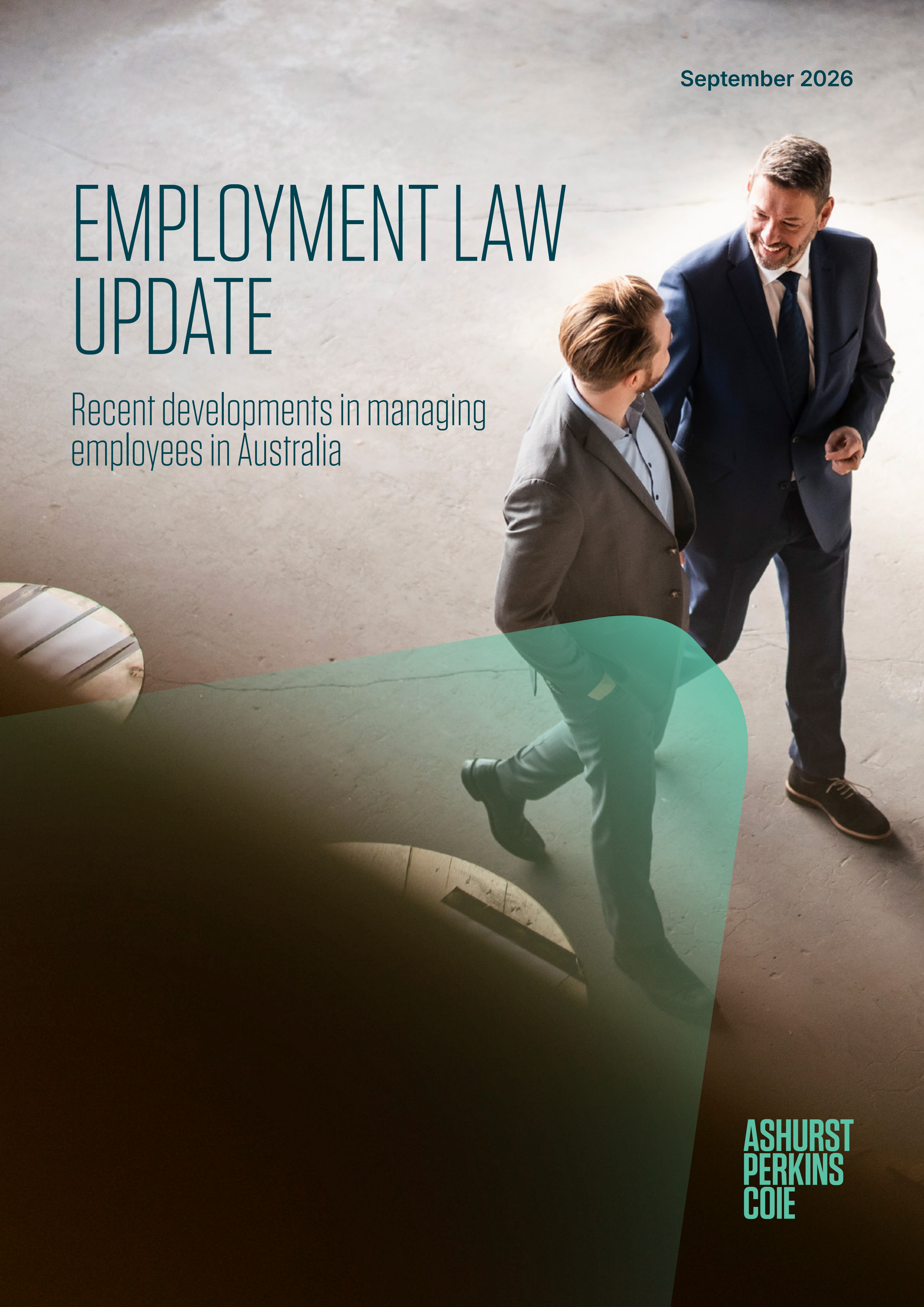
September 2026

EMPLOYMENT LAW UPDATE

Recent developments in managing employees in Australia



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Contents

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. Topics include whether refusing to adopt AI may amount to misconduct, recent trends in flexible work arrangement refusal cases and workplace investigations, and what Australia's safety regulators are targeting in 2026.

Use it or lose it: When refusing to adopt AI may amount to misconduct

Authors: Shelley Williams (Partner), Greta Avis (Lawyer) and Tarryn Sorour (Graduate)

In Brief

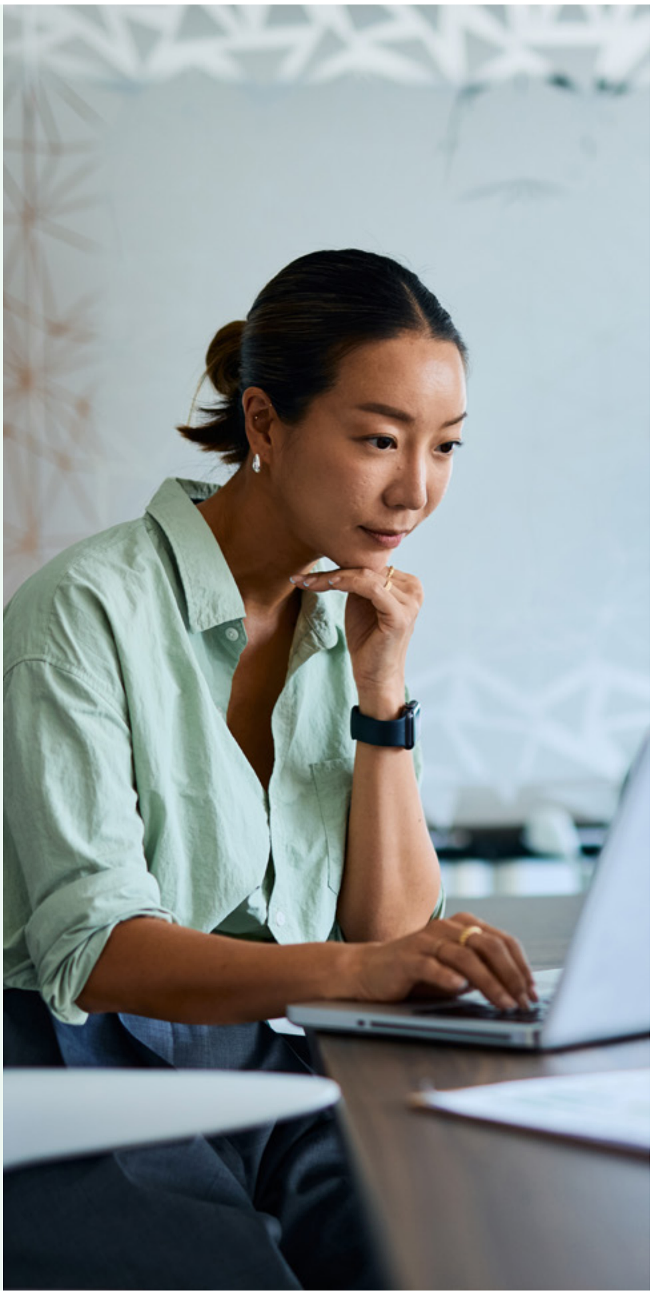
- As artificial intelligence becomes embedded in many workplaces, a question arises: at what point does an employee's refusal to adopt AI amount to misconduct? The UK Jurisdiction Taskforce's *Legal Statement on Liability for AI Harms* describes AI as a tool at a professional's disposal, and suggests that misconduct can involve not only misusing AI, but also failing to use it at all.
- In Australia, professionals owe a duty to exercise reasonable care and skill in carrying out their work. Judged against this standard, it is possible that a professional may be found to be negligent not only for using AI inappropriately, but also for failing to use AI where a competent member of their profession would have done so. What counts as "standard practice" will evolve, but the fundamental principle remains the same: employees must act with reasonable care and skill when conducting their work.
- Where an employer issues a lawful and reasonable direction to use AI, an employee's refusal may constitute serious misconduct. However, as the decision in *Lee v Superior Wood* [2019] FWCFB 2946 illustrates, an employer cannot simply mandate the use of new technology for its own sake - the direction must be lawful, genuinely connected to the competent performance of the relevant role, and consistent with the employee's contractual duties.
- Where AI use has become integral to performing a role productively and to the required standard, employers may be able to establish it is an inherent requirement of the position. Failure to perform that inherent requirement may provide a valid reason for dismissal, constitute industrial action under the *Fair Work Act 2009* (Cth) or even amount to repudiation of the employment contract.
- Employers must consider whether employees have legitimate grounds for reluctance to use AI, including disability, age-related unfamiliarity, or genuine concerns about privacy and accuracy, and whether reasonable adjustments or accommodations are required.

