



GREENWAY CHAMBERS

# The Hottest Topics in Industrial Relations for 2026

Wednesday, 25 February | 5:30 pm

## SESSION SPEAKERS



Matthew Minucci



Matt Harker

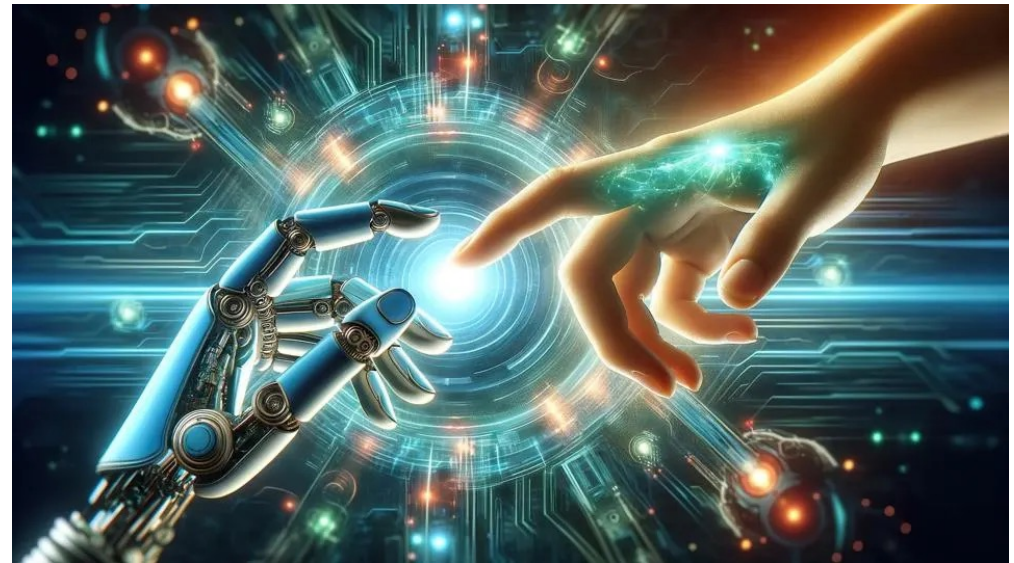


Sophie Dewis

- Artificial Intelligence
- Genuine Redundancy
- Flexible Working Arrangements
- Regulated Labour Hire Orders Update
- Work, Health and Safety Dispute Provisions – Industrial Relations Commission

# Artificial Intelligence

1. Use by Self Represented Litigants
2. Use in affidavits and submissions
3. Use in client instructions
4. Hallucinations
5. What to do/not to do?



## **How ChatGPT industrialised the unfair dismissal market**

## **How AI is helping workers take on their bosses in workplace disputes**

### **Fair Work warns against reliance on AI for claims**

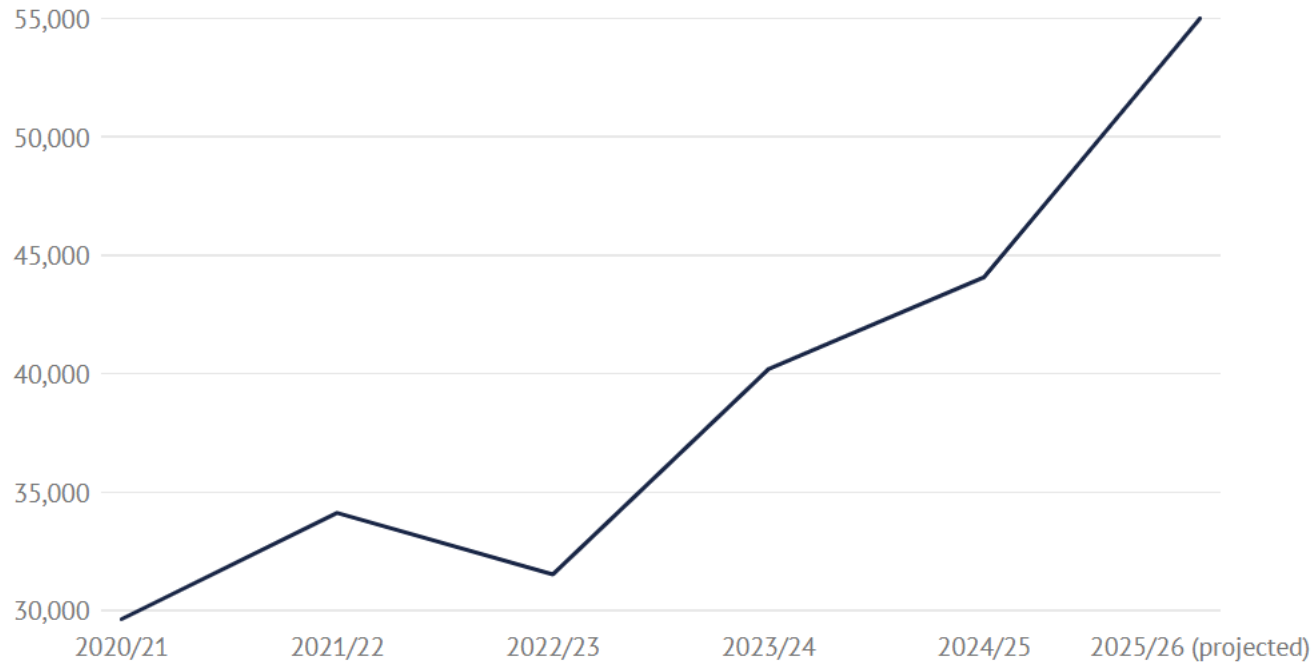
The workplace tribunal has dismissed a worker's claim that relied on ChatGPT for legal advice as being 'hopeless and unnecessarily wasting the resources of the commission.'

