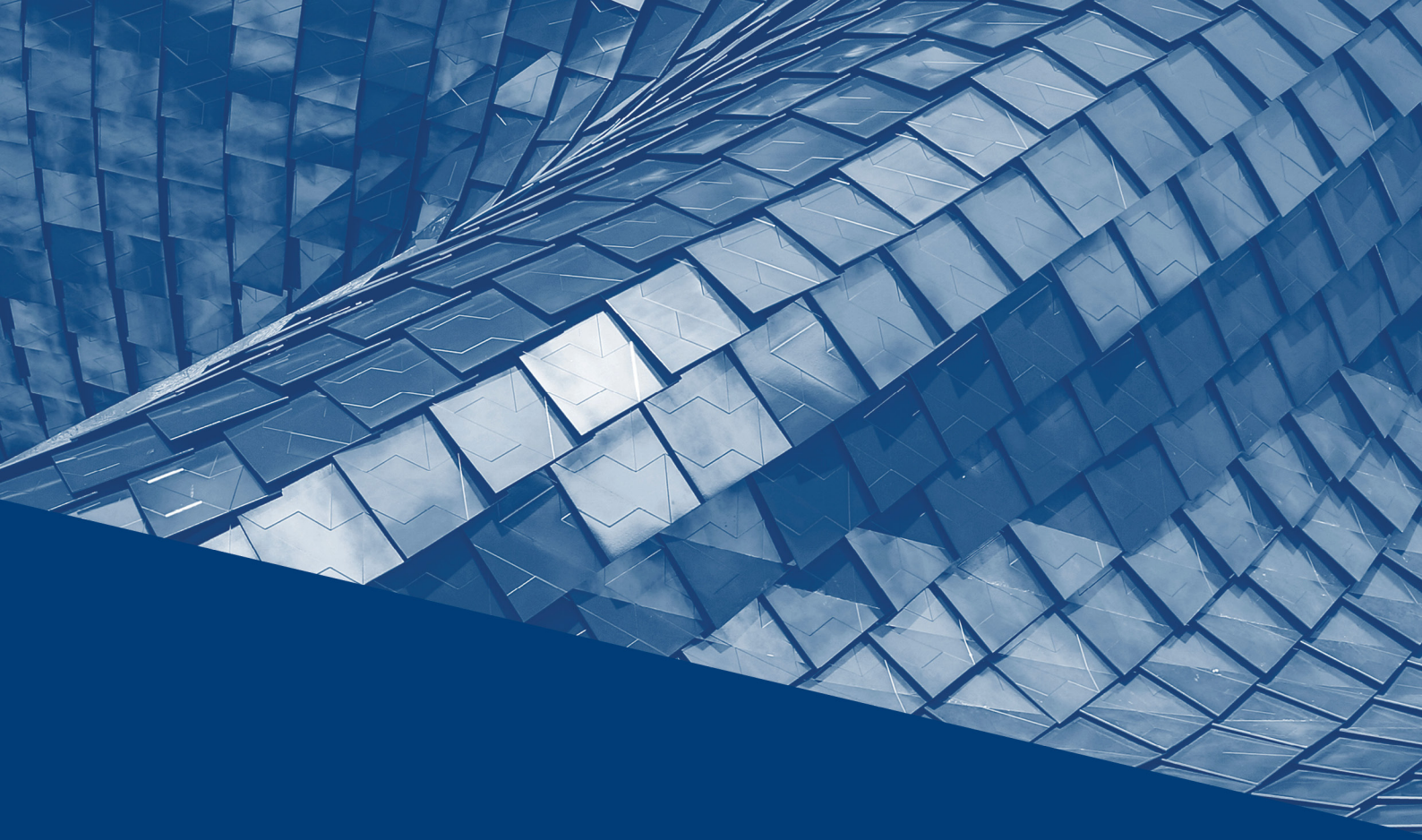


Workers' Rights through Automated Decision-Making

Submission to the Office of the Australian Information Commissioner on the ADM Transparency Obligation Issues Paper

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ACTU
australian council of trade unions

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Introduction

Since its formation in 1927, the Australian Council of Trade Unions (ACTU) has been the peak trade union body in Australia. There is no other national confederation representing unions. The ACTU consists of affiliated unions and State and regional trades and labour councils. Our affiliates have approximately 2 million members engaged across a broad spectrum of industries and occupations in the public and private sectors.

Automated decision-making (ADM) is already reshaping Australian workplaces. Decisions about who is hired, how people are rostered and surveilled, how their performance is judged and whether they keep their jobs are increasingly made or substantially assisted by computer programs. These are decisions that significantly affect the rights and interests of workers.