Lessons for employers

- **Assess whether AI use is genuinely an inherent requirement of the role:** Before directing employees to use AI, employers should conduct a careful analysis of whether AI adoption is genuinely connected to the competent and efficient performance of the role and whether it has become integral to performing the work to the required standard and with the required speed. A blanket requirement to use AI that is imposed for administrative convenience alone is unlikely to constitute a lawful and reasonable direction. This extends to the use of biometric technology which might be implemented for administrative or operational ease but is not required to effectively perform the position.
- **Clearly identify AI use as an inherent requirement where appropriate:** Where AI is indispensable to performing essential job functions, employers should document and communicate this to employees and make clear that AI use is an inherent requirement of their position. This should be reflected in position descriptions, contracts, relevant policies and

ideally form part of the onboarding process so candidates are on notice of the requirement to use AI as part of the position.

- **Provide adequate training and support:** Before taking disciplinary action against an employee who refuses to use AI, employers should ensure they have provided adequate training, resources and support to enable the employee to adopt the technology. An employee who raises genuine concerns or requests further training would not necessarily be guilty of wilful misconduct or under performance.
- **Conduct genuine consultation about technological change:** Employers considering mandating AI adoption should consult with affected employees about the introduction of AI tools, the reasons for the new mandate, and any concerns employees may have in accordance with any consultation obligations under an industrial instrument. When consulting on the change, employees must be given a meaningful opportunity to understand the mandate and provide feedback on it, which employers are in turn required to genuinely consider.
- **Consider reasonable adjustments and accommodations:** Employers must have regard to their obligations under the *Disability Discrimination Act 1992* (Cth) and applicable state or territory anti-discrimination laws, and should consider the Australian Human Rights Commission's Final Report: Human Rights and Technology, which highlights accessibility obligations and the need to assess human-impact risks before mandating AI adoption.
- **Establish that refusal genuinely impacts capacity to perform:** Before dismissing an employee for refusing to use AI, employers should be prepared to demonstrate that the employee's refusal genuinely impacts their capacity to perform essential job functions.



When computers became widely integrated into modern workplaces in the 1990s, there were significant concerns about automation and job displacement, with some workers refusing to use them. However, as computers and email shifted from novelty to professional necessity, those who insisted on fax machines and 'snail mail' were not merely exercising a preference - they were failing to render services in the most efficient way available. Today, as artificial intelligence becomes embedded in workflows across industries, a strikingly similar question arises: at what point does an employee's refusal to adopt AI mean they are engaging in misconduct?

AI as a tool in the professional's arsenal

AI is often perceived as a machine that replaces human thought and action, but it can be more accurately understood as a tool at an employee's disposal, no different in principle from any other tool available to them. This is the position adopted by the UK Jurisdiction Taskforce (the Taskforce), chaired by Sir Geoffrey Vos (Master of the Rolls), in its *Legal Statement on Liability for AI Harms*, which examines both the risks of misusing AI and the consequences of failing to use it at all. This new lens has raised important questions about professional liability.

Employees owe an obligation to exercise reasonable care and skill in carrying out their duties, and this extends to their use of AI. In Australia, the standard requires a professional employee to exercise the degree of care expected of an ordinary person professing to have their special skill (*Rogers v Whitaker* (1992) 175 CLR 479). Whether an employee has acted with reasonable care and skill will depend on the circumstances.

Judged against this standard, an employee may be found to be negligent for using AI inappropriately, selecting an unsuitable AI model, failing to conduct proper due diligence or ethical standards, or failing to validate AI outputs effectively. It is also possible that an employee could be found professionally liable for ***failing*** to use AI where a competent member of their profession would have done so. As the Taskforce emphasises, whether AI should be used will be judged by reference to others working in the same field. Of course, technological developments are moving rapidly, workplace policies are still catching up, and what counts as standard practice today may shift again tomorrow, but the fundamental principle remains the same: employees must act with reasonable care and skill in conducting their work.

Can an employee sacked for saying no?

The above analysis raises a practical question: what happens when an employee refuses to use AI? There is an implied term in every employment contract that requires an employee to comply with lawful and reasonable directions given by their employer. Under regulation 1.07 of the *Fair Work Regulations 2009* (Cth), refusing to carry out a lawful and reasonable direction consistent with the employee's contract can constitute serious misconduct and an employee's failure to comply may be grounds for disciplinary action, including termination of their employment. The critical question, then, is not whether an employer can direct an employee to use AI, but whether it is ***reasonable*** to do so in the circumstances.

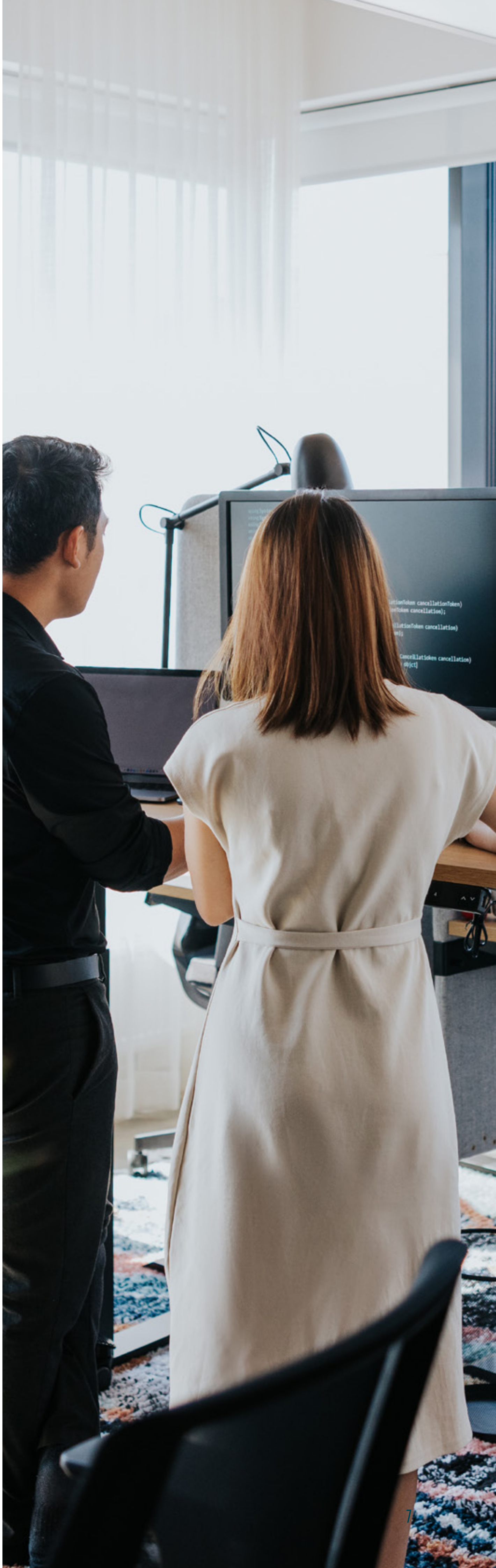
Employers cannot simply assert that using AI is an inherent requirement of a role without careful analysis. Inherent requirements are the essential features or defining characteristics of a position (*Qantas Airways Ltd v Christie* (1998) 193 CLR 280). The question for employers, then, is whether AI use has become so integral to performing a role productively and to the required standard that it is now indispensable.

