

Ashurst

# Employment Law Update

Recent developments in managing  
employees in Australia

February 2026

Outpacing change



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

In this edition, we discuss developments that employers should keep in mind to ensure legal compliance and best practice. In addition to the [inquiry](#) of the House of Representatives Standing Committee on Employment, Workplace Relations, Skills and Training into the operation and adequacy of the National Employment Standards, these developments include taking a national approach to sexual harassment, whether pandemic work from home arrangements can be altered or revoked, WHS obligations in redundancy and change management processes, changes to incident notification duties under Model WHS laws, a review of industrial relations developments to watch in 2026, and the introduction of a new statutory tort of discrimination in Singapore.



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# Taking a national approach to sexual harassment: Why employers should consider moving faster than the law

**Authors:** Shelley Williams (Partner), Molly Pearse (Lawyer) and Greta Sweeney (Lawyer)



## In brief:

- **Legislative changes in Queensland:** Since 1 March 2025, persons conducting a business or undertaking (PCBUs) in Queensland have been required to prepare and implement a written sexual harassment prevention plan (SHPP) under the *Work Health and Safety Regulation 2011 (Qld)* (WHS Regulation).
- **Legislative changes in Victoria:** Victoria's recently enacted *Restricting Non-disclosure Agreements (Sexual Harassment at Work) Act 2025 (Vic)* (NDA Act) will restrict the use of non-disclosure agreements (NDAs) and non-disclosure clauses in agreements relating to workplace sexual harassment matters. The NDA Act is expected to commence operation during 2026.

## Lessons for employers:

- **Consider whether to adopt a national, unified standard:** Employers with a national presence should consider whether to create an organisation-wide framework for preventing and managing the risk of sexual harassment that adheres to the stringent requirements in Queensland. Employers can then tailor their framework to accommodate any particular legislative requirements in other jurisdictions. This approach would help to ensure operational consistency within organisations and “future-proof” organisations in anticipation of potential reforms in other jurisdictions.
- **Implement best practice:** Employers should treat sexual and sex/gender-based harassment as a psychosocial hazard that needs to be managed as a work health and safety issue. Employers should prepare a written SHPP that identifies hazards, assesses risks and implements control measures to prevent sexual harassment within the workplace. Employers should also regularly review the effectiveness of control measures implemented, and periodically identify new and emerging risks and hazards. Employers should regularly obtain and respond to insights collated from sexual harassment surveys, reports and whistleblowing within their workplaces.
- **Recalibrate NDA strategy:** The Victorian reforms demonstrate the beginning of a shift away from employers being able to impose broad confidentiality requirements on employees involved in sexual harassment matters. Employers should consider using narrow, specific non-disclosure clauses with appropriate carve outs (such as for family members, medical advisers and regulators), to ensure that the maintenance of appropriate confidentiality does not impede sexual harassment risk analysis or remediation of harm caused to victims. To the extent that employers have routinely used NDAs in the past, they may wish to consider developing a system to track current NDA usage as a risk metric. Employers should also consider revising settlement agreement templates across their organisation to align with the upcoming Victorian restrictions and contemporary policy settings, and train settlement decision makers accordingly.

## Workplace sexual harassment laws: What has changed?

Queensland and Victoria have both recently introduced State-specific legislation addressing different aspects of workplace sexual harassment. In Queensland, PCBUs are required under the WHS Regulation to prepare and implement a SHPP. In Victoria, the NDA Act, which is likely to come into effect later this year, restricts the use of NDAs in settlement agreements related to workplace sexual harassment.

These State-specific requirements raise the prospect that for employers with national operations, a national approach to managing sexual harassment may:

- be more efficient
- be more effective in driving prevention of sexual harassment, accountability and trust in both employees and the public; and
- offer greater protection, and defences, in respect of legal action being taken against employers for failing to fulfil their duties in relation to sexual harassment prevention.

Employers may wish to consider implementing policies and practices that are compliant with both the Queensland and Victorian reforms, in anticipation of increasing regulatory momentum across Australia that will continue to promote proactive, risk-based controls and greater transparency.

## Using Queensland's SHPP as best practice nationwide

Changes to the WHS Regulation mean that PCBUs in Queensland are required to prepare and implement a SHPP to identify and control risks of sexual harassment or sex/gender-based harassment. This requirement took effect on 1 March 2025.

While the SHPP sits within WHS risk management (and not human resources, which typically deals with employee grievance handling), the SHPP could be developed and implemented across all relevant business functions to ensure consistency. [WorkSafe Queensland](#) provides an optional [template](#) that employers can access for guidance

on how to develop their SHPP, which can be adapted to refer to and incorporate existing prevention systems and control measures that are already being utilised by a PCBU.

