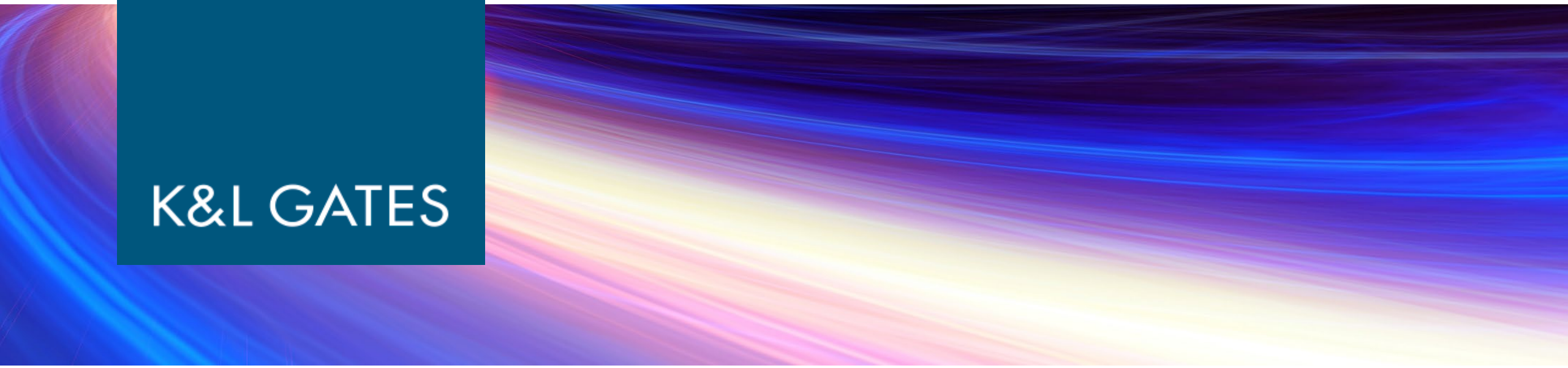


Tuesday 25 November 2025

2025 Year in Review and the Year Ahead

Presented by: Michaela Moloney, Alanna Fitzpatrick, Nick Ruskin and John Monroe

EMPLOYMENT CONTRACTS AND WORKERS RIGHTS

The Current Industrial Relations Landscape

- The Labor Government has introduced a suite of changes to the *Fair Work Act 2009* and other federal industrial relations law over the last few years:
  - *Respect@Work Act 2022*
  - *Secure Jobs, Better Pay Act 2022*
  - *Protecting Worker Entitlements Act 2023*
  - *Closing Loopholes legislation*
  - *Sex Discrimination Act 1984*
  - *Paid Parental Leave Act 2010*
- Many of these changes are yet to be tested in the Courts
- We expect reforms to legislation to continue and will explore suspected trends for 2026 towards the end of our presentation

EMPLOYMENT SECURITY

Fixed Term Contracts

- Parties are now unable to enter into a contract that:
  - Operates for more than two years
  - Could be extended to operate for more than two years through an option or right to renew
  - Provides for more than one option or right to renew the contract (irrespective of the total term)
- Applies to successive contracts for the same or substantially similar work
- Limited exceptions apply (eg: training arrangements; employees on salaries in excess of AU$183,100) with the onus on the employer to satisfy the applicability of the exemption if challenged
- Contracts in violation of these rules will operate as if they have no end date
- No significant case law in this area but businesses seem to have adapted

Changes to Casual Conversion

- Reversal of requirements relating to casual conversion - casual employees now have a workplace right to give an employer written notification if they would like to change their employment status to full-time or part-time employment after six months' employment (12 months for small businesses)
- This “employee choice” framework effectively makes it easier for employer who no longer have to initiate conversion processes
- The employer may not accept the employee notification if the employee does not qualify for conversion; there are fair and reasonable operational grounds for not accepting the request
- Disputes regarding conversion are intended to be resolved at the workplace level. However, the FWC has powers to resolve the dispute if necessary

Redefining Casual Employment

- The definition of “casual employee” was amended last year
- The definition has not yet been tested
- An employee will only be a casual where:
  - The relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work
  - The employee is entitled to a casual loading or rate of pay
- However, it seeks to assess the **real substance, practical reality and true nature** of the employment relationship which takes away certainty
- Employers are prevented from misrepresenting casual employment and/or scheming to avoid the applicability of the proposed definition