In *Lee v Superior Wood* [2019] FWCFB 2946, an employee's dismissal for refusing to use biometric fingerprint scanners was overturned because the employer's direction to use the scanners breached the *Privacy Act 1988* (Cth) and was merely administratively convenient rather than reasonably necessary. As that case illustrates, employers cannot simply mandate new technology for its own sake. However, where AI adoption is genuinely connected to the competent performance of a role, and a direction to use AI as part of the role is lawful and aligns with the employee's contractual duties, employers will have a stronger basis to discipline employees who fail to use AI as directed.

Where an employer establishes that AI use is an inherent requirement of the role, non-compliance may amount to repudiation of the contract, provide a valid reason for dismissal, or constitute industrial action under the *Fair Work Act 2009* (Cth). That said, context matters. A blanket refusal to engage with new technology without legitimate justification may constitute misconduct, particularly where adequate training has been provided. An employee who raises genuine concerns about AI's appropriateness in their role, or who requests further training, would not necessarily be guilty of wilful misconduct or under performance. A range of circumstances may legitimately ground such concerns, such as a vision impairment that renders an interface inaccessible, age-related unfamiliarity with the technology, or genuine reservations about privacy or accuracy. In such cases, employers must consider reasonable adjustments under the *Disability Discrimination Act 1992* (Cth) and any applicable state and territory anti-discrimination legislation. Employers should also have regard to the Australian Human Rights Commission's *Final Report: Human Rights and Technology*, which highlights the importance of ensuring AI tools are accessible to persons with a disability and the need to assess human-impact risks before mandating AI adoption.

In considering whether a dismissal of an employee for refusing to use AI is harsh, unjust, or unreasonable, the Fair Work Commission must weigh all relevant factors under section 387 of the *Fair Work Act 2009* (Cth), which will likely include whether the direction was lawful and reasonable, whether procedural fairness was afforded, and whether the employee had legitimate grounds for reluctance that the employer ought to have accommodated. Employers considering mandatory AI adoption should therefore be prepared to clearly identify AI use as an inherent requirement of the relevant positions, provide adequate training and support to employees, conduct genuine consultation about the new mandate, and explain how an employee's refusal to use AI genuinely impacts their capacity to perform essential job functions.

AI issues are endlessly complex and there are also increasingly becoming circumstances, including AI wearables, where employers might seek to ban or mandate the non-use of certain AI tools. Employers should continue to closely monitor these issues and update (or develop) employment contract terms, policies and procedures, as required.



On what grounds? Recent trends in flexible working arrangement refusal cases

Authors: Talia Firth (Partner), Amanda Wu (Senior Associate) and Christina Chiaverini (Graduate)

In Brief

- Employers who refuse flexible working arrangement (**FWA**) requests continue to face heightened scrutiny by the Fair Work Commission. This remains the trend we are seeing since our September 2025 publication (accessible here).
- Employers must show role-specific and evidence-based "reasonable business grounds" for refusing a FWA request under s 65A(3)(d) of the *Fair Work Act 2009* (Cth).
- The four pre-conditions for a refusal under s 65A(3) are cumulative. If one is not met, the refusal will be invalid.
- Where fairness requires it, the Commission will use its broad discretion under s 65C to order compromises (eg return-to-office plans and trial periods), even where reasonable business grounds are made out.

Lessons for employers

- Before deciding whether to refuse a FWA request, conduct a role-specific and operational impact assessment, supported by quantifiable evidence, where possible. If the arrangement has been provided to the employee previously, consider whether the performance data supports or undermines the employer's proposed decision.
- Do not rely on general reasons, such as impacts on team culture, collaboration or cohesion. Similarly, any hybrid working policy should be applied on a role-specific and employee-specific basis.
- Consider and document how any refusal would affect the specific employee and include that analysis in the written response.
- Consult with the employee and genuinely explore alternatives informed by their circumstances before deciding whether to grant or refuse a FWA request.
- This article focuses on the FWA regime under the FW Act. However, employers should be aware that the position with respect to working from home requests is currently in flux:
  - On 27 August 2026, a Full Bench of the Commission decided on its own initiative to insert a working from home term in the *Clerks—Private Sector Award 2020 in Variation on the Commission's own initiative – Clerks—Private Sector Award 2020* [2026] FWCFB 225.
  - Victoria is considering enacting a parallel "work from home" regime. Employers with Victorian-based workforces should monitor progress of the proposed *Equal Opportunity (Work from Home) Bill 2026* and ensure compliance with both regimes if it is enacted.