It may be prudent for PCBUs to apply their SHPP across all jurisdictions and not just in Queensland. This is because doing so would be a reasonably practicable step that PCBUs and their officers can take to ensure the health and safety (including psychological health and safety) of their workers. PCBUs hold similar health and safety duties across the various jurisdictions and a nationally consistent SHPP may assist in satisfying those duties. Further, a nationally consistent SHPP may also assist to show an employer has taken "all reasonable steps" to prevent sexual harassment where it is faced with a claim under discrimination legislation.

PCBUs should be prepared to engage in periodic reviews of existing and emerging risks of sexual harassment that exist within their workplaces, and should regularly assess the effectiveness of control measures documented in their SHPP. To achieve this, PCBUs should ensure there are clear responsibilities assigned to a PCBU's HR, safety, legal, and operational business units, and that real-time insights from internal reporting and whistleblowing channels inform meaningful updates to their SHPP.

## Rethinking NDAs: Building transparency into your settlement strategy

Public policy has been shifting regarding the use of broad confidentiality terms in workplace sexual harassment cases. This reflects concern that expansive NDAs can perpetuate a "culture of silence," impede organisational learning and victim healing, and undermine positive duties to eliminate harassment. Many employers have already begun reducing the scope of non-disclosure clauses, and incorporating carve-outs that permit disclosures to family, medical advisers and regulators. In some cases, employers have ceased using NDAs in settlement negotiations involving sexual harassment altogether. This aligns settlement practice with preventative obligations and supports safer, more transparent workplaces.

In an Australian first, Victoria will soon commence a dedicated regime restricting NDAs in workplace sexual harassment matters under the NDA Act. The NDA Act

defines an NDA broadly, as any agreement (or part of an agreement) intended to stop a party from disclosing certain information, including non-disclosure or non-disparagement clauses within broader settlement agreements. A "workplace NDA" is an agreement between a complainant and employer and/or respondent concerning the disclosure of "material information" about sexual harassment (namely, the respondent's identity and details of the conduct).

Coverage under the NDA Act extends to employees, contractors and volunteers, and is framed broadly as applying "if the workplace sexual harassment is connected to Victoria". This will include a situation where, for example, the employer's principal place of business is in Victoria, even if the complainant employee does not usually work in, and is not based in, Victoria.

Even before commencement of the NDA Act, the direction is clear: narrow, purpose-specific confidentiality is more consistent with positive duties and with the evolving Victorian framework, and broad confidentiality clauses are increasingly out-of-step with policy and risk management. In practice, depending on what is being requested, this potentially means calibrating the scope and duration of any confidentiality requirements and, limiting who is bound, and ensuring clauses do not prevent employers from identifying and responding to systemic issues, each of which is consistent with the [Respect@Work Council's guidelines](#) and with the broader preventative paradigm.

From a practical perspective, employers should consider the viability of maintaining different confidentiality clause templates, depending on where a particular sexual harassment matter occurs and the nature of the circumstances. For most employers, there is likely to be utility in updating national agreement template suites, such that any non-disclosure and confidentiality clauses comply with the requirements in Victoria that will be introduced by the NDA Act. This will also have the added benefit of ensuring compliance with the NDA Act where interstate issues arise.

## **Why take a national unified approach to managing sexual harassment?**

Implementing a national approach to these issues would allow employers to set one risk appetite, one culture and one vocabulary for prevention across all jurisdictions. This would reduce gaps between policies, practices and legal duties, ensuring a consistent approach to risk across operations, regardless of location. The still relatively new positive duty under the *Sex Discrimination Act 1984* (Cth) to take reasonable and proportionate measures to eliminate sexual harassment, and the intensifying WHS focus on psychosocial risks, are both pushing employers beyond reactive grievance handling toward proactive risk management. Employers should be thinking about how they can "future-proof" their practices. Adopting a national approach to sexual harassment matters is likely to mean less work down the track, should such legislative changes extend nationwide.

## **What a national standard could look like in practice**

The most robust national approaches share several hallmarks:

- they integrate sexual harassment risk into the WHS management system, rather than solely HR policy, with a written SHPP, controls mapped to identified hazards, and a regular review cycle
- they align dispute settlement practices to prevention by taking a nuanced approach to confidentiality requirements; and
- they set national standards that exceed current law so the organisation never has to "level down" when operating across borders.

## **Staying ahead of the curve**

Sexual harassment prevention is now a frontline governance and safety issue, not only a legal compliance matter. Employers that move first will likely find that the same investments that reduce the incidence of sexual harassment within their workplaces also improve their workplace culture and lower the long-run cost of workplace grievance management.