Employees v Contractors

- Return to previous multi-factorial approach to determine whether a worker is an employee or contractor
- Involves an assessment of the **real substance, practical reality and true nature of the relationship** between the parties again this lacks certainty
  - Requires consideration of degree of control, remuneration (loading, invoices, tax etc) and hours of work
- Unwinds previous decisions which held that primacy was to be given to contractual terms, as opposed to the behaviour of the parties
- A high-income contractor may formally ‘opt out’ of the provision

EMPLOYEE RIGHTS

Prohibition on Pay Secrecy

- Employee's have a right to:
  - Share or not share their pay terms and conditions
  - Ask other employees about their pay and employment conditions
- Pay secrecy clauses in employment agreements are now prohibited and can be voided
- This entitlement is a workplace right and is captured by the general protections regime but so far we have seen no cases on this issue
- A failure to comply with the workplace right can result in penalties for employers of up to AU$495,000 per breach

Right to Disconnect

- A new workplace right for all Australian employees with effect from 26 August 2024
- Employees may refuse to monitor, read or respond to contact, or attempted contact, from an employer or a third party about work outside of their working hours unless the refusal is unreasonable:
  - Employer likely to bear the onus of establishing that conduct is unreasonable
- Disputes can, after an attempt to be resolved within the workplace, be taken to the FWC by the employer / employee, or an industrial association:
  - FWC is then empowered to make orders that the employee cease refusing contact (if refusal unreasonable) or prevent the employer from contacting the employee and/or taking adverse acting against them (if refusal not unreasonable)
- FWC has no power to issue pecuniary penalties unless existing order is breached
- In practice, application of this right will likely turn on whether or not refusal by an employee to respond to contact is unreasonable but we have not seen how it will be interpreted in practice:
  - Factors such as remuneration above minimum entitlements and specific allowances paid to employees to remain available are likely to favor the conclusion that employer contact is reasonable

Flexible Work Requests

- Expanded eligibility for employees to request a flexible working arrangement, including pregnant employees and employees (or their immediate family member) experiencing family or domestic violence
- An employer can only refuse a request on *reasonable business grounds* and if they have:
  - Discussed the request with the employee and genuinely tried to reach an agreement on alternative arrangements
  - Considered the consequences for refusing the employee's request

Flexible Work Requests – Applications to Fair Work Commission

- The FWC now has the power to conciliate and arbitrate disputes about requests for flexible working arrangements including when an employer:
  - Refuses an employee's request
  - Doesn't respond to a request within 21 days
- If the employee's request is refused the Fair Work Commission can make an order that:
  - The grounds of refusal are not on reasonable business grounds
  - The employer grant the request or make specified changes to the employees working arrangements
- Unlike other areas of reform, a number of applications have been made to the FWC for determination since commencement of these provisions

WAGE COMPLIANCE

Fair Work Ombudsman v Woolworths – Background

- Deals with proceedings brought by the Fair Work Ombudsman and two class actions against both Woolworths and Coles in respect of salaried employees
- Woolworths and Coles have already made payments of AU$300 million and AU$7 million respectively, however, it was argued that they owed even more based on the way in which those payments had been calculated

Fair Work Ombudsman v Woolworths – Facts

- Coles and Woolworths' employees were engaged on annualised salaries which were intended to satisfy all award entitlements
- Both Coles and Woolworths acknowledged the salaries did not satisfy all entitlements in practice
- Woolworths and Coles each argued that the salaries could be considered over multiple pay periods. That is, if an employee's salary was AU$1,000 more than the award in one fortnight, then this AU$1,000 could be applied to a shortfall in a different fortnight
- Woolworths' employment contracts specifically stated that this could be done over a 26-week period, while Coles' contracts were less specific

Fair Work Ombudsman v Woolworths – Key Issues

- Over 100 overlapping issues were put forward, however some of the key matters considered were:
  - Could the salary paid to an employee in one pay period, which exceeded award entitlements, be "set off" against amounts paid to them in another pay period which fell short of the award entitlements?
  - What records must be kept by employers of different award entitlements, and does this change when the employee is on a salary?
  - When has an employee "agreed" to vary entitlements under an industrial instrument?

