomed to fail as he had not met the eligibility requirements for making such an application. Despite this, he preferred the advice provided by an AI platform and continued with his application.⁵

- Continuing to publish decisions that include pointed criticism of unreliable AI-generated material.⁶

The future of AI: lessons from Greg Baker and the McDonalds class action

Not all recent AI-related decisions have resulted in cautionary tales.

In a recent 'win for AI', Macquarie University computing academic, Greg Baker, successfully challenged his casual employment status at the Commission, running his case using sophisticated AI tools and agents in a responsible fashion, accompanied by appropriate human oversight.

Baker's success is attributable to his own technical expertise in AI, typically running 10 to 15 advanced AI agents and investing in paid 'premium' versions of the more typically used large language models. He conceded that even his premium AI tools needed support initially and were '*stumbling through*' legal questions. Critically, he was able to train the agents to verify their own work, reducing the risk of inaccuracies and hallucinations.

Baker recognises that most people in his position are not using AI to this level. However, Baker warned that it is only a matter of time before AI will catch up, envisioning that by 2031, everybody will have an AI agent as capable as his set-up.



Indeed, some courts are moving beyond merely regulating AI use and are actively encouraging parties to consider its benefits to assist in implementing *'reforms which allow lawyers to spend more time exercising professional judgment and judges to spend more time identifying what really matters and deciding it according to law'*.⁷ That is, courts are recognising that AI can be used to reduce the costs of complex litigation

For example, in a current employment class action before the Federal Court,⁸ Justice Michael Lee ordered the parties to investigate and confer with *'suitably qualified technology experts'* on whether AI could assist with a range of litigation tasks, including analysing data, preparing chronologies and managing large volumes of documents. Importantly, the Court emphasised that any use of AI must be subject to appropriate safeguards, including traceability, testability, confidentiality and human supervision. Justice Lee stated that AI *'allows us to reconsider entrenched processes which developed in a world constrained by the capacity of human beings to collect, collate and synthesise information'*.

These two examples indicate that the future of AI in employment litigation is not all bad, and if used responsibly and appropriately, it can both reduce the time and cost associated with litigation and improve access to justice.

However, in the meantime while employment disputes and litigation continue to be disrupted by the proliferation of 'AI slop' being used by unrepresented litigants, we recommend employers consider the following:

- **Clear documentation of employment processes is now more important than ever**, particularly given potential disputes are far more likely to be determined 'on the papers', largely by reference to documentary evidence.
- **Consider ways to use AI** to reduce the burden of reviewing and processing claims made by employees, while being cautious of the risks involved (e.g., risks including privacy, discrimination, work health and safety, intellectual property, cyber, loss of legal professional privilege etc).
- **Provide training to managers** on AI literacy and develop **systems and policies** on appropriate AI use.

1 *Ba v Sterling Parts Australia Pty Ltd* [2026] FedCFamC2G 1245.

2 See *Use Of Artificial Intelligence (PD-AI)* FCFCOA Practice Direction; *Use of Generative Artificial Intelligence Practice Note* (GPN-AI) FCA; *Use of generative artificial intelligence in Commission cases* Guidance note FWC

3 For example, *'Base responses on the Fair Work Act 2009'* and *'Prioritise accuracy and objectivity over telling me what you think I want to hear'*. See FWC webpage *'Using AI to help you with your case'* <<https://www.fwc.gov.au/genai>>

4 For example, *Workplace Relations Legislation Amendment (Building Cooperative Workplaces No. 1) Act 2026* (Cth)

5 *Sadnan Khan v Aldi Pty Ltd* [2026] FWC 3144.

6 For example, *Sarah Byrne v CXC Corporate Services Pty Ltd* [2026] FWC 2751.

7 *Rogers v McDonald's Australia Ltd (AI-use)* [2026] FCA 1264.

8 *Rogers v McDonald's Australia Ltd (AI-use)* [2026] FCA 1264.



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