# Five years on: Can pandemic work from home arrangements be altered or revoked?

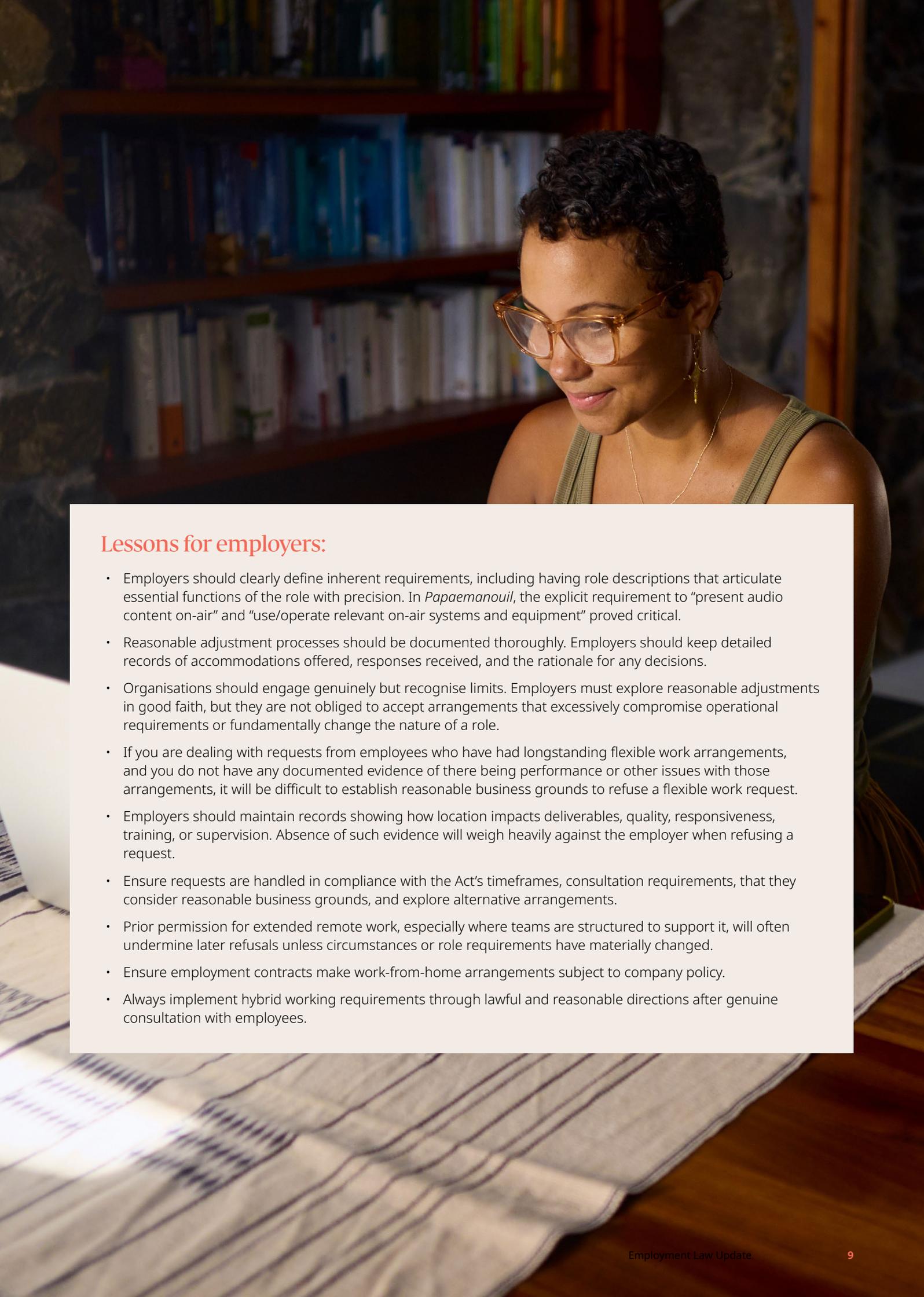
**Authors:** Shelley Williams (Partner), Laura Kokolis (Graduate) and Molly Fitzgerald (Graduate)



## In brief:

- For some employers, the tension between flexible work arrangements and operational necessity has become one of the defining employment law challenges of the post-pandemic era.
- Since our last [article](#) and [podcast](#) about navigating flexible work requests under the *Fair Work Act 2009* (Cth) (**FW Act**), the direction of recent decisions suggests that workplace legislative protections do not guarantee indefinite flexibility.
- [Chandler v Westpac \[2025\] FWC 3115](#) demonstrates that employers must show role-specific, evidence-based impacts to refuse remote work. It confirms that generic policy rationales are insufficient and individualised assessment with clear documentation is required.
- In [Papaemanouil v Special Broadcasting Service Corporation \[2025\] FedCFamC2G 2150](#), the Court rejected the suggestion that pandemic-era working arrangements created ongoing entitlements, and considered a work from home request in the context of disability and whether the employee could perform the inherent requirements of the role.
- [Johnson v PaperCut \[2026\] FWC 178](#) suggests hybrid attendance mandates are a lawful and reasonable direction when contracts link remote work to policy, following genuine consultation, with clear expectations, and documented warnings.





