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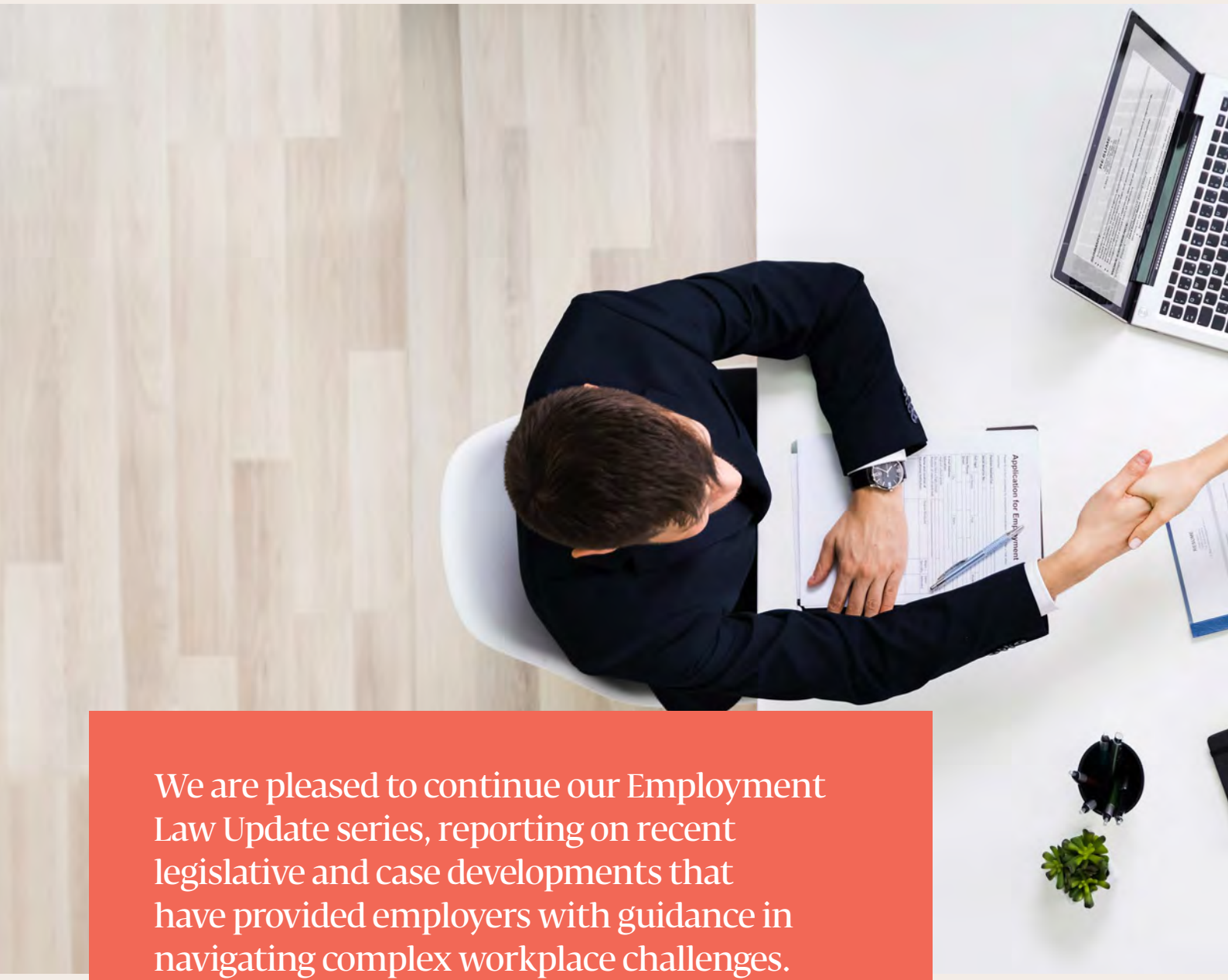
Employment Law Update

Recent developments in managing employees in Australia

September 2025

Outpacing change



We are pleased to continue our Employment Law Update series, reporting on recent legislative and case developments that have provided employers with guidance in navigating complex workplace challenges.

In this edition, we discuss developments that employers should keep in mind to ensure legal compliance and best practice. These developments include managing employee online influencers, the erosion of harmonised WHS laws, navigating flexible work arrangements, developments in multi-employer bargaining and an update about workplace investigations.

Contents

The rise of employee online influencers – time to call 'tick tock' on TikTok?

Authors: Trent Sebbens (Partner), Julie Mills (Counsel) and Poppy Gammon (Graduate)

In brief:

- Online influencers are permeating all areas of our lives, and now, it seems, they are increasingly crossing the "workplace" line. The rise of employee influencers presents a new set of challenges for employers, particularly given the potentially wide reach of social media posts.
- Enforcing confidentiality in relation to workplace conduct issues is becoming an increasingly complex issue. Many employers are also observing the long-term effects of a time when virtual connections were paramount for a significant portion of the workforce. A new generation, whose primary source of contact and information sharing for a significant time was online media, is now entering the workforce. This has contributed to a distorted understanding, amongst some people, of what is "confidential", and what information they can or should share online.
- Employers need to consistently enforce confidentiality and social media policies for them to have any impact, meaning such policies need to be regularly reviewed in light of changing societal and employer standards.
- Some legal risks associated with employee online influencers, which may not have arisen in the context of regulating employee social media usage to date, include contempt of court, exposure to aggravated damages, breaching prohibitions on recording from court premises, psychosocial harm to other employees and breach of the new statutory tort for serious invasions of privacy.