For the purposes of this submission, the 'ADM obligation' refers to the transparency requirement on entities using automated decision-making systems that significantly affect the rights or interests of individuals, and 'human-in-the-loop' refers to genuine, informed and timely human engagement with, and oversight of, an automated recommendation before any decision affecting a person is made.

The issues paper does not address rights available to workers through the Fair Work Act 2009 nor through Workplace Health and Safety (WHS) legislation, nationally or through States or Territories.

Any guidance on ADM should align with Fair Work Act consultation obligations, work health and safety duties, and relevant enterprise agreements and modern awards, to prevent fragmentation and avoid gaps in protections for workers.

Workers' professional duties and the broader public interest in safe, accountable decision-making cannot be displaced by ADM outputs. Transparent and reviewable decision-making is essential wherever ADM affects workers or the people they serve.

The ACTU's submission will deal with these absences and recommends that any guidance or advice coming from Government regarding ADM be consistent across all domains.

The ACTU recommends that the OAIC's guidance:

1. expressly recognises that decisions about hiring, rostering, surveillance, performance assessment, discipline and termination can significantly affect the rights or interests of an individual and are within the scope of the ADM obligation;
2. references the Fair Work Act 2009 and relevant work health and safety laws as relevant for interpreting the meaning of rights and interests, alongside the anti-discrimination and administrative law frameworks already cited;
3. identifies workers as a class of people whose rights and interests may be significantly affected by ADM, including in circumstances of dependence or vulnerability arising from the employment relationship, including vulnerability factors such as insecure or casual work, new entrants to the workforce, and those working in high-pressure, remote or isolated settings;
4. makes clear that human oversight must be genuine, informed and timely, that adequate time to review automated outputs must be factored into workload, and that the professional and legal obligations of registered occupations cannot be displaced by ADM;

that oversight should be conducted by people with relevant expertise, with time explicitly allocated within workloads for review and explicit override pathways where rights or safety are at risk, and must not amount to rubber-stamping under workload pressure; and,

5. confirms that public sector use of ADM does not diminish the accountability of the agency or the responsible officer.

Workers' rights

The Issues Paper identifies a set of frameworks it treats as working in synergy with the ADM obligation: anti-discrimination law, administrative law, the Freedom of Information Act 1982 and the General Insurance Code of Practice.[1]

Absent from that list is the Fair Work Act 2009 and the wider body of law that governs the employment relationship, including work health and safety law and the system of enterprise agreements and modern awards.

Unions have documented many issues where ADM systems or AI-assisted management tools have affected workers' rights.

Section 205(a) and (1A) of the Fair Work Act require, at a minimum, that enterprise agreements include a term that requires employers to promptly consult the employees subject to the agreement about:

- a major workplace change that is likely to have a significant effect on the employees; or
- a change to their regular roster or ordinary hours of work; and
- allows for the representation of those employees for the purposes of that consultation.

Last year the Fair Work Commission determined a model consultation clause for enterprise agreements which is read into enterprise agreements unless a compliant consultation clause has been otherwise negotiated and approved.

Consultation under modern awards and under the model clause for enterprise agreements requires, in the first instance, for employers to disclose to workers and their representatives:

- the nature of the change; and
- the expected effect on employees; and
- any other matters likely to affect employees.

When making the decision, employers must consider any matters about the changes raised by workers and unions and mitigate any adverse impacts.

A decision to introduce AI into the workplace is a major change that has significant effects. Further some industrial instruments will have different, enterprise specific, consultation clauses that require consultation before a definite decision is made.

Further, a decision to use AI in:

[1]OAIC, Automated Decision-Making Transparency Obligation (APP 1) Issues Paper (18 May 2026), 8 to 11 (Synergy with other requirements).

- Recruitment,
- Performance management,
- Workplace surveillance, or
- Disciplinary proceedings including sackings

Should be considered major changes having a material impact on workers' rights and ought to be disclosed and subject to genuine consultation.

The introduction or material reconfiguration of ADM systems in recruitment, performance management, workplace surveillance or disciplinary processes is also a 'major change' for the purposes of consultation clauses in modern awards and enterprise agreements.

The use of AI in the abovementioned areas of the workplace could affect workers' fundamental labour rights as recognised by the International Labor Organisation (ILO) and uses of ADM may impede workers' right to organise, right to strike, and right to collectively bargain.