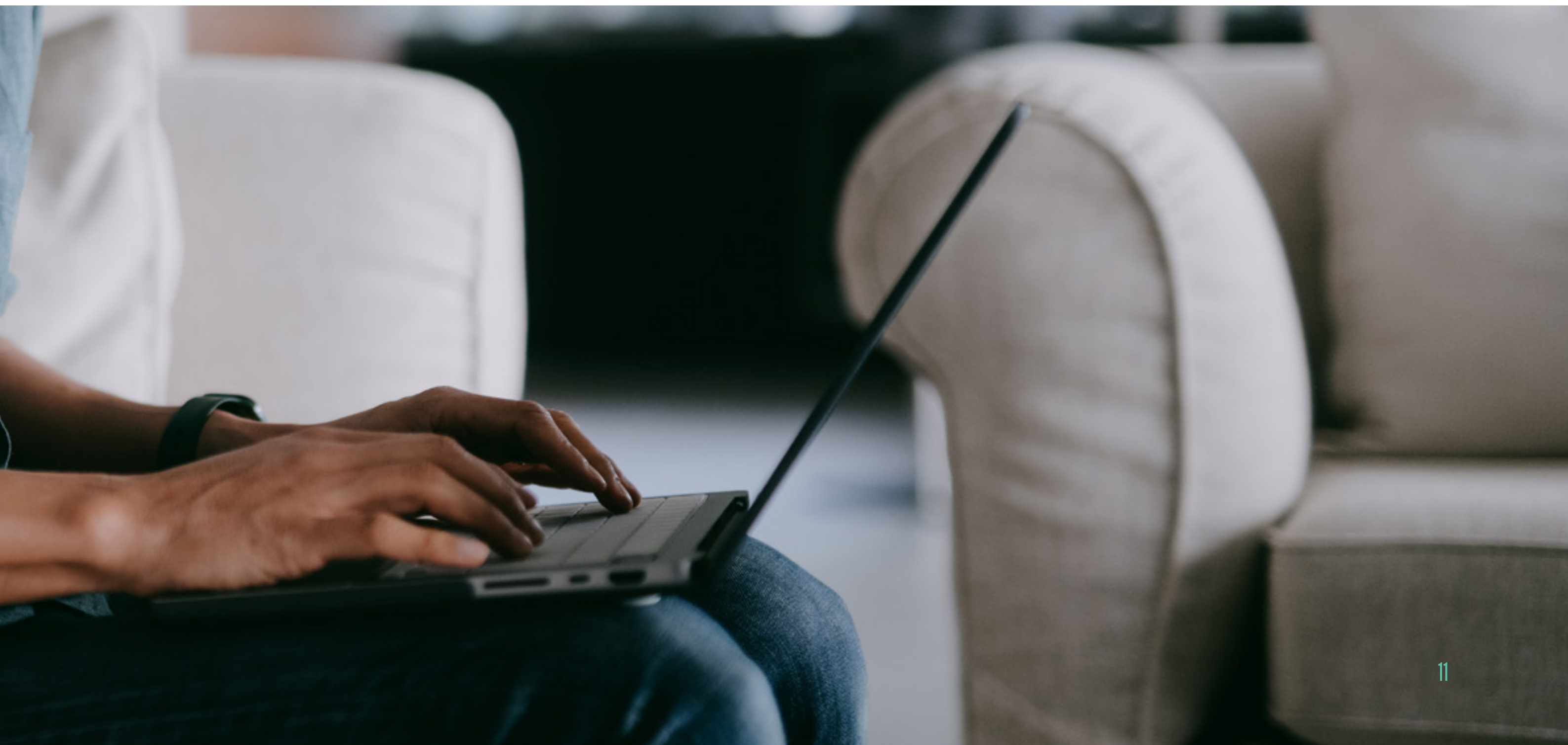
Recent cases

The following table provides a high level summary of recent decisions under the FWA regime as well as the key principles arising from each case.

Case	Was refusal upheld?	Key principles
Chandler v Westpac Banking Corporation [2025] FWC 3115 (DP Roberts) Ms Chandler requested to work from home to care for her two young children. Westpac refused her request without first discussing the request. Westpac relied on its Hybrid Working Model Policy (which required 2 days in the office per week) as a measure to manage efficiency and productivity loss. However, Ms Chandler had worked remotely for several years with sustained high performance.	No – FWA request granted	• **Consultation must precede refusal:** The employer did not comply with the procedural requirements under s 65A(3)(a)-(c). • **Business grounds must be role specific and substantiated:** The employer's evidence was "generalised" and "insufficient to establish reasonable business grounds", particularly given it did not quantify the alleged losses or negative impact. • **Sustained remote performance undermines refusal:** The Commission noted that as Ms Chandler had been successfully working remotely for a number of years, it was unlikely that a continuation of those arrangements would generate adverse productivity or efficiency related results.
Duncan v Coal & Allied Mining Services Pty Ltd [2026] FWC 1427 (Commissioner McKinnon) Ms Duncan, a Mining Operator, sought to work permanent day shifts after parental leave because she lacked care for her young child at night. The mine operated a 7-day rotating roster of 12.5-hour day/night shifts. A three-month trial resulted in 16 night shifts not being covered, with deferred production revenue implications.	Yes – Reasonable business grounds established	• **Quantified losses can establish reasonable business grounds:** Evidence of approximately $1.8 million in annual deferred production and lower productive truck hours established significant efficiency and productivity impacts. • **Precedent risk across the workforce is a legitimate consideration:** The Commission acknowledged that accommodating the request would prompt similar requests from other employees in comparable circumstances, resulting in likely capacity constraints.
Gurung v Knauf Gypsum Pty Ltd [2026] FWC 2371 (Commissioner Matheson) Mr Gurung, a full-time Payroll Officer and primary caregiver for two young children, sought to work from home on Mondays and Fridays when his children did not attend daycare. His most recent performance review rated him as "Partially meets Expectations" with concerns about focus and attention to detail.	No orders made. However, the Commission encouraged further discussions	• **Primary carer responsibilities may be incompatible with work duties:** Where a role requires "uninterrupted focus", providing primary care to young children is unlikely to be feasible. • **Working from home as primary carer linked to performance concerns:** The Commission accepted that Mr Gurung's primary carer responsibilities while carrying out payroll work likely contributed to the recent performance concerns.

Case	Was refusal upheld?	Key principles
Kliffen v Reapit Employment Services Pty Ltd [2026] FWC 1766 (Commissioner Matheson) Ms Kliffen, a part-time T1 Support Specialist, had worked remotely since 2016 whilst employed by a predecessor to Reapit. She was a parent of two young children, one with special needs. Reapit (post-acquisition) sought to require that the workforce (with limited exceptions) attend the Sydney office 2 days per week. Ms Kliffen's role was largely administrative, performed via phone, email, live chat and online tools. Her team was dispersed across Australia and overseas.	FWA request partially granted (subject to a compromise to require fortnightly office attendance)	• **Team cohesion alone is not a reasonable business ground:** Reliance on "team culture", "team cohesion" and "collaboration" was insufficient where there was no demonstrated efficiency impact. In particular, only a small number of team members were also based in Sydney. • **Fairness may require a compromise:** The Commission must consider fairness between the employer and employee under s 65C(2) of the FW Act. A fair outcome may involve extending additional support and flexibility to employees in certain circumstances. In this case, fortnightly attendance on a regular day to be determined by Ms Kliffen was held to "strike the right balance". • **Post-acquisition change may support in-person attendance:** In-person consultation, collaboration and training may be beneficial during organisational transformation.
Murray v Watpac Construction Pty Ltd [2026] FWC 1442 (Commissioner Simpson) Mr Murray, aged 67, sought to reduce his working days to four days per week to facilitate a transition to retirement and to pursue creative writing projects. Watpac raised a jurisdictional objection, arguing that the request lacked a sufficient nexus to Mr Murray's age.	Jurisdictional objection dismissed. Case to proceed to substantive hearing	• **Facilitating a transition to retirement has a sufficient nexus to the employee's age:** A request to reduce working days to facilitate a transition to retirement is sufficiently connected to being over 55, even without an age-related limitation or fixed retirement date. • **The request does not need to be exclusively driven by the qualifying circumstance:** Personal projects do not break the nexus where the request is genuinely connected to the employee's age and life stage.