Fair Work Ombudsman v Woolworths – Findings

- Offsetting is only permitted on a pay period basis, where there is a contractual right identified
- To be enforceable, offset clauses must be well drafted and clear as to the specific entitlements that are satisfied by the employee's salary
- In the absence of a clear indication of the order in which entitlements are to be allocated under an offset clause, they will be split equally
- There is no "de facto" right to offset; any above award or agreement compensation paid to an employee cannot be applied to reduce the overall back payment owing to an employee Employees are contractually entitled to that amount
- Where there is no offset clause, salaries can only satisfy the employees' ordinary wages, even if they exceeded the other entitlements, like overtime and penalty rates, an employee was entitled to under an industrial instrument
- The record keeping obligations under the *Fair Work Regulations 2009* apply to both salaried and non-salaried employees

Fair Work Ombudsman v Woolworths – Actions

- Ensure good understanding of industrial instrument entitlements, including whether employees are covered by certain industrial instruments or not
- Review offset clauses in template employment agreements to ensure compliance with findings of Federal Court
- Review rostering and payment practices to make sure employees are paid enough to satisfy industrial instrument entitlements in every pay period
- Ensure record keeping captures everything required in sufficient detail
- Consider a guarantee of annual earnings for employees earning over the high income threshold which is currently AU$183,100 per annum

TRENDS IN EMPLOYMENT LITIGATION

Fair Work Commission – Litigation Review

- 10% increase in FWC lodgement for FY2025
- The most common types of litigation lodgement are unfair dismissal and general protections claims:
  - 16,500 of the lodgements received were unfair dismissal applications
  - 7,946 were general protections applications
- Justice Hatcher – President of the Fair Work Commission, has observed many general protections dismissal applications are being used as a substitute for an unfair dismissal application rather than raising a genuine allegation of unlawful dismissal:
  - Many are being brought by a small number of regular paid agents and steps will be taken to rein in their use

Fair Work Commission – Litigation Review Cont.

- Two thirds of unfair dismissal cases that proceeded to a substantive arbitration were determined in favour of the employee
- More than half of GP dismissal claims are settled by a member or staff conciliator
- There has been an increase in the number of general protections (not involving dismissal) claims brought (1737 claims)
- Anecdotally seeing more challenges via unfair dismissal in circumstances of redundancy including failure to consult and failure to consider reasonable redeployment

Key Litigation – Flexibility

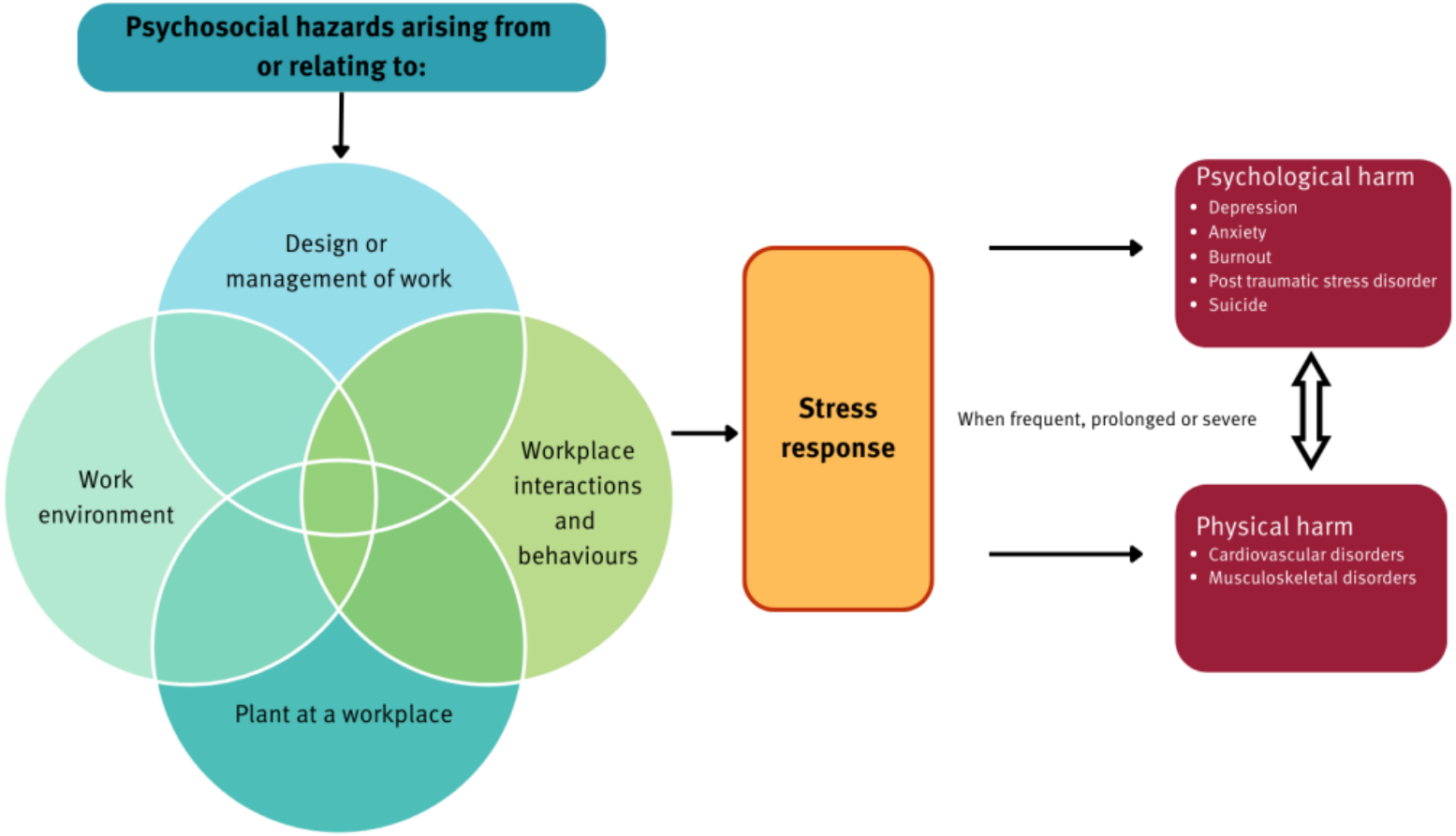
- Employee was a mortgage operations team member, submitted an application for flexible working arrangements to work from home to accommodate her children's schooling
- Application was declined without complying with obligations under the *Fair Work Act 2009 (Cth)*, including:
  - Discussing the application with the employee before rejecting it or
  - Trying to reach a genuine agreement on the request
- Employer stated working from home was no substitute for face-to-face engagement was necessary for customer service and efficiency, despite the fact the employee had worked remotely since 2018
- The Fair Work Commission found no evidence of a likely reduction in productivity or efficiency or a decline in customer service if the application were granted, noting the team member has been successfully working remotely for a number of years and her performance ratings have been high