ADM is already making and shaping decisions that significantly affect workers

Algorithmic surveillance driving disciplinary action

A supermarket employee with more than thirty years of service received a final written warning for scanning accuracy after alerts generated by an AI checkout monitoring system. The system uses overhead cameras to compare items moved through the checkout with items scanned, and generates alerts where it detects a possible mismatch.

The alerts are automated and do not account for transaction complexity, customer interaction or ordinary human error. The employee's actual error rate was approximately 0.19 per cent, an accuracy of about 99.81 per cent, consistent with normal human variation in a high-volume environment.

The worker was never told what error rate was acceptable, what benchmark the system used, or how many alerts would trigger discipline. In effect, a long-tenured employee was escalated to a final warning against an undisclosed standard, on the basis of opaque automated metrics, with disciplinary action becoming the easiest defensible response to a head-office alert.

This is the kind of decision that significantly affects an individual's rights and interests. It affects job security, reputation and livelihood, and it engages procedural fairness.

A worker in this position has no way to exercise any right of review if they do not even know that an automated system produced the allegation, what information it used, or what standard it applied.

Overriding professional judgement

Members of the Victorian Branch of the Australian Nursing and Midwifery Federation (ANMF) have raised ongoing concerns with the introduction of the Integrated Assessment Tool (IAT) for aged care assessments. The IAT was introduced on 1 July 2024.

It was developed following the Royal Commission into Aged Care Quality and Safety, recommendations to simplify access to aged care for older people. The IAT sits within a broader

regulatory framework that included the Aged Care Act 2024. The tool is used by registered nurses working in both public and private health services across the country.

Registered nurses undertake a comprehensive holistic assessment of an older person who wants to access aged care services. They use the IAT to guide this assessment to determine an older person's eligibility for aged care services and input the assessment outcome into the tool.

An algorithm uses the scores generated in the tool which the registered nurse inputs to assign an aged care service level to an older person. The registered nurse is only able to see the algorithm generated outcome once they have completed the assessment.

Once the outcome has been determined, the registered nurse is unable to adjust or review any of their assessed outcomes. There is no human/clinician override to adjust the algorithmically generated outcome.

Members have outlined the following concerns with the algorithm generated outcomes:

- Often the outcomes result in inappropriate service allocated for the older person, however the experienced registered nurse cannot adjust or influence the outcome in any way.
- this could result in older people being underfunding for services and in some instances overfunded.
- There appears to be a lack of consistency in the way the algorithm generated outcomes occur and members are often unable to predict the outcome.
- When a decision is reviewed, this often results in the outcome being the same due to the algorithm determining the outcome.

There is extensive media coverage currently on the IAT and the lack of human override and the resulting poor outcomes for older people.

It is noted that when the IAT was introduced, members understood that there would be an option for human override but a late policy decision by government introduced the system without an override option.

Automated allegations undermining procedural fairness

In the non-government education sector, the Independent Education Union (IEU) reports receiving AI-generated materials from employers that set out allegations against members and initiate employment-related disciplinary procedures. These documents are frequently based on limited and generalised information, drawing heavily on templated external content rather than the specific circumstances of the case.

The result is that members cannot fully understand the allegations against them or respond appropriately, which compromises procedural fairness. Where the document that frames a disciplinary process is itself an automated output, the worker's ability to contest the decision depends entirely on knowing that, and how, a computer program was involved.

Mandated platforms, consultation and professional judgement

A large non-government school system in New South Wales introduced an AI-driven assessment platform that creates, delivers, marks and analyses assessments. Teachers were directed to use the platform without formal consultation, without reference to enterprise agreements, and with

little communication about how their uploaded work and the data generated would be collected, stored or reused.

The platform disclaims responsibility for the validity of its outputs, yet teachers are required to rely on it, creating risks for their professional accountability.

Creative workers and the use of their work

A 2025 survey of more than 330 screen, stage and gaming writers found that 91 per cent were concerned about AI affecting their livelihood, and that a significant and rising share reported their work being edited or used by automated systems without their knowledge or consent. Whatever the broader debates about AI in the creative sector, the through-line is the same: workers are being affected by automated processing of information about them and their work, and they are routinely not told.

Across these examples the pattern is consistent. ADM is making or substantially assisting decisions about discipline, performance, hiring and the conditions of work. The people affected are workers. The decisions plainly affect their rights and interests. And in each case the central problem is a lack of transparency, which is the very thing the new obligation exists to address.

What the guidance should do

The OAIC should ensure its guidance recognises work as a domain in which rights and interests arise, and addresses the distinct features of ADM in the workplace.