Case	Was refusal upheld?	Key principles
Robinson v Australian Financial Complaints Authority Limited [2026] FWC 2720 (DP Bell) Mr Robinson, a Dispute Resolution Specialist, requested to work from home 100% of the time to care for family members with health conditions. The employer's hybrid working policy required two office days per week. The rationale for this position was to support better mental health, stronger working relationships and less burnout. The employer proposed a graduated return for Mr Robinson.	Yes – Reasonable business grounds established	• **A reasonable hybrid working policy is a significant factor:** Compliance with a reasonable, generous and non-arbitrary policy can materially support a refusal of a request to work from home full-time. • **Graduated return proposal addresses consequences:** Proposing a graduated or tiered return to the office over an extended period can show that the employer had regard to the consequences of refusal for the employee. • **The benefits of face-to-face attendance are "difficult to quantify" but legitimate:** Benefits such as "team connection" through workplace attendance are a legitimate objective, even if its benefits are difficult to measure financially.
Taunisila v AGL Energy Limited [2026] FWC 2428 (DP Clancy) Ms Taunisila, a full-time Customer Service consultant, had worked exclusively from home since May 2020. She sought to continue permanently working from home to care for her mother. Her performance was rated "Inconsistent" in FY23 and FY24, and her responses in a self-assessment showed she was capable of performing only 26% of the tasks required to be performed by her role.	While reasonable business grounds were established, compromise order was made under s 65C(1)(f)(ii) (4 hours attendance per fortnight in office, 6-month trial)	• **Documented performance decline that is linked to WFH supports refusal:** Inconsistent performance with no improvement under the existing arrangement constituted a reasonable business ground. The Commission also accepted there was a real prospect that Ms Taunisila may develop a skill and knowledge deficit over time when compared with her peers. • **In-person contact with a line manager may be a reasonable business ground:** Some in-person contact with a line manager is a reasonable business ground that may justify refusing a request to work exclusively from home.



Under the microscope: What Australia's safety regulators are targeting in 2026

Authors: Julia Sutherland (Partner), Eshani Mendis (Senior Associate) and Alicia George (Graduate)

In Brief

- Safety regulators across Australia are increasing their regulatory oversight and enforcement action, with convergence on key priority areas.
- Common hazards and risks that are the subject of regulatory focus are **psychosocial risks, falls from heights, hazardous substances (particularly crystalline silica), and mobile plant and vehicles.**
- The **construction industry** appears in every jurisdiction's priority list. In the ACT, it accounts for 54% of all workplace inspections, and in Victoria the construction industry represents 17% of workplace fatalities. Construction industry businesses should expect heightened regulator scrutiny regardless of the jurisdiction in which they operate.
- Psychosocial risk has emerged as the most significant regulatory shift in WHS in recent years, with every jurisdiction now identifying it as a regulatory priority. Many jurisdictions have also invested significantly in dedicated psychosocial safety inspectors to monitor compliance.
- From a national perspective, Safe Work Australia's Australian Work Health and Safety Strategy 2023–2033 seeks a 30% reduction in worker fatalities and no new cases of accelerated silicosis by 2033.

Lessons for employers

- This is a timely reminder for businesses to proactively review safety management systems having regard to the regulator priority areas and to consider whether current controls are effectively managing those hazards and risks.
- Organisations should continuously review psychosocial risk management processes in particular, given each jurisdiction in Australia now treats psychosocial risks as a regulatory priority.
- Businesses should pay attention to effectiveness of control measures that are in place for groups at higher risk of harm, such as young workers, apprentices and migrant and culturally and linguistically diverse workers.
- Regulator priority areas are a guide that tell us about trends in risk across Australian workplaces. If your organisation is not identified as within a priority industry or the priority hazards/risks do not heavily feature within your organisation, this does not mean that you won't be subject to regulator attention. Organisations should continue to focus on eliminating the key risks to health and safety within their organisations, so far as is reasonably practicable.

Regulator priority areas at a glance

Each Australian state and territory safety regulator has published strategic priorities, compliance programs and enforcement focus areas, signalling where inspectors will direct their attention and where increased enforcement action is most likely. We highlight below the key priority industries and risks across jurisdictions, and the common themes that emerge.

State/ Territory	Safety Regulator	Key Strategy/ Document	Priority Industries	Priority Hazards/Risk
NSW	SafeWork NSW	Regulatory Statement 2026–27	Construction (residential), tunnelling, infrastructure, agriculture, manufacturing	Falls from heights, psychosocial risks, crystalline silica & asbestos, mobile plant & vehicles
QLD	Work Health and Safety Queensland	WHSQ Priority Plan 2024–2030; Proactive Compliance Program 2024–2027	Manufacturing, construction, agriculture, road transport and logistics, wholesale trade, public administration and safety, health care and social assistance, accommodation and food services	Work at heights, Slips, trips and falls, Falling objects, Use of plant, Moving plant, Electrical powerlines, dusts and fibres
VIC	WorkSafe Victoria	WorkSafe Victoria Strategy (Feb 2025, 5-year) WorkSafe Statement of Regulatory Intent	Health care and social assistance, manufacturing and logistics, construction, government, agriculture	Slip, trips and falls, falls from heights (construction), psychosocial hazards (including exposure to trauma, aggression and violence), hazardous manual handling
WA	WorkSafe WA	WorkSafe: The Way Forward 2023–24 to 2025–26 Key priority areas	WorkSafe WA has focused on key priority risks as applicable to general industries	Mobile plant, psychosocial hazards, manual tasks, electricity, working at height, slips, trips and falls, hazardous substances and machine guarding
SA	SafeWork SA	Strategic Plan 2023–2027, and complaint campaign 2025-2026	Agriculture, Construction, Manufacturing, Transport, Forestry and Healthcare	Broad hazard-based compliance campaigns across priority industries
TAS	WorkSafe Tasmania	Strategic Plan 2024–2028	Healthcare & social assistance, Public administration, Agriculture, Transport, Construction, Mining	Musculoskeletal disorders, mental health, asbestos, hazardous manual tasks, slips/trips/falls; vehicles & plant, silica (from WorkSafe Strategic Plan 2018-2023. No equivalent key priorities have been identified in the 2024-2028 Plan).
ACT	WorkSafe ACT	Strategic Plan 2025–2029; Compliance & Enforcement Policy 2025–2029	Construction, Retail, Accommodation/food, Manufacturing, Health/ community, Education	Occupational lung diseases, psychosocial hazards, musculoskeletal disorders, asbestos, crystalline silica, hazardous chemicals
NT	NT WorkSafe	NT WorkSafe Strategic Plan 2021-2026	Construction, Health and Community services, Government administration and defence, Agriculture, Forestry and fishing, Accommodation, cafes and restaurants.	Being hit by moving object, falls slips and tripes, contact with electricity, body stressing

Case study – Fall from heights

Falls from heights remain a leading cause of traumatic workplace death, particularly in construction. NSW reports over 600 fall incidents, including five fatalities, in the past 12 months, and is targeting duty holders across the full construction supply chain (designers, principal contractors and supervisors). Queensland is running a dedicated construction work-at-heights campaign from July to September 2026, and Western Australia, the ACT and Tasmania all include falls and working at height in their priority hazards.

The recent case of *SafeWork NSW v Fitzmoore Group Pty Ltd* [2026] NSWIC 43 provides an example of a prosecution for an offence in the context of a fall from height. A carpenter fell approximately 2.9 metres through an inadequately covered skylight penetration on the roof of a school building. The employer had installed temporary covers over the skylight penetrations using unfixed pieces of plywood that could not support a person's weight, with no exclusion zones, physical barriers or warning signage. The worker had not been inducted to the site, was not shown the safe work method statement, and was not warned about the penetrations; the only instruction he received was to "be careful of the voids".