## **Fair Work warns of dangers of using AI for dismissal cases**

## **AI adding to surge of meritless dismissal claims**



### Number of lodgements to the Fair Work Commission



Source: Fair Work Commission



# What not to do

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1. *Ayinde v The London Borough of Haringey* [2025] EWHC 1383
2. *May v Costaras* [2025] NSWCA 178



## *Helensburgh Coal Pty Ltd v Bartley* (2025) 424 ALR 1

### [2025] HCA 29

#### 389 Meaning of *genuine redundancy*

(1) A person's dismissal was a case of *genuine redundancy* if:

- (a) the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and
- (b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

(2) A person's dismissal was not a case of *genuine redundancy* if it would have been reasonable in all the circumstances for the person to be redeployed within:

- (a) the employer's enterprise; or
- (b) the enterprise of an associated entity of the employer.

# Flexible Working Arrangements

## *The Legislative Framework*

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- Chapter 2 – Terms and Conditions of Employment
  - Part 2.2 – The National Employment Standards
    - Div 4 – Requests for Flexible Working Arrangements
- s 65 – Requests for flexible working arrangements
- s 65A – Responding to requests for flexible working arrangements
- s 65B – Disputes about the operation of this Division
- s 65C – Arbitration



# Flexible Working Arrangements

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- Requirements of Employee Requests
  - *Jordan Quirke v BSR Australia Ltd* [2023] FWCFB 209
- The Importance of the Employer Response
- Reasonable Business Grounds
  - *Chandler v Westpac Banking Corporation* [2025] FWC 3115



## Flexible Working Arrangements

- FWC's Arbitration Power
  - *Naden v Catholic Schools Broken Bay Limited as Trustee for the Catholic Schools Broken Bay Trust* [2025] FWCFB 82
  - *Catherine Louise v Metcash Trading Ltd* [2025] FWC 2090
- Inconsistency with Enterprise Agreements – s 65C(2A)
  - *Paper Australia Pty Ltd trading as Opal Australian Paper v Anthony May* [2025] FWCFB 224





## RLHOs - 'Same Job Same Pay' Update

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Two recent decisions of the Full Court dealing with regulated labour hire orders:

- *BHP Coal Pty Ltd v Mining and Energy Union* [2025] FCAFC 194
- *Skilled Workforce Solutions (NSW) Pty Ltd v Mining and Energy Union* [2025] FCAFC 195

## RLHOs - 'Same Job Same Pay' Update

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- *Skilled Workforce Solutions (NSW) Pty Ltd v Mining and Energy Union* [2025] FCAFC 195
  - Two applications for judicial review of decisions of the Commission re RLHOs in relation to employees performing work at the Mt Arthur Coal Mine and the Bengalla Coal Mine
  - The errors alleged concerned the nature of the orders made by the Commission and the fact that:
    - The cohort of employees specified in the orders went beyond the evidence before the Commission, such that the Commission could not have reached the state of satisfaction required by s 306E(1)
    - The 'regulated employees' the subject of the order by the Commission were not identified in 'precise terms' contrary to s 306E(9)(c)
    - The orders of the Commission were otherwise void for uncertainty
  - Skilled supplying labour to Mt Arthur to operate haul trucks (at [21]) and to Bengalla in relation to various types of work including haul trucks, drill and blast operators, heavy equipment and wash technicians (at [33])

## RLHOs - 'Same Job Same Pay' Update

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- *Skilled Workforce Solutions (NSW) Pty Ltd v Mining and Energy Union* [2025] FCAFC 195
  - Full Court construed s 306E(1) and concluded that it does not provide the Commission with a binary choice between making the order sought or not making the order sought by a particular applicant. Rather, the Court concluded that the Commission is empowered to make 'an order'. The scope of such an order will depend upon the evidence led before it (at [78] – [86]).
  - Also construed s 306E(9(c)) in a manner that required the Commission to confine the terms of any RLHO to the employees about which it had formed the state of satisfaction required by s 306E(1) (at [129] – [133]).