The guidance should include explicit requirements for: meaningful human override of automated outputs; transparency about the data inputs, thresholds and rationale used by ADM systems; clear escalation pathways for workers whose interests are affected by ADM outputs; and provisions ensuring continuity and safety while ADM is deployed.

1. Workplace rights are rights

Decisions affecting employment conditions, job security, pay, performance assessment, discipline and workplace participation are squarely within the class of decisions that could reasonably be expected to significantly affect the rights or interests of an individual.[2] The guidance should say so expressly. It should reference the Fair Work Act 2009[3] and relevant work health and safety acts[4] as relevant to the interpretation of rights and interests, in the same way the paper presently references anti-discrimination and administrative law.

It should make clear that workers are entitled to know when ADM is being used to make or inform decisions about them at work, and that employment is properly understood as a significant interest, not merely a setting in which consumer-style harms occasionally occur.

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[2]Australian Privacy Principle 1.7, as inserted by the Privacy and Other Legislation Amendment Act 2024 (Cth).

[3]Fair Work Act 2009 (Cth), including the general protections in Part 3-1, unfair dismissal in Part 3-2, and consultation obligations contained in modern awards and enterprise agreements.

[4]Work Health and Safety Act 2011 (Cth) and corresponding state and territory laws, including the duty to manage psychosocial hazards and the obligation to consult workers under ss 47 to 49.

2. Meaningful human oversight

The paper acknowledges human-in-the-loop models, including in the aged-care eligibility edge case, but does not address whether human oversight is substantive or merely nominal. The guidance should make clear that human oversight means genuine, informed and timely engagement with an automated recommendation, not rubber-stamping under time and workload pressure. The worker responsible to be the human-in-the-loop must be trained in the domain that they are responsible for, have the time allocated to perform this role, and meaningfully able to affect its output.

Where a decision affects a person's livelihood, health, safety or education, it should be made by a human who has meaningfully engaged with the evidence and has adequate time to do so.

For workers in registered or licensed occupations, such as registered health care professionals and tradespeople, professional and legal obligations attach to their decisions, and those obligations cannot be displaced by an algorithmic output. These workers need the meaningful ability to opt out of participation in ADM systems where it conflicts with their professional obligations. The ability to opt out preserves professional accountability and the safe, competent provision of services; override options are essential to preserve professional standards.

3. Public sector accountability must be preserved

Public sector workers must remain the responsible and accountable decision-makers in government, and ADM must support rather than replace that responsibility. Government decisions affecting citizens, entitlements, services and compliance obligations should be made by identifiable human officers who can be held to account, and the guidance should confirm that the use of ADM does not diminish the accountability of the agency or the officer.

Recommendations

The ACTU recommends that the OAIC's guidance:

1. expressly recognises that decisions about hiring, rostering, surveillance, performance assessment, discipline and termination can significantly affect the rights or interests of an individual and are within the scope of the ADM obligation;
2. references the Fair Work Act 2009 and relevant work health and safety laws as relevant for interpreting the meaning of rights and interests, alongside the anti-discrimination and administrative law frameworks already cited;
3. identifies workers as a class of people whose rights and interests may be significantly affected by ADM, including in circumstances of dependence or vulnerability arising from the employment relationship;
4. makes clear that human oversight must be genuine, informed and timely, that adequate time to review automated outputs must be factored into workload, and that the professional and legal obligations of registered occupations cannot be displaced by ADM;
5. recommend training for workers who have responsibility for administering or interacting with ADM system and,
6. confirms that public sector use of ADM does not diminish the accountability of the agency or the responsible officer.

Conclusion

Transparency about automated decision-making is the foundation on which every other right depends. A worker who does not know that an automated system monitored them, flagged them, ranked them, rostered them or recommended their dismissal cannot meaningfully exercise the protections that the law already provides. We urge the OAIC to ensure that, when its guidance is released, working people are recognised as people whose rights and interests are significantly affected by ADM, and that the law governing their work is treated as part of the picture.

The guidance should also mandate transparency covering, at a minimum: (a) when ADM is used in decisions affecting workers; (b) a high-level description of the inputs and logic used by the system; (c) the decision thresholds applied; and (d) the human review and contestability pathways available to workers to challenge ADM-driven outcomes.

In health settings, the guidance should have health-specific transparency: (a) when ADM is used in staffing or care decisions; (b) high-level description of inputs and logic ; (c) decision thresholds; (d) available human review/contestability pathways for health workers to challenge ADM-driven outcomes affecting staffing or patient care

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