Lessons for employers:

- Employers should review and, where necessary, update existing social media and confidentiality policies (and contract terms) in light of changing societal and employer standards. These standards should clearly state when (if at all) employees may associate themselves with their employer on their personal social media accounts, and when (if at all, such as by consent) these employees may identify other employees. These policies should set out clear expectations regarding the prohibition of sharing confidential information, identifying colleagues, or discussing workplace disputes online, particularly where legal proceedings are involved.
- Employers should also consider providing regular training and guidance to staff on the importance of confidentiality, the risks of social media misuse, and the potential legal consequences of inappropriate online conduct, including contempt of court. This training should be tailored to highlight the specific risks associated with platforms such as TikTok and Instagram, which encourage rapid and informal sharing of content.
- Employers should ensure they have in place clear reporting lines so that employees know how to raise concerns if they become aware of inappropriate social media activity.

Online creators, once a fixture of our leisure time, are now making their presence felt in our places of work.

We are seeing employees recording TikToks in court corridors about legal proceedings involving their workplace, sharing videos of their offices (and customer/client files) online, opening OnlyFans accounts as a secondary income source and the rise of "A day in the life of" young professional influencers sharing video insights into their daily work to help those coming behind them make more informed career choices.

These developments pose both opportunities and challenges for employers, particularly given the potentially wide reach of social media posts. However, the long standing challenges of balancing confidentiality, enforcing social media policies and complying with court rules still apply.

Confidentiality in the post #MeToo and post Covid era

It is getting more complicated to enforce confidentiality in the workplace. Some recent developments reflect that challenge – with a Federal positive duty to eliminate sexual harassment from the workplace, as well as recent challenges to the appropriateness of confidentiality and non-disclosure agreements from both the Australian Human Rights Commission and the Victorian Government.

Employers need to consistently enforce confidentiality and social media policies for these policies to have any impact. That means that such policies need to be regularly reviewed in light of changing societal and employer standards. Social media policies need to clearly state when (if at all) influencer (and all) employees may associate themselves with their employer on their personal accounts, and when (if at all, such as by consent) these employees may identify other employees, thereby protecting the privacy and safety of all workers.

As most, if not all, employee influencers have access to sensitive or confidential information, there is a risk that they might inadvertently, or deliberately, share this information in their influencer posts. For example, if an employee influencer has been involved in an internal investigation (in any capacity, including as a witness) and it then becomes the subject of legal proceedings, they may be tempted to share their personal perspective or experiences online to increase their following. In doing so, they could reveal confidential details that are not meant for public consumption. This disclosure could seriously compromise the employer's legal position, potentially affecting the outcome of the proceedings or exposing the employer to further legal liability. Depending on the stage of the proceedings, it might also amount to a contempt of court.

Further risk arises when an employee influencer identifies, either explicitly or implicitly, other employees while discussing ongoing proceedings or internal matters which could become the subject of legal proceedings. Such identification may be intended to embarrass or shame colleagues perceived to be at fault, and/or to hold them publicly accountable. This conduct can cause those employees to feel unsafe, and may constitute a psychosocial harm for which the employer could be liable.

Many employers are also experiencing the ongoing effects of a new generation of workers entering the workplace whose primary source of contact and information sharing for so long was online media. This has contributed to a distorted understanding, amongst some people, of what is "confidential", and what information they can or should share online. Employers should be mindful of this in their training and induction of new employees and not assume that previously commonly held views about confidentiality hold for these workers.

Some legal risks arising from employee online influencer conduct

When employee influencer conduct involves legal proceedings, both the employer and the posting employee may be at risk:

- **Prohibitions on recording from court premises –** Recording *anywhere* on federal and state court premises, whether that be an audio or visual recording, is prohibited in Australia. As examples, Rule 6.11 of the *Federal Court Rules 2011* and the section 17 of the *Court Security Act 2013* (Cth) prohibit such recording. There is similar legislation in each state and territory, with NSW adopting specific provisions in section 9A of the *Court Security Act 2005* (NSW) banning the use of social media in court rooms. An exception may apply where a judicial officer has expressly given permission for a certain individual to make a recording. However, anyone without such permission is strictly forbidden from recording content, particularly for social media platforms.
- **Contempt of court –** In *Registered Clubs Association of New South Wales v Stolz (No 2)* [2021] FCA 1418 the Federal Court granted an interlocutory injunction to restrain a former employee of an employer from making public commentary about ongoing litigation in which the employer had sued him for breach of confidentiality. The former employee made statements on social media and to the media. It was held that this was a calculated effort to pressure the other party to discontinue its legal proceedings against him, and amounted to a threatened contempt of court. The Court considered that this conduct was an improper interference with the administration of justice because it was intended to improperly influence the outcome of the case.

  Employers should ensure they take action to prevent or remove content over which they have control that contains abusive or inflammatory language

or any misrepresentations about the nature of the proceedings. It may also help to make it clear to employees that this conduct can constitute contempt of court, and a conviction for contempt of court can result in imprisonment.

- **Defamatory and harassing conduct by employees –** An employee engaging in social media posts may also defame other persons, like co-workers, or in some cases their own employer. In *BeautyFULL CMC Pty Ltd* [2021] QDC 111, a court awarded damages to an employer (being a small business capable of being defamed) after an Instagram story posted by a former employee was found to be defamatory. The Court found the post by the former employee was designed to cause hurt and distress, particularly to a former manager, with the post being intentionally false. The Court also accepted that the clinic suffered a loss of business reputation as a result of the defamatory publication.

  For defamatory or harassing posts by employees, it is possible that an employer may be liable for the statements made by an employee who was acting in the course of their employment and within their authority. If the employer could take steps to remove the employee's post, but did not do so, the employer may also be exposed to "aggravated damages". In extreme cases – effectively amounting to cyberbullying - posts that are offensive could amount to a breach of the *Criminal Code* (Cth) (see for example the cases of *R v Hampson [2011] QCA 132* and *Agostino v Cleaves [2010] ATSC 19)*. Accordingly, if an employer considers the conduct to amount to serious misconduct, then it may take steps to discipline the employee, including by means of dismissal (see as an example, *Waddy v Ability Centre Australasia Pty Ltd [2021] FWC 3030* in which the Fair Work Commission upheld the dismissal of an employee who made out-of-hours posts on his Facebook page (which listed his then employer) which were discriminatory, sexist and racist).

- **Breach of statutory tort for serious invasions of privacy –** A new provision in the *Privacy Act 1988* (Cth) came into effect on 10 June 2025 that allows individuals to sue under a 'statutory tort' for serious invasions of privacy. This law allows individuals (including employees) to take direct legal action instead of relying upon the Australian Information Commissioner to bring an action. To be considered a serious invasion of privacy:

  - the invasion needs to be a result of misuse of information or intrusion on a person's solitude;
  - a reasonable person would expect privacy in that situation;
  - the invasion must be intentional or reckless;
  - the invasion of privacy must be serious; and
  - the individual's right to privacy must outweigh the public interest in the situation.

  An employer could be found to be reckless if they knew about the potential for misuse of information and did nothing about it. For example, if an employer knows that one of their employees is a social media influencer and has access to sensitive information, the employer may be considered reckless if they do not take steps to prevent the misuse of that information.

The erosion of harmonised WHS laws

Authors: Scarlet Reid (Partner) and Joycelyn Tang (Senior Associate)

In brief:

- Fourteen years ago, SafeWork Australia introduced model Work Health and Safety laws with the goal of creating a balanced and nationally consistent framework to protect the health and safety of workers and workplaces across Australia. This initiative was widely welcomed, especially by businesses operating in multiple states, as it promised greater clarity and consistency in WHS obligations.
- The model WHS laws were designed to simplify compliance for employers and reduce confusion, and ensure that all workers, regardless of their location, enjoyed the same level of protection. For organisations with a national footprint, this harmonisation meant they could implement uniform policies and procedures, consistent staff training, and more effective risk management.
- However, states and territories have gradually introduced their own amendments, often influenced by changes in government or local priorities. This has led to a patchwork of WHS laws that differ from one jurisdiction to another. SafeWork Australia is currently conducting a best practice review of the model WHS laws which includes consideration of whether there are any opportunities to strengthen and maintain harmonisation. Further information about this best practice review is available on SafeWork Australia's website.

Lessons for employers:

Given this evolving landscape, it is crucial for employers to:

- **Stay informed:** regularly review the WHS laws and regulations in each state and territory where your business operates, as requirements may change or divert from the model laws.
- **Update policies and training:** ensure that your workplace policies, procedures and training programs reflect the specific requirements of each jurisdiction in which you operate.

We highlight below a few key differences across the jurisdictions which have adopted the model WHS laws.

Limitation periods

Limitation periods for WHS prosecutions are not uniform across Australia. Employers should be aware of these jurisdictional differences to manage long-term legal risks.

The model WHS laws: the standard approach

Most Australian jurisdictions have adopted the model WHS laws, which provide that the standard limitation period for bringing a prosecution is the latest of:

- 2 years after the offence comes to the regulator's attention;
- 1 year after a coronial report is made or coronial inquiry ends, if it appears an offence was committed; or
- 6 months after a WHS undertaking is contravened or withdrawn.

For the most serious offences (Category 1), proceedings can be brought after these periods if fresh, previously undiscoverable evidence emerges.

Jurisdictional variations: what employers should watch out for

Despite the model approach, there are important variations in most jurisdictions:

- **Commonwealth:** Prosecutions can be brought within 1 year after an official inquiry (including a Royal Commission) ends (if it is later than the model timeframes). There is also no limitation period for industrial manslaughter.
- **Australian Capital Territory:** There is no limitation period for industrial manslaughter. For all other offences, the model timeframes apply.
- **Queensland:** There is no limitation period for industrial manslaughter. For all other offences, the model timeframes apply.
- **South Australia:** If a matter is referred to the Director of Public Prosecutions, proceedings may be brought within one month of the Director's advice to the regulator (if it is later than the model timeframes). There is also no limitation period for industrial manslaughter.
- **Northern Territory:** Follows the model WHS laws without variation.
- **New South Wales:** Currently follows the model WHS laws without variation but recent reforms will allow prosecutions for offences beyond the model timeframes if it is in the "interests of justice" to do so.
- **Tasmania:** Follows the model WHS laws without variation.
- **Western Australia:** Proceedings can be commenced after the model timeframes if the DPP decides not to bring, or discontinues, industrial manslaughter proceedings related to the conduct. The new proceedings must relate to the conduct and be commenced within 6 months of the DPP's decision or discontinuance.

Prosecution powers

Each jurisdiction has adapted the powers to prosecute WHS offences to suit local legal and administrative structures. The ability for unions to prosecute is a particularly notable point of divergence.