Key Litigation – Redeployment Obligations

- Employer operated a mine
- As a result of an economic downturn, Employer restructured its operations at the mine, thereby requiring fewer workers, and dismissed the Employees
- Employer continued to deploy contractors to perform work at the mine
- The Employees applied to the Fair Work Commission for remedies for unfair dismissal
- Employer objected to the applications on the basis that the terminations were cases of "genuine redundancy"
- The High Court held that the Fair Work Commission could:
  - Inquire into whether it would have been reasonable in all the circumstances for the Employees to be redeployed in the Employer's enterprise to perform work that was being performed by the contractors
  - Inquire into whether an employer could have made changes to how it uses its workforce to operate its enterprise so as to create or make available a position for an employee who would otherwise have been redundant

DEVELOPMENTS IN PSYCHOSOCIAL RISK MANAGEMENT

Refresher



(WHSQ, *Managing the risk of psychosocial hazards at work Code of Practice 2022*)

Psychosocial Hazards and Controls

Work environment	Job design	Job demands	Workplace interactions	Workplace decisions	Support
•systems of work •workplace design and layout •environmental conditions •plant, substances and structures •facilities for the welfare of workers	•management of work •low role clarity •low recognition and reward	•long hours •long periods of vigilance •too much / too little to do •monotonous tasks •hazardous conditions •remote or isolated work	•poor workplace relationships •interpersonal conflict •inappropriate or harmful conduct •bullying and harassment •violence and aggression	•poor organisational justice •poor organisational change management	•response to traumatic events •supervision •information, instruction and training •tools, equipment and resources

Common Types of Control Measures

Work environment	Job design	Job demands	Workplace interactions	Workplace decisions	Support
•CCTV and physical security •duress alarms •safe glass •private and safe spaces •eliminate or minimise environmental stressors (e.g. nuisance noise)	•flexibility •autonomy over work tasks / workflow •design work tasks and activities to eliminate or minimise hazard exposure	•give a realistic view of demands during recruitment •job rotation •monitor workloads and redistribute work during high demand periods •reasonable deadlines •limit or manage overtime	•clear reporting lines •code of conduct on appropriate workplace behaviour •manager training to respond to inappropriate behaviour	•consultation & communication with workers •support through periods of change •performance review systems give timely, fair, and constructive feedback •fair reward and recognition schemes	•supervision •debriefing •peer support networks

Risk Management Process

Key considerations:

- Work / worker characteristics impacting vulnerability to a hazard (e.g. young workforce)
- Severity, frequency & duration of exposure to hazard
- Interaction & combination of hazards in the workplace (compounding effect)