## RLHOs - 'Same Job Same Pay' Update

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- *BHP Coal Pty Ltd v Mining and Energy Union* [2025] FCAFC 194
  - Full Court
    - The question before the Commission was whether the Commission could be satisfied in each case that the supply of employees by each of the two OS entities to BMA Coal Operations to perform production and maintenance work 'is not or will not be for the provision of a service, rather than the supply of labour'.
    - Commission concluded that the two OS entities were supplying labour rather than providing a service

## RLHOs - 'Same Job Same Pay' Update

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- *BHP Coal Pty Ltd v Mining and Energy Union* [2025] FCAFC 194
  - Full Court
    - Judicial review grounds:
      - By imposing a requirement that the performance of the relevant work be 'discrete' and 'distinct' (in the sense of separate or disjointed) from the supply of the employees' labour before it could be satisfied that the work was 'for the provision of a service'. That misconstruction was said to have led the FWC to disregard substantial parts of the BHP Parties' factual case.
      - Commission wrongly focused on the performance of work of the relevant employees itself, rather than on the purpose and object for which the employees were provided.



## RLHOs - 'Same Job Same Pay' Update

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- *BHP Coal Pty Ltd v Mining and Energy Union* [2025] FCAFC 194
  - Full Court
    - BHP Parties contended that the FWC misconstrued s 306E(1A), erected a wrong test and misdirected the inquiry by imposing a requirement that the asserted 'service' be 'identifiable and discrete' and 'distinct from the supply of labour' in question before a finding of service provision could be reached. The import of these qualifying words, confirmed by the FWC's approach to the s 306E(1A) inquiry, was that the 'service' must be separate from the 'labour' rather than functions and activities provided in conjunction with the labour, and must be discrete and distinct from what would occur under any other hypothesised labour hire arrangement (PD [91]-[93]).
    - Rejected
  - Application for special leave



## New dispute provisions in the WHS Act

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Division 7A of the *Work Health and Safety Act 2011* (NSW) (**WHS Act**), titled 'Work Health and Safety Disputes'

Allows the Industrial Relations Commission of NSW to conciliate and/or arbitrate disputes about WHS matters.

Intersection between the WHS Act and the well-established arbitral functions of IRC.

Interesting, in light of the recent consultation dispute involving the University of Technology Sydney in the FWC, after Safe Work NSW had issued provisional improvement notices to stop or modify the manner in which UTS was proposing to conduct its restructure due to alleged 'psychosocial risks'.

## New dispute provisions in the WHS Act

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Jurisdiction of the IRC to 'deal with' a WHS dispute:

1. Section 102B of the WHS Act provides jurisdiction to the Commission to 'deal with' a 'dispute about a WHS matter... whether or not an inspector has been appointed to assist in resolving the dispute'.
2. A 'WHS matter' is defined exhaustively in s 102A. It includes:
  - access to information by a health and safety representative under section 70(1)(c),
  - a request by a health and safety representative for a person assisting the representative to have access to the workplace under section 70(1)(g),
  - a matter mentioned in section 72(2)(a) or (b) or (4) relating to training for a health and safety representative,
  - a health and safety committee matter,
  - a matter about work health and safety that is an issue to which Division 5 applies,
  - an issue about cessation of work under Division 6.



## New dispute provisions in the WHS Act

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Jurisdiction of the IRC to 'deal with' a WHS dispute:

1. 'dispute' also defined in s 102A, and can be between any of the following persons:
  - a person conducting a business or undertaking,
  - a worker affected by the WHS matter,
  - a health and safety representative affected by the WHS matter,
  - a registered organisation for a worker affected by the WHS matter.
2. Any of these persons have standing to bring a dispute before the Commission



## New dispute provisions in the WHS Act

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Jurisdiction of the IRC to 'deal with' a WHS dispute:

1. Section 102C then requires a party to a dispute provide a notification
2. Section 102E(2) provides that, once a notification has been issued, the IRC:  
    "...may deal with the dispute in any way it thinks fit, including by means of mediation, conciliation or arbitration"
3. Once the IRC has elected to 'deal with' the dispute, s 102E(3) identifies the scope of the powers that the Commission can exercise:  
    "Without limiting subsection (2), if the Industrial Relations Commission deals with the dispute by arbitration, the Commission may make an order the Commission considers appropriate for the prompt settlement of the dispute."





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