## Lessons for employers:

- Employers should clearly define inherent requirements, including having role descriptions that articulate essential functions of the role with precision. In *Papaemanouil*, the explicit requirement to “present audio content on-air” and “use/operate relevant on-air systems and equipment” proved critical.
- Reasonable adjustment processes should be documented thoroughly. Employers should keep detailed records of accommodations offered, responses received, and the rationale for any decisions.
- Organisations should engage genuinely but recognise limits. Employers must explore reasonable adjustments in good faith, but they are not obliged to accept arrangements that excessively compromise operational requirements or fundamentally change the nature of a role.
- If you are dealing with requests from employees who have had longstanding flexible work arrangements, and you do not have any documented evidence of there being performance or other issues with those arrangements, it will be difficult to establish reasonable business grounds to refuse a flexible work request.
- Employers should maintain records showing how location impacts deliverables, quality, responsiveness, training, or supervision. Absence of such evidence will weigh heavily against the employer when refusing a request.
- Ensure requests are handled in compliance with the Act’s timeframes, consultation requirements, that they consider reasonable business grounds, and explore alternative arrangements.
- Prior permission for extended remote work, especially where teams are structured to support it, will often undermine later refusals unless circumstances or role requirements have materially changed.
- Ensure employment contracts make work-from-home arrangements subject to company policy.
- Always implement hybrid working requirements through lawful and reasonable directions after genuine consultation with employees.

## Changes coming for flexible work requests?

Under the National Employment Standards in the FW Act, eligible employees may request flexible working arrangements.

As many employers wind back pandemic-era work from home arrangements, changes may be on their way. 2024 legislative reforms are now operational and impose more strict, process-driven obligations on employers responding to flexible work requests.

These changes also gave the Fair Work Commission jurisdiction to deal with disputes about flexible work. In 2024-2025, the Commission received approximately 300 applications under the new dispute provisions. Most settled without a hearing and roughly 2% proceeded to arbitration.

In 2025, a [Bill](#) was introduced to the Parliament of Australia which would grant all employees a right to request up to two work-from-home days per week. An employer's right to refuse such a request would be limited to impracticability due to the inherent requirements of the role, after considering whether reasonable adjustments would enable the request. The Bill was referred to the Senate Education and Employment Legislation Committee in November 2025, with a report due in March 2026.

Victoria has also announced [proposed legislation](#) to give employees a legal right to work from home at least two days per week.

## Case law developments

Three recent decisions provide guidance for employers on how to meet the requirements associated with working from home requests.

## Commission orders permanent remote work due to lack of reasonable business grounds

In [Karlene Chandler v Westpac Banking Corporation \[2025\] FWC 3115](#), Ms Chandler, a long serving part time employee, requested a flexible working arrangement under section 65 of the FW Act to work remotely so she could manage school drop-offs and pick-ups for her two young children. The employer refused the request. The applicant then proposed an alternative of working two days per week from the local Bowral branch instead of the employer's Sydney corporate office. This too was rejected, although the applicant did work from Bowral briefly in 2025. The applicant had worked from home on at least a part time basis since 2017. She lived two hours from the Sydney office, and her children's school was 30 minutes from home. The applicant sought orders from the Fair Work Commission granting her request or, alternatively, permitting the Bowral arrangement.

### Employer did not have reasonable business grounds for refusal

The Commission ordered that the applicant may continue working remotely on a permanent basis to accommodate her caring responsibilities.

It found the employer's reliance on general benefits of in person attendance, including its Hybrid Working Policy, which requires two days per week in a corporate office, and its asserted collaboration needs, was too general and not sufficiently specific to the employee's role to constitute reasonable business grounds. The evidence showed the applicant's work could be performed completely remotely, she and her team had performed at a high level for years, deadlines were met or exceeded, and there was no loss of productivity, efficiency, or customer service from remote work. The Commission considered it unlikely that adverse outcomes would arise if remote work continued.

While accepting the employer might obtain some benefit from minimal office attendance and acknowledging the applicant's circumstances reflected personal choices to reside some distance from her primary place of work, the Commission nevertheless granted the request. The Commission had regard to the employer's prior permission for extended remote work, the practical limits on the ability of the applicant's partner to play a greater role in the arrangements for the children before and after school, the applicant's financial circumstances, and the fact that the applicant's team performed their work predominantly remotely, and had been structured to support remote work.

The Commission noted that the applicant had worked from home for a number of years without any loss of productivity. It had no doubt that the applicant could perform her role from home and was satisfied that continuing those arrangements would not change that. The Commission rejected arguments that the order was inconsistent with the applicable enterprise agreement and was not satisfied the employer's evidence established reasonable business grounds to refuse the request.

### Working from home and disability

In [Papaemanouil v Special