Updates in Victoria

- Victoria's *Occupational Health and Safety (Psychological Health) Regulations 2025* takes effect on **1 December 2025**
- The Regulations impose similar requirements to the Model WHS Laws in place in other States and Territories. Most significantly, they require employers to:
  - Identify psychosocial hazards
  - Eliminate and risk associated with the hazard
  - Where elimination of a risk is not reasonably practicable, to reduce the risk reduce the risk so far as reasonably practicable
- (arguably) Broader interpretation of 'psychosocial hazard' than other States and Territories
- WorkSafe Victoria has also released a **Psychological Health Compliance Code**

Updates in New South Wales

- *Work Health and Safety Regulation 2025* took effect on 22 August 2025:
  - Hierarchy of controls for psychosocial hazards (to align with other jurisdictions)
- *Workers Compensation Legislation Amendment Bill 2025* passed on 18 November 2025:
  - The introduction of objective tests for bullying, sexual harassment, racial harassment and excessive work demands
  - A new definition of 'reasonable management action'
  - A requirement for claims involving a dispute in relation to the occurrence of relevant conduct (including bullying, sexual harassment, racial harassment and excessive work demands) to be referred to the IRC for determination

Fatigue Management – Enforceable Undertaking

- In December 2024, the NSW Resources Regulator accepted a greater than **AU$1 million enforceable undertaking** from Cobar Management Pty Ltd in relation to a series of psychosocial incidents that occurred at its CSA mine
- It was alleged workers were exposed to **role overload, long working hours, inadequate rest and fatigue management, role conflict, and poor support from supervisors and management**
- Prior to acceptance of the EU, the Regulator had commenced prosecution into alleged breaches of ss 19 and 32 of the Work Health and Safety Act 2011, for Cobar:
  - Allegedly failing to take reasonably practicable steps to eliminate or minimise the risk of psychosocial hazards at its CSA Mine
  - exposing two workers to a risk of serious injury or death through that failure

University Of Technology (Syd) – Prohibition Notice

- In September 2025, the University of Technology Sydney was proposing redundancies arising from a restructure
- 800 employees were invited to a meeting to discuss the possible loss of 150 academic positions
  - Meetings scheduled for 3 September
  - Change proposal to be released on 4 September
- Prohibition Notice issued by WorkSafe NSW to **stop** planned redundancy due to **serious and imminent risk of psychological harm**
- Notice lifted following a review and consultation

Positive Duty Update

- AHRC continues to adopt a ‘educative’ function
  - Proposal to introduce **civil penalties** for non-compliance
  - Focus area for 25/26:
    - Retail and trade
    - Accommodation and food services
- Requirement for **Prevention and Response Plan** in Qld
- Sexual assault in ACT triggers **notification requirements**
- Victoria leading the way with OHS Act **prosecutions**

Key Observations From Recent Cases

- Regulatory enforcement of psychosocial risk management - **Interventionist** approach
- Regulators expect:
  - Psychosocial risk management to be integrated into existing workplace health and safety systems; and
  - Evidence of proactive (rather than reactive) risk management
- Importance of **multi-disciplinary** approach
- 'Everyday' stressors and managerial processes themselves can be deemed hazardous or a risk to psychosocial safety if poorly managed

ON THE HORIZON FOR 2026

What We Expect to See in 2026

Restriction on Non-Competes

- The Federal Government has announced it intends to reform the use of restraint of trade provisions, including stating in the 2025-2026 Federal Budget that it will seek to ban the use of non-compete clauses for low and middle-income earners

Increased Employee Flexibility

- FWC model clause on hybrid work expected
- The Victorian Government has introduced a bill which will legislate the right for any employee who can perform their role from home to do so at least two days per week. Other states may follow

Continued Pursuit of Non-Dismissal Litigation

- Likely increase in general protections (not involving dismissal) and flexible work disputes

What We Expect to See in 2026 Cont.

Commencement of Payday Super from 1 July 2026

- Employers will be required to pay super within 7 business days of each pay cycle, not quarterly
- Legislation on the use of **generative AI** and a focus on data and privacy protection
- Case law dealing with recent changes in law:
  - Right to disconnect
  - Fixed term contracts
  - Meaning of casuals

QUESTIONS

CONTACTS

Michaela Moloney
Partner
Melbourne
+61 3 9640 4430
+61 411 135 300
Michaela.Moloney@klgates.com

Alanna Fitzpatrick
Partner
Brisbane
+61 7 3233 1251
+61 400 311 880
Alanna.Fitzpatrick@klgates.com

Nick Ruskin
Partner
Melbourne
+61 3 9640 4431
+61 421 051 191
Nick.Ruskin@klgates.com

John Monroe
Special Counsel
Melbourne
+61 3 9205 2141
+61 418 939 422
John.Monroe@klgates.com

K&L GATES