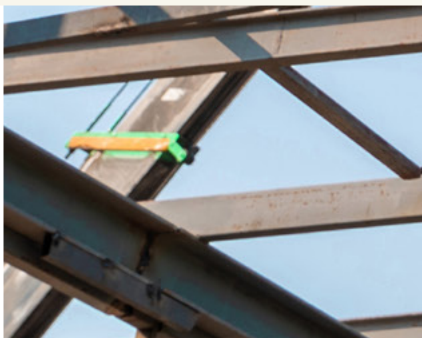
The worker sustained a head fracture requiring a craniotomy, and subsequently suffered a seizure while driving which was attributed to the brain injury, resulting in further serious spinal injuries. The Court assessed the offence at the high end of the moderate range, finding the risk was not merely foreseeable but foreseen, and that the available controls were straightforward and inexpensive. The defendant was fined $390,000 (after a 25% discount for an early guilty plea) and ordered to pay SafeWork NSW's costs. The decision reinforces that PCBUs cannot rely on verbal warnings alone to manage fall-from-height risks. Higher order controls such as physical barriers, exclusion zones and properly secured covers are required. It also confirms that having safety systems on paper does not mitigate liability where those systems are not implemented in practice.

Case study – Hazardous substances and crystalline silica

Crystalline silica has become a national focal point following the engineered stone ban and the regulatory response is now broadening beyond engineered stone. NSW is targeting silica in tunnelling and infrastructure, while the ACT and Tasmania treat crystalline silica as part of wider occupational lung disease priorities. NSW's Silica Worker Register, launched on 1 October 2025 with over 15,000 workers enrolled, is a novel regulatory tool for monitoring exposed workers, and Tasmania has set a target of no new cases of accelerated silicosis. More broadly, regulators are paying particular attention to how duty holders identify, assess and control risks arising from hazardous substances. The following case study illustrates this broader focus in the context of repeated exposure to hydrogen sulphide.

In *SafeWork NSW v Fusarelli* [2026] NSWDC 244, the defendant and sole director of Myra Corporate Pty Ltd, was convicted of an offence when he failed to exercise due diligence to ensure that the company complied with its duty as a PCBU. A research scientist was repeatedly exposed to hydrogen sulphide (H_2S) during biogas experiments at an Alstonville facility. Gas concentrations exceeded 5,000 ppm (vastly above the 10 ppm workplace exposure standard). Despite warnings from multiple scientists since January 2019, the defendant refused requests for proper equipment and PPE. No gas detection, respirators, updated risk assessments or exposure controls were implemented.

The research scientist sustained severe whole-body impairments, including hearing, vision and cognitive deficiencies. The Court found the risk was "obvious, glaringly so" and that the defendant had been "repeatedly put on notice" by workers yet "failed to act". The defendant was convicted and fined $195,500 (reduced from $230,000 for a late guilty plea). The decision reinforces that an officer's due diligence obligation under s 27 of the WHS Act is not delegable, and that failing to act on repeated warnings about known hazards will attract significant penalties.



Recent trends in workplace investigations

Authors: Julia Sutherland (Partner), Melanie Taylor (Counsel) and Sofia Basso Betancourt (Graduate)

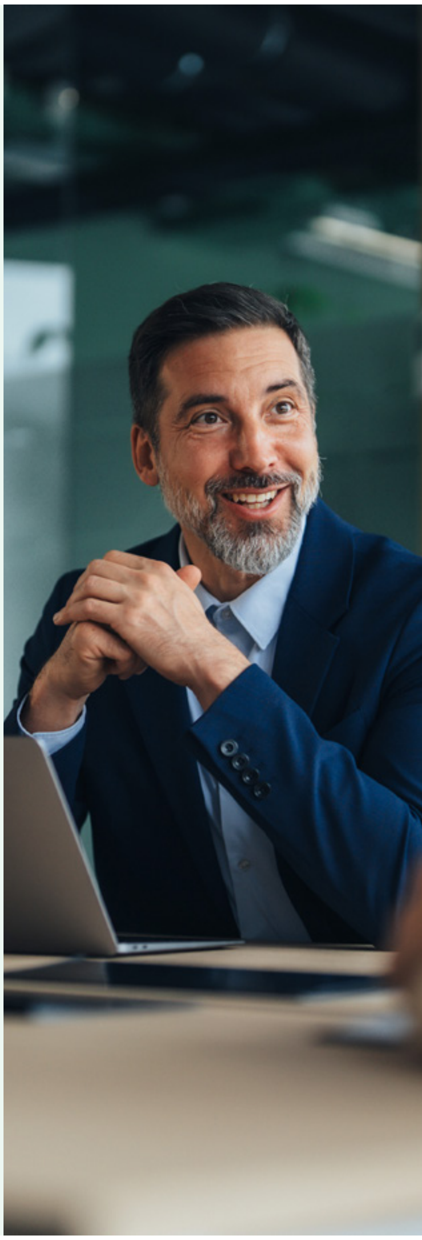
In Brief

- Recent Fair Work Commission and other decisions continue to highlight the need for thorough, impartial and timely workplace investigations. In particular, investigators should carefully consider the appropriate scope for any investigation, identify and interview relevant witnesses and test competing or inconsistent accounts.
- The decisions also show the importance of considering how to obtain witness evidence, avoiding both undue delay and excessive speed in investigations and meaningfully engaging with an employee's response in show cause processes.
- The investigation process itself can also exacerbate the impacts on workers of the investigation process (for example) through delay, while the rise of AI creates both challenges and opportunities for the conduct of workplace investigations.

Lessons for employers

In undertaking workplace investigations and disciplinary processes:

- Investigators must apply a robust investigation methodology: clearly articulate the scope of the investigation, identify and interview relevant witnesses, test competing or inconsistent accounts and genuinely consider matters raised by a respondent.
- Give careful consideration to the appropriate mode of interview (e.g. in-person, video, telephone), taking into account the materiality of a participant's evidence.
- Delay in investigating can prejudice both the process and the participants, though thoroughness should not be sacrificed for speed.
- Approach the show cause process as a genuine decision point where a decision maker meaningfully engages with and responds to an employee's response.
- Identify psychosocial risks that may arise to investigation participants, including risks that may arise from delay and changed working arrangements.
- Remain alert to AI-generated or AI-fabricated communications when conducting investigations. Corroborate communications where possible and preserve original source records where available.
- Use AI responsibly by maintaining human oversight and verification of all AI outputs, and complying with privacy and workplace surveillance requirements.



Key trends shaping workplace investigations

In our September 2025 edition, we examined the Commission's decision in *Mr Roy Smout v BHP Coal Pty Ltd* [2024] FWC 2062 (*Smout*) and the lessons it offered about investigative rigour. Since then, a series of further decisions have reinforced those lessons and highlighted additional pitfalls for employers at each stage of the investigation and disciplinary process.

The investigation process

Recent tribunal decisions underline the importance of applying a robust investigation methodology. There is a continued focus on whether investigation processes adequately identify material witnesses, test competing or inconsistent accounts and maintain an open-minded approach. Investigators should therefore undertake considered investigation planning, and then treat that investigation plan as a live framework: it should be promptly revisited and relevant lines of inquiry pursued if new information suggests a potential change in the factual matrix underpinning the alleged conduct the subject of the investigation.

The decision in *Walker v State of Queensland (Queensland Health)* [2026] QIRC 104 (*Walker*) illustrates how not identifying and interviewing witnesses in a timely manner can undermine the investigation process. There, witnesses identified by the appellant, were not spoken to until over a year after the alleged incident. These individuals did not recall witnessing the alleged incident, and the appellant asserted that this was consistent with her version of events (namely, that the incident had not occurred). In response, the employer said that it had primarily relied upon the evidence of a manager who had witnessed the alleged conduct. Commissioner Pidgeon called the delay in identifying and interviewing these other witnesses "befuddling", including given the seriousness of the allegation and the readily available information about who was present on the day of the incident. The employer's decision on disciplinary findings was ultimately set aside on the basis that the Commission was not satisfied that the available evidence before the decision maker made the finding of misconduct fair and reasonable.