Jurisdiction	Who can prosecute?	Can unions prosecute?
CTH	Comcare, an inspector (with written authorisation from Comcare), or the Director of Public Prosecutions	No
ACT	WorkSafe ACT, an inspector (with written authorisation from WorkSafe ACT), or the DPP	No
NSW	SafeWork NSW, an inspector (with written authorisation from SafeWork NSW), the Attorney General, or the DPP. For category 1 and 2 offences, the secretary of a union may prosecute if SafeWork NSW has declined to follow the advice of the DPP to bring proceedings.	Currently unions can initiate prosecutions in limited circumstances. Recent reforms will allow unions to initiate prosecutions after consulting with SafeWork NSW if it does not commence proceedings
NT	NT WorkSafe, an inspector (with written authorisation from NT WorkSafe), or the DPP	No
QLD	The WHS prosecutor or the DPP. For category 3 offences, an inspector (with written authorisation from WorkSafe QLD) may prosecute.	No
SA	SafeWork SA, an inspector (with written authorisation from SafeWork SA), or the DPP	No
TAS	WorkSafe Tasmania, an inspector (with written authorisation from WorkSafe Tasmania), or the DPP	No
WA	WorkSafe WA, a public service officer working in the WHS department (with written authorisation from WorkSafe WA), the State Solicitor, or the DPP	No

Powers and functions of health and safety representatives

The model WHS laws: the standard approach

Most Australian jurisdictions have adopted the model WHS laws, which empower HSRs to:

- represent workers in health and safety matters;
- monitor compliance measures taken by the PCBU;
- investigate complaints from workers regarding health and safety; and
- inquire into risks to health and safety arising from the conduct of the business or undertaking.

HSRs may also:

- inspect the workplace, with or without notice depending on the situation;
- accompany inspectors during workplace inspections;
- be present at interviews concerning health and safety, with the consent of the worker(s);
- request the establishment of a health and safety committee;
- receive information about health and safety matters (with privacy safeguards); and
- request assistance from any person as necessary.

Additional powers include directing work to cease in certain circumstances and issuing provisional improvement notices.

Jurisdictional variations: what employers should watch out for

Currently, all jurisdictions have adopted the model HSR powers, except for Queensland.

Queensland has introduced several important changes including:

- **Expanded investigative powers:** HSRs can take measurements, conduct tests, and take photos or videos at the workplace to identify or record hazards and risks.
- **Use of equipment:** HSRs may bring and use equipment and materials necessary for these tasks.
- **Assistance:** HSRs may request assistance from a "suitable entity" rather than "any person."

Recent reforms in NSW will also confer expanded investigative powers for HSRs, allowing them to take measurements, conduct tests, and capture photographs or videos to collect evidence of suspected WHS contraventions.

Effective workplace investigations – an update

Authors: Tamara Lutvey (Partner) and Andrea Motbey (Counsel)

In brief:

- Workplace investigations are increasing in frequency and complexity as employers respond to expanding legal obligations, including in respect of bullying, psychosocial risk and the positive duty to prevent sexual harassment.
- Amidst this complexity, recent decisions of the Fair Work Commission have highlighted the importance of quality and robust investigation processes and outcomes.

Lessons for employers:

In conducting workplace investigations, employers should remember that:

- Investigation processes should be probing, rigorous and conducted with an open mind;
- Investigations should be thorough and not rushed, although prolonged investigations should be avoided to reduce adverse impacts on participants;
- Care should be taken to accurately capture and frame the recollections of witnesses;
- Investigators may be called before courts and tribunals, with the form and substance of the investigation process and outcomes being subject to external (and public) scrutiny; and
- Where investigation recommendations are made, employers should consider whether non-implementation carries risk, for example, where implementation could aid compliance with the positive duties regarding sex discrimination or work health and safety duties.

Investigating with rigour and an open mind

The decision of the Fair Work Commission in *Mr Roy Smout v BHP Coal Pty Ltd* [2024] FWC 2062 demonstrates the difficulties in balancing speed to investigate with procedural fairness and a thorough exploration of the facts.

In this case, two female cleaners at a mine site alleged that the Applicant made sexually harassing comments to them. An external lawyer, seconded to the employer, was appointed to investigate the complaint, complete the investigation and deliver findings in seven days. The investigation comprised of telephone interviews with the complainants, and a video conference interview with the Applicant.

A show cause meeting occurred the day after the investigation was finalised, on the day before the Easter long weekend. During the meeting, the Applicant was notified of the findings and that the employer was considering terminating his employment. The Applicant was invited to respond to the proposed dismissal, and after considering the Applicant's response, the employer terminated the Applicant's employment that day.

The FWC decision

Notably, Commissioner Riordan required the investigator to attend the hearing and give evidence about the investigation.

Commissioner Riordan found that the investigation was partially flawed, and was critical of the following aspects of the investigation:

1. The investigator was not truly external or independent, despite asserting that he was. The investigator maintained ongoing contact with the employer's management during the process and provided a draft report for review and amendment before releasing it, thereby undermining the independence of the investigation.
2. The investigator did not attempt to identify or interview a witness to one allegation, and relied heavily on the consistency of the complainants' accounts without adequately probing for independent verification.
3. The investigative rigour expected of an external and independent process was lacking. There were no probing questions and the complainants were asked leading questions rather than open questions. The investigator appeared to believe the complainants on the basis of them giving virtually the same answers, and failed to explore inconsistencies in their evidence. The investigator also did not ask one complainant about how she could have heard a comment by the Applicant given the noise of operating machinery.
4. The complainants were interviewed by telephone, which made it impossible to assess body language, determine whether anyone else was present during the interview, or whether they were reading from the filed complaint.
5. The Applicant was interviewed by video conference, limiting the ability to evaluate body language or see if anyone else was present during the interview, and for the investigator to convey the seriousness of the issue to the Applicant.
6. The investigation was completed quicker than usual for the employer, with the Commission finding it was rushed due to the impending transfer of the mine's ownership. The investigation was finalised by the end of the day after the Applicant's interview, making it difficult to accept that the investigator took time to weigh up the Applicant's evidence as against the other interviews and undertake deliberations.

Commissioner Riordan concluded that the show cause process was rushed due to the long weekend and transfer of mine ownership to take effect shortly after. The show cause process did not afford the Applicant a full opportunity to consider the allegations, seek advice, and prepare a response to the proposed dismissal.

While some allegations were substantiated and there was a valid reason for dismissal, the lack of procedural fairness in the investigation and show cause process rendered the dismissal unfair.

An update on gist memory vs verbatim memory: *Wild v Meduri* [2024] NSWCA 230

In our July 2024 publication, we outlined the decision of Justice Jackman in *Kane's Hire Pty Ltd v Anderson Aviation Australia Pty Ltd* [2023] FCA 381 **(Kane's Hire)**.

In that decision, Justice Jackman remarked that people routinely remember only the gist of conversations, or striking or important words from conversations, rather than recalling conversations verbatim. In that context, Jackman J cautioned about the common practice of witnesses giving written evidence of the gist of a conversation by using direct speech (generally in quotation marks), preceded by qualifying words to indicate that the direct speech records only the substance or gist of what was said.

An example of this follows:

> I then said words to the following effect "If you pay me $2000 in cash today, I will transfer the ownership of the car to you by the end of tomorrow."

In *Wild v Meduri* [2024] NSWCA 230, the majority of the Court of Appeal of the Supreme Court of New South Wales disagreed with Jackman J's concern about witness evidence being presented in this way. The majority's view was that, where the witness recalls the actual words used, then the witness should state those words in direct speech, and where the witness recalls only the substance, gist or effect of what was said, then it is acceptable to provide the evidence in direct speech, if that direct speech is prefaced with an explanation that it records the substance, gist or effect.

With these developments, investigators should consider the following principles when collecting and testing evidence from witnesses which concerns their recollection of a conversation, particularly where the content of the conversation is a key issue under consideration:

1. The form of the evidence should correspond to the nature of the actual memory the witness has of the conversation. Care should be taken not to put words into the mouth of the witness;
2. If the witness remembers only the gist or substance of what was said, and not the precise words, then the evidence should be given and recorded in a way that clarifies that direct speech is recording only that gist or substance;
3. If the witness claims to remember particular words or phrases being used, then those words or phrases should be put in quotation marks to indicate they are verbatim quotes;
4. If the witness genuinely claims to recall the actual words used in a conversation, then the evidence should be given in direct speech, and should not be prefaced by the phrase that the conversation occurred "in words to the following effect"; and
5. Evidence of a witness who claims to remember the exact words of a conversation, but who is later found to have exaggerated the nature and quality of their memory, may result in an adverse finding about their credibility.

Risks from non-implementation of investigation recommendations

In a recent decision, the FWC found that an employer did not comply with its obligations under enterprise agreement provisions regarding bullying, harassment and discrimination as it failed to implement recommendations made following two external investigations.

While this decision concerns particular provisions of a single enterprise agreement, it highlights the potential risks for employers where they do not implement recommendations received as part of a workplace investigation.

In this case, the Australian Workers' Union applied to the FWC to deal with a dispute with the employer under the applicable enterprise agreement. The enterprise agreement contained a provision regarding "Discrimination, Bullying and Harassment", which detailed commitments of the parties about those matters, such as investigation of complaints and providing a workplace that is free of bullying, harassment and discrimination.

The AWU argued that the employer failed to comply with its obligations to investigate and deal with complaints made by an AWU member employee against their manager.

The investigation and recommendations

The employee and manager made complaints to the employer about each other. The employer appointed an external investigator, who made recommendations to the Employer at the conclusion of the investigation. These included changed reporting lines, possible training for both individuals, and a mediation to reset the working relationship.

Further complaints were made to the employer by the employee and the manager, and the employer appointed the same external investigator. The investigator made further recommendations, again involving changed reporting lines, training, and a mediation. It was also recommended that if mediation was refused, the employer should consider whether the working relationship or continued employment remained tenable.

The recommendations were not implemented and the AWU raised a complaint for the employee about the investigation process and the manager's refusal to participate in mediation. The employee later resigned.

The FWC's decision

The FWC found that the initiating of the two external investigations demonstrated that the employer took the complaints seriously, and appropriately and promptly investigated them.

However, in failing to implement the recommendations, the employer did not comply with the enterprise agreement obligation to take complaints seriously, nor its commitment to maintaining a workplace free from bullying, harassment and discrimination.

The FWC said that implementing, or at least genuinely considering the recommendations that arise from investigations, must necessarily be within the meaning of the employer's obligations under the enterprise agreement to take complaints seriously and maintain a workplace free from unlawful discrimination, harassment and bullying.

Lessons for employers

While this case is specific to the terms of the enterprise agreement, there are other sources of bullying, harassment and discrimination obligations for employers where risks may arise from non-implementation of investigation recommendations.

Examples include the positive duty under the *Sex Discrimination Act 1984* (Cth) to take reasonable and proportionate steps to eliminate sexual harassment and sex discrimination connected to work, or the duty to ensure, so far as is reasonably practicable, the health and safety of those in the workplace.

Non-implementation of investigation recommendations targeted at addressing sexual harassment, bullying and other workplace risks, such as providing training to workers or making changes to the workplace, could place an employer at risk of a finding of non-compliance with their duties.

Employers should carefully consider whether to include the making of recommendations in the investigator's scope. An alternative approach is for employers to require factual findings only to be made as part of an investigation. Where recommendations are received, implementation should be carefully considered.

Navigating flexible work arrangements

Authors: Talia Firth (Partner), Joycelyn Tang (Senior Associate), Peta Banbas (Lawyer), Helena Kastrissios (Graduate)

In brief:

- Employers will now be familiar with the various "Secure Jobs, Better Pay" changes made to the *Fair Work Act 2009* (Cth) throughout 2022 in relation to requests for flexible working arrangements.
- There is now a noticeable trend of Australian employers rolling back work-from-home arrangements originating from the COVID-19 pandemic, with many directing employees to return to the office on at least a part-time basis. This shift has coincided with rising tensions between employees and employers, resulting in an increase in disputes about flexible work arrangements. To date, the Fair Work Commission has published 39 decisions and orders on applications made under the new section 65B of the Fair Work Act, addressing disputes about flexible work arrangements.
- These decisions reflect a clear movement towards stronger employee protections and increased scrutiny of employers' compliance with statutory requirements – not just the validity of business grounds for refusal, but also whether all procedural and consultative obligations have been properly met.
- This movement towards stronger employee protections is also playing out beyond the court room, with the Victorian government recently announcing its proposal to introduce legislation to mandate the right to work from home for at least two days a week if an employee can reasonably perform their job remotely.

Lessons for employers:

- **Understand the requirements for a valid flexible working request:** Employers should familiarise themselves with the preconditions to a request being validly made, contained in section 65(1) of the Fair Work Act.
- **Establish a clear connection between the request and the employee's circumstances:** It is essential to determine whether the employee is seeking a flexible work arrangement "because of" a circumstance listed in section 65(1A) and whether the request properly "relates to" that circumstance, as required by section 65(1)(b).
- **Engage in genuine consultation and consider alternatives:** Employers are required to discuss flexible work arrangement requests with employees and genuinely attempt to reach an agreement. This includes exploring and, where possible, offering alternative arrangements.
- **Understand your obligations when responding to or refusing a flexible working request:** These are outlined in section 65A. Employers who rely on "reasonable business grounds" to refuse a request must provide an evidentiary basis for this reliance.

Flexible work arrangement obligations of employers

Current legislation aims to create a fairer and more transparent process for flexible work requests.

The Fair Work Act extends the right to request flexible working arrangements to a broad range of employees, including but not limited to employees who are pregnant, parents of school aged children, and carers.

When an eligible employee requests a change in working arrangements, the employer must provide a written response within 21 days.

An employer may refuse the request only if:

- it has discussed the request with the employee and genuinely tried to reach agreement with them on changes to the employee's working arrangements to accommodate the relevant circumstances;
- the employer and employee have not reached such an agreement;
- the employer has had regard to the consequences of the refusal for the employee; and
- the refusal is on reasonable business grounds. For example, the new working arrangement requested by the employee is too costly for the employer, it would be impractical to change other employees' working arrangements or recruit new employees to accommodate the request, the request would likely result in a significant loss in efficiency or productivity, or the request would likely have a significant negative impact on customer service.

If the employer refuses the request, its response must set out the reasons for the refusal, including any particular business grounds for the refusal and how they apply to the request, and must detail how it has had regard to the consequences of the refusal for the employee.

If a dispute about flexible work arrangements cannot be resolved at the workplace level, an employer or employee can refer the matter to the Fair Work Commission. If the matter cannot be resolved by alternative means (such as conciliation), the Commission can arbitrate the dispute. In exceptional circumstances, matters can proceed straight to arbitration.

Case law developments

Three recent decisions provide useful guidance for employers on how to apply these provisions.

Commission finds risk of employee exposing her daughter to pathogens from the office outweighs back-to-office directive: *Catherine Louise v Metcash Trading Ltd [2025] FWC 2090*

Catherine Louise began employment in July 2020, at the height of the COVID-19 pandemic, working full-time from home. In late 2024, her employer implemented a new policy requiring certain employees to return to the office for at least three days per week. Ms Louise sought an exemption from this requirement due to her unique family circumstances: she is the parent of a teenage daughter with cystic fibrosis. Ms Louise's request was motivated by a desire to minimise the risk of bringing pathogens from the workplace into her home, thereby protecting her daughter's health.

The employer refused Ms Louise's request for a full exemption but offered a compromise, allowing her to work from home three days per week and requiring her to attend the office two days per week, with the caveat that she could be directed to attend at other times as needed. Ms Louise did not accept this compromise, instead seeking to maintain her existing full-time remote work arrangement. She escalated the matter to the Fair Work Commission under section 65B of the Fair Work Act, seeking a formal determination.

Employer did not have reasonable business grounds for refusal

The Fair Work Commission found Ms Louise's request was validly made, as it was directly related to her circumstances as a parent of a child with a serious health condition.

When notifying Ms Louise that her request had been denied, her employer had cited various business grounds, including fostering an environment of collaborative working, improving working relationships between colleagues, increasing productivity and accountability,

and improving the health and wellbeing of employees by promoting connections between them.

The Commission determined the employer did not have reasonable business grounds to refuse the request. The Commission held that the employer did not provide sufficient evidence to substantiate its business reasons for requiring Ms Louise's physical presence in the office. Nor did it lead any evidence to demonstrate it had regard to the consequences of the refusal for Ms Louise.

As a result, the Commission ordered the employer to grant Ms Louise's request, allowing her to continue working from home on a full-time basis.

Commission finds requisite nexus between flexible work arrangement request and employee's stated circumstances was not established: *Paul Collins v Intersystems Australia Pty Ltd [2025] FWC 1976*

In February 2025, Intersystems ended its COVID-19 hybrid working arrangements, requiring all employees to return to the office five days a week. Mr Collins formally requested to continue working from home two days per week, citing his responsibilities as a parent of school-aged children and the need for work-life balance. Intersystems denied the request but offered a compromise: Mr Collins could work from home one day per week. Mr Collins rejected this alternative.

Request was not validly made

The Commission found Mr Collins' request was not validly made. The key reason was the lack of a clear connection between his parental responsibilities and the specific change in working arrangements he sought. The Commission noted Mr Collins' written request simply expressed a preference to continue remote work, without explaining how this arrangement was necessary to fulfill his caring responsibilities.

The Commission was satisfied the evidence in the matter demonstrated Mr Collins and his wife could manage school drop-offs and pick-ups through existing flexible start and finish times, and that he had no specific caring duties during core working hours. The Commission also acknowledged Intersystems had made genuine efforts to accommodate Mr Collins, including offering alternative flexible arrangements, which he did not adequately address or explain as unsuitable.

Because the request did not meet the requirements of section 65 of the Fair Work Act, the Commission determined the request was not validly made and therefore outside its jurisdiction.

Full Bench of the Fair Work Commission finds employer did not meet the requirements that would otherwise have permitted it to refuse a request for a flexible work arrangement: *Elizabeth Naden v Catholic Schools Broken Bay Limited as Trustee for the Catholic Schools Broken Bay Trust [2025] FWCFB 82*

Elizabeth Naden, a teacher and Religious Education Coordinator at Sacred Heart Primary School, requested to return from parental leave in 2025 on a part-time basis while retaining her executive role. The school refused, offering only a part-time classroom teacher position unless Ms Naden returned full-time to the executive role. Ms Naden, supported by her union, challenged this under the Catholic Schools Broken Bay Enterprise Agreement 2023 and the Fair Work Act.

Employer ordered to implement requested flexible work arrangement

In this case, the Commission initially upheld the employer's refusal of the flexible work request, citing reasonable business grounds. However, on appeal, a Full Bench found Ms Naden's employer had failed to meet all requirements under section 65A(3) of the Fair Work Act. Specifically, the Full Bench found the Commission had not properly considered the consequences of refusal for Ms Naden. Because all four requirements of section 65A(3) must be satisfied before a refusal is valid, the Full Bench quashed the original decision and ordered Ms Naden's employer to implement Ms Naden's requested flexible work arrangement.

The Full Bench made several important observations:

- section 65A(3)(c) of the Fair Work Act places a positive obligation on the employer to consider the consequences of a refusal on the employee;
- this consideration should be discussed during consultations and included in the written reasons for refusal, which must be provided within 21 days;
- the written response must detail not only that the employer has had regard to the consequences of the refusal, but also how it has had regard to those matters; and
- if any of the procedural requirements in section 65A(3) are not met, the employer cannot validly refuse the request.

Multi-employer bargaining developments

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In brief:

- While multi-employer bargaining has always been a feature of the Fair Work Act, the Secure Jobs, Better Pay reforms significantly broadened access to multi-employer bargaining, with increased scope for employers being forced to bargain for a multi-employer agreement.
- There has been a recent uptick in unions leveraging the multi-employer bargaining streams, with McDonald's franchisees in South Australia most recently being subject to a supported bargaining authorisation (previously, the low-paid authorisation multi-employer stream) **(McDonald's Decision)** and three coal mining operators, Peabody, Whitehaven and Ulan Coal, being ordered to collectively bargain as single interest employers **(Peabody Decision)**. These decisions are significant because:
    - The McDonald's Decision arguably lowers the threshold for finding that employers and employees may have difficulty bargaining at the single-enterprise level and, in doing so, expands the class of employers who could be required to bargain with other employers through the supported bargaining stream. McDonald's is challenging the FWC's decision via appeal to the Federal Court.
    - The Peabody Decision found that mining the same commodity in the same state was sufficient to establish a 'common interest'. This is despite the mining operators not operating in the same region and using substantially different mining methods at their respective mines. The Peabody Decision has also been appealed with judgement reserved.
- We expect to see increasing activity in the multi-employer bargaining space into 2026 and beyond.

Lessons for employers:

- It is essential for employers to understand whether any part of their operations could be roped into multi-employer bargaining through the single interest or supported bargaining streams of multi-employer bargaining.
- Low union membership amongst your workforce does not reduce the risk of multi-employer bargaining: in the McDonald's Decision, the SDA admitted that it only represents a small minority of employees covered by the supported bargaining authorisation and that it could not otherwise successfully obtain a majority support determination for a single enterprise agreement.
- An employer can also be roped into a multi-enterprise agreement that is already in operation, through a variation process that can be initiated by a union without the employer's agreement.
- Once an employer is ordered to participate in multi-employer bargaining, they cannot bargain for a single enterprise agreement. There are limited ways to be removed from a multi-employer agreement or multi-bargaining bargaining which require an FWC order and/or the majority agreement of employees and their bargaining representatives.
- An employer can inoculate themselves against multi-employer bargaining, including by having an in-term single enterprise agreement and/or agreeing with a bargaining representative to bargain for a single enterprise agreement.
- In September 2025, the multi-employer bargaining process collapsed following Peabody's decision to close its Wambo mine, with the unions and remaining employers agreeing to pursue single enterprise bargaining. This development does not diminish the significance of the FWC's preparedness to find a common interest but indicates that single enterprise bargaining remains a more straightforward pathway than multi-enterprise bargaining.

Overview of multi-employer bargaining

Multi-employer bargaining involves two or more employers negotiating collectively with employees (and their representatives) to make a multi-enterprise agreement containing terms and conditions of employment that apply across multiple workplaces.

While multi-employer bargaining has always been a feature of the *Fair Work Act 2009* (Cth), following the Secure Jobs, Better Pay **(SJBP)** reforms, the FW Act now provides several streams for multi-employer bargaining, each with distinct features and requirements:

- Single interest employer stream;
- Supported bargaining stream (replacing the low paid authorisation bargaining stream that was previously in the FW Act); and
- Cooperative workplace stream.

Importantly, employees covered by single interest and supported bargaining authorisations can take protected industrial action. Multi-employer bargaining can also be subject to an intractable bargaining declaration.

Single-interest enterprise bargaining

The single-interest stream allows a union to seek FWC authorisation for multiple employers to bargain together if certain criteria are met, including:

- At least some employees are union-represented;
- Employers have "clearly identifiable common interests";
- Operations and business activities are "reasonably comparable";
- It is not contrary to the public interest; and
- Each employer consents, or a majority of employees of each employer support the making of the single-interest authorisation.

When determining whether employers have a common interest, the FWC will consider factors such as geographical location, regulatory regime, the nature of the enterprises and terms and conditions of employment. For employers with more than 50 employees, there is a presumption of common interest unless proven otherwise. Later in this article, we consider the Peabody Decision and the Full Bench's application of the 'common interest' test.

Supported bargaining

Supported bargaining is designed for low-paid industries where employees face barriers to effective bargaining. Unions may apply to the FWC to initiate bargaining across multiple employers. There is ongoing union advocacy to expand this stream to other sectors, such as fast-food franchisees, as seen with the McDonald's Decision.

Cooperative workplace bargaining

This stream allows multiple employers to voluntarily agree to bargain together with employees and a registered employee organisation, resulting in a 'cooperative workplace agreement'. Participation is entirely voluntary, and employers cannot be compelled to join. Uptake has been limited since the reforms, with only one agreement in the finance sector and a variation in the religious education sector.

Steering clear of multi-employer bargaining

For most employers, multi-employer bargaining is not a desired industrial outcome as it reduces an employer's ability to tailor agreement terms and conditions to its particular operational and financial needs.

An employer can take certain measures to protect its desired position, including by having an in-term single enterprise agreement and/or agreeing with a bargaining representative to bargain for a single enterprise agreement. The FWC also has discretion to exclude employers based on recent bargaining history or effective ongoing negotiations. For employers with enterprise agreements, this means that initiating bargaining for replacement enterprise agreements is an important protection against multi-employer bargaining, while employers who do not have an enterprise agreement should periodically reevaluate this position against the potential to be covered by a single interest or supported bargaining authorisation. As the McDonald's and Peabody Decisions show, unions are growing increasingly confident in their use of the multi-bargaining jurisdiction and we expect this trend to continue. Employers without a bargaining strategy should consider developing one as a matter of priority.

Recent developments

Supported bargaining authorisation approved for McDonald's franchises in South Australia

In June 2025, a Full Bench of the FWC approved an application by the Shop, Distributive and Allied Employees Association **(SDA)** for a supported bargaining authorisation covering McDonald's-branded restaurants in South Australia. This authorisation applies to 18 employers, each holding a licence agreement with McDonald's Australia Limited **(MAL)**. The decision is significant because it is the first contested supported bargaining application targeting a private sector, non-government funded employer.

The Full Bench found that:

- Pay and conditions in the fast food sector are generally at or near minimum standards, with low rates of pay prevailing, and assigned significant weight to this.
- The SA Licensees have clearly identifiable common interests, operating under standard form licence agreements with MAL adhering to the "McDonald's System", resulting in significant uniformity in operations and public presentation.
- The work performed by employees is essentially the same across the restaurants, with standardised roles and largely uniform pay arrangements.
- The anticipated number of bargaining representatives would be consistent with a manageable collective bargaining process.
- The Full Bench did not accept the SA Licensees' submission that the SDA has a history of successful bargaining within the fast food industry and that there are high levels of bargaining in the industry. Instead, the Full Bench found that without the authorisation, the SA Licensees would not participate in bargaining, and their employees would not have access to collective bargaining. In this regard, the Full Bench placed weight on the evidence that McDonald's is the employer of almost half of all employees in the fast food industry – and so the extent to which it engages in enterprise bargaining is highly significant.
- Support is necessary for the SDA and other employee bargaining representatives to facilitate meaningful employee participation in bargaining.

The Full Bench concluded that a supported bargaining process would best serve the objectives of the FW Act. As a result, the supported bargaining authorisation was granted.

The employers opposed the application and the decision is now set to be challenged in the Federal Court. Court dates have yet to be set, as at the date of publication of this article.

Federal Court challenge to multi-employer bargaining in black coal industry

In *Association of Professional Engineers, Scientists and Managers, Australia v Great Southern Energy Pty Ltd T/A Delta Coal, Whitehaven Coal Mining Ltd, Peabody Energy Australia Coal Pty Ltd, Ulan Coal Mines Ltd* [2024] FWCFB 253 **(Peabody Decision)** the FWC authorised multi-employer bargaining for deputies, under-managers, shift engineers, and control room operators across several underground black coal mines in NSW. While the mines use different mining methods and are not located in the same region, the FWC found that mining the same commodity in the same state was sufficient to establish a 'common interest', compelling the employers to bargain collectively. Delta Coal was excluded due to its unique business model, which was not reasonably comparable to the others.

Whitehaven, Peabody, and Ulan have appealed the decision in the Federal Court. The Minerals Council of Australia supports the appeal, warning that the decision could set a precedent for other sectors. The Collieries Staff and Officials Association **(CSOA)**, which sought the authorisation, argues that multi-employer bargaining will standardise workplace conditions and improve workforce mobility.

While the change in circumstances of the employer parties means the multi-employer bargaining is no longer being pursued, the Federal Court's determination will be closely watched, as it may clarify the scope and limits of 'common interest' in multi-employer bargaining authorisations.

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