Ms Linda Florence McFadden v Mars Australia Pty Ltd [2026] FWC 2772 is a reminder that appropriately setting the scope of an investigation and giving genuine consideration to matters raised by a respondent during the course of an investigation, is critical. After a food-safety incident, the applicant was dismissed and identified as being solely responsible for its occurrence, despite the applicant asserting that multiple other people were involved in the incident. The Commission held that the investigation process was flawed because it had focussed only on the applicant's role in the incident and this had "misdirected the investigation". Ultimately, the dismissal was held to be unfair, with the Commission noting that the investigation was "too narrow" because it didn't include an assessment of whether applicable procedures had been followed by others, as raised by the applicant.

Mode of interview

Recent decisions have confirmed that the mode of interview adopted by an investigator can materially affect the Commission's views on the soundness of investigation findings.

In *Kacy Brazier v OS MCAP Pty Ltd* [2026] FWC 2003, the Commission found it "astonishing" that the investigator "saw fit" to interview a key witness, Mr Smith, by telephone. This was particularly considering the veracity of the allegation made by Mr Smith "live[d] or die[d] on the assessment of Mr Smith's evidence", in which the investigator acknowledged that she was "not able to see his demeanour or body language". The Commission determined that, if Mr Smith had been interviewed by video or if he had been required to put his allegations in writing, the allegations "would not have made it past first-round considerations". The Commission ultimately held that there was no valid reason for dismissal. The decision is currently under appeal.

A similar issue arose in *Smout*, where the Commission found that telephone interviews of the complainants and a video interview of the respondent limited the investigator's ability to assess body language, identify who else was present during the interviews, and to convey the seriousness of the allegations to the respondent.

We do not consider that these decisions support a conclusion that all interviews need to be conducted face-to-face. However, they do underline the importance of investigators turning their minds to the appropriate mode of interview and the extent to which this may impact upon the collection of reliable evidence and their ability to assess a participant's credibility. Where a participant is providing material or disputed evidence (such as a complainant, a respondent or a key witness), investigators should seek to conduct face-to-face interviews, where possible (and where this is not possible, that appropriate weight is placed on the participant's account in light of any limitations on the investigator's ability to assess demeanour and presentation at interview).

Timeliness of investigation process

Timing has also been a key area of scrutiny: investigations may be undermined by avoidable delay; conversely, investigations that are concluded too quickly may compromise the rigour of the process. Employers should conduct investigations within a reasonable timeframe taking into account the seriousness and complexity of the allegations and the availability of participants, keeping participants informed of timeframes, and revisiting those timeframes if new issues emerge.

The decision of *Walker* illustrates the risk of delay. Ms Walker was suspended in June 2024, but was not asked to respond to allegations until March 2025, with the disciplinary process taking approximately 18 months. The decision ultimately serves as a warning to employers that unaccounted for, or unreasonable, delay risks losing "the opportunity to obtain a timely recollection of events".

By contrast, the investigation in *Smout* was completed in just seven days. The Commission found it "difficult to accept" that the investigator had taken the time necessary to adequately weigh up the evidence in that matter.

The practical question for employers is whether the investigation timetable gives the investigator sufficient time to identify witnesses, review all evidence, and arrive at considered findings. Any acceleration of the investigation timetable should be documented and balanced by safeguards, such as additional investigative support or enhanced record keeping. Conversely, any delays should be explained, and the impacts on investigation participants mitigated through regular communication with participants and steps to preserve evidence, where necessary.

The show cause process

Following the conclusion of an investigation, the show cause process (where an employee is asked to show cause why their employment should not be terminated) must be a genuine decision point rather than a formality or "tick-the-box" exercise. The decision-maker should meaningfully consider the employee's response before reaching a final conclusion about dismissal.

The findings in *Brazier* demonstrate the importance of genuinely considering an employee's show cause response. In that case, during the show cause process the applicant raised concerns about procedural issues with the investigation and sought information about dates and places where the alleged conduct was said to have occurred. However, the employer did not provide a response to the applicant's inquiries and the decision to dismiss was subsequently confirmed. The Commission found that the employer "failed" the applicant by not providing answers to his reasonable questions before proceeding with the dismissal.

As noted in our September 2025 edition, the Commission also held in *Smout* that the show cause process did not afford the applicant a genuine opportunity to respond. This was because the process was held on the day before the Easter long weekend, with the termination of employment taking effect approximately 30 minutes after the employee was told his employment was at risk.

The cases reinforce that the show cause process is more than a procedural step. Decision-makers should answer any new, reasonable inquiries from employees and consider why the employee's response does or does not change the proposed outcome. It is helpful to record this reasoning. Employers should also be mindful of the potential legal risks associated with show cause processes that are conducted in condensed timeframes or that otherwise deviate from the business' usual process.

Emerging challenges for investigations

Investigations as a psychosocial hazard

A developing area that employers cannot afford to overlook is the impact of an investigation process on the psychosocial health and safety of workers. Recent cases confirm that employers should implement an investigative process that seeks to control any foreseeable psychosocial risks for investigation participants. This includes, for example, risks arising from delays associated with the investigation process and changed working arrangements pending the outcome of an investigation.

In *Secretary, New South Wales Department of Education v SafeWork NSW (No 2)* [2026] NSWIRComm 1014, the NSW Industrial Relations Commission upheld the issuing of two SafeWork NSW improvement notices (with one variation) regarding a misconduct investigation that was conducted by the employer over 10 months. During this process, the respondent was placed on alternate duties and attempted suicide. Commissioner O'Sullivan was critical of the employer's system for managing investigations, expressing the view that it lacked safeguards to ensure the timely completion of investigations and to minimise the risks that may arise from allocating alternative duties. Commissioner O'Sullivan found that the issuing of the notices was the "correct and preferrable decision" because there was a reasonable basis for the Inspector to believe that the employer was contravening the legislation.

To address this important issue, it can be helpful for employers to consider the process that is about to commence, identify risks to health and safety that may be encountered in the investigation, and identify and put in place control measures to eliminate the risks identified or minimise them (if elimination is not practicable).

Artificial intelligence and investigations

Employee use of AI

Artificial intelligence may create new challenges for workplace investigations on two fronts:

- First, generative AI now makes it easier to generate or adjust digital evidence, including text messages, chat logs and screenshots. As such, investigators should be confident about the authenticity of communications relied upon in misconduct matters before relying upon them, and if they are not, seek to appropriately verify those communications.
- Second, employees can now use AI tools to draft their communications during investigation and disciplinary processes, with consequences that can be counterproductive.

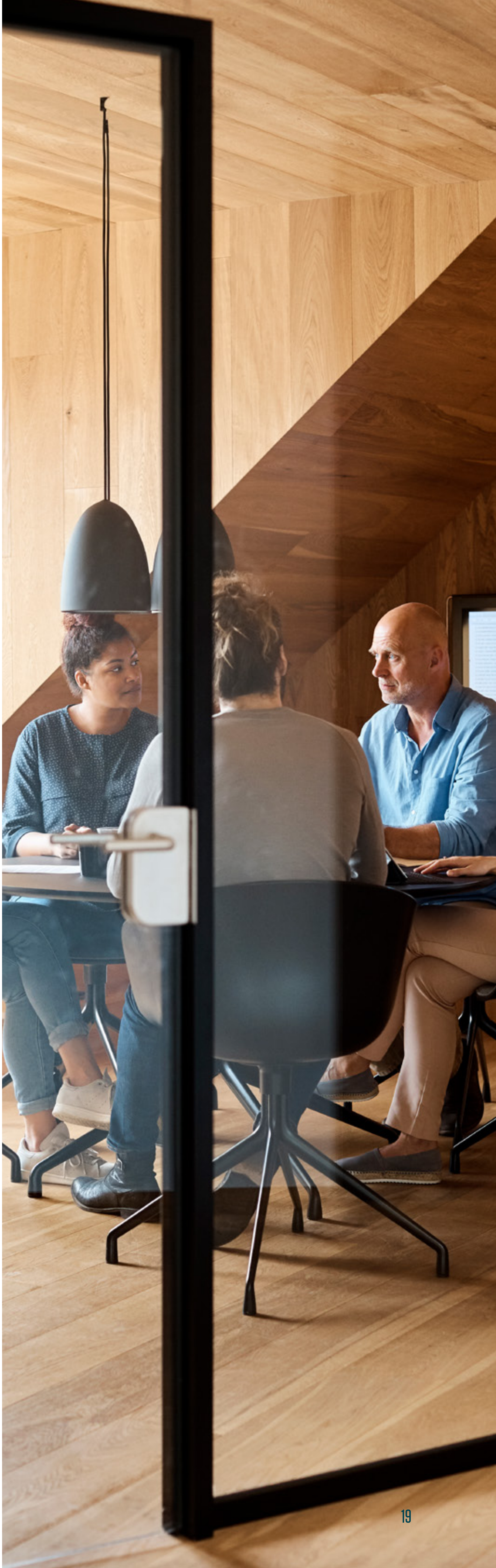
The challenges of AI in misconduct matters were illustrated in *Wibmer v Fujifilm Data Management Solutions Pty Ltd* [2026] FWC 835. The employee, a Senior Java developer employed for over 11 years, was dismissed after he refused to accept a colleague's apology following a bullying complaint and instead escalated the matter to HR. Over the course of the investigation and disciplinary processes, the employee sent several emails to various managers, making numerous requests for information and alleging (among other things) sex discrimination, sexual harassment and protection under the whistleblower provisions of the *Corporations Act*. The employee acknowledged that he had used AI language tools when preparing these communications. There was also unchallenged evidence from managers that, during meetings, the employee appeared to be referring to Chat GPT for guidance when responding to management comments. In upholding the employee's dismissal, the Commission found that the employee had become "ungovernable".

For employers, the practical response is to remain cognisant that communications received from parties to an investigation may be AI-generated or AI-fabricated. Investigators should corroborate communications where possible, and preserve original source records where available. As AI tools become more sophisticated, investigation processes will need to adapt to maintain the evidentiary rigour that tribunals and courts expect.

Investigator use of AI

Conversely, AI has also presented opportunities for workplace investigators. Investigators can leverage AI across various aspects of the investigative process, including digesting and organising large amounts of data, interview preparation and transcription, report writing and detecting irregularities in evidence/records.

However, responsible AI use relies on maintaining human oversight and verification of all AI outputs and ensuring that privacy and workplace surveillance requirements are complied with at all times.



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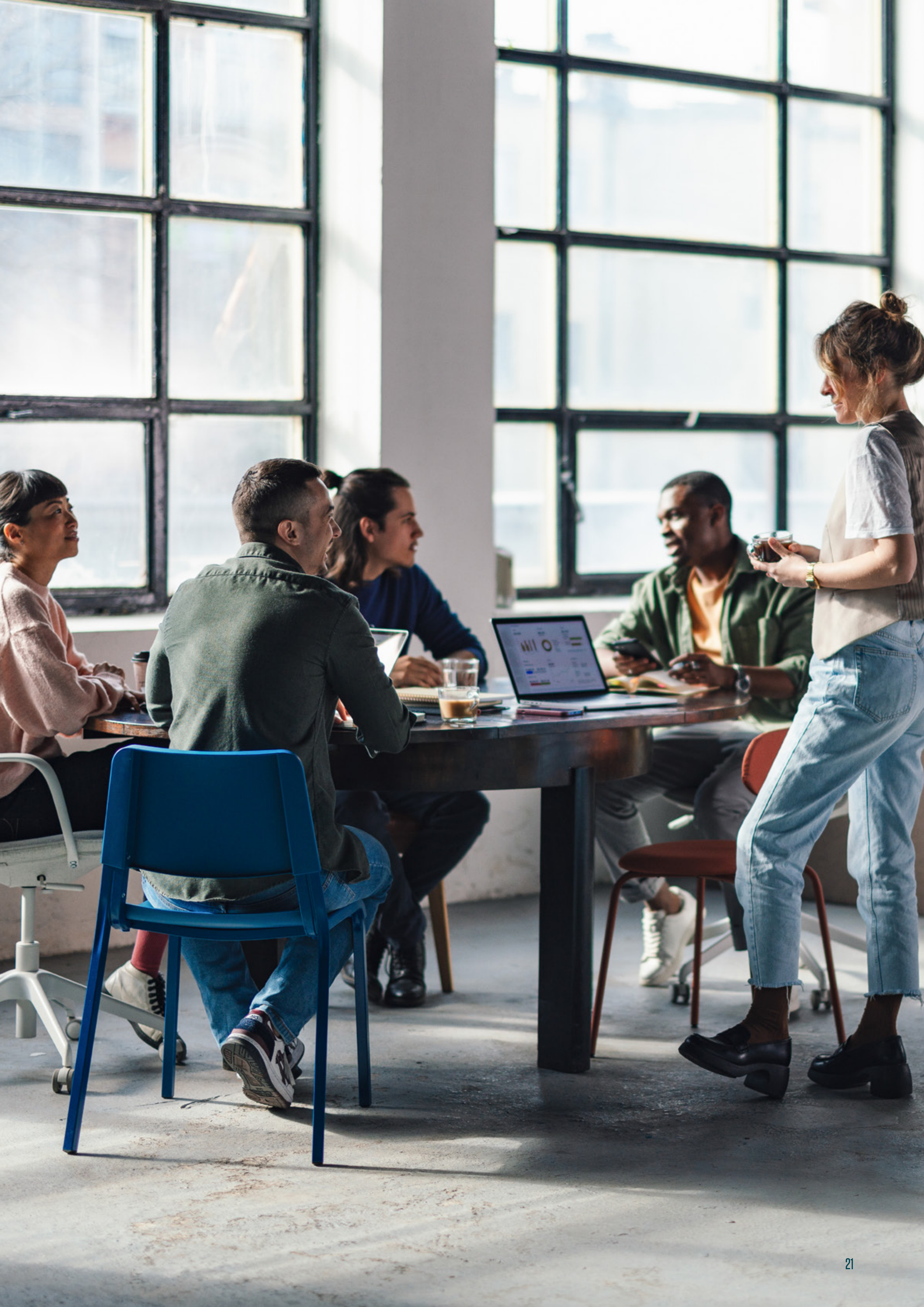

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Design Ref: R017898 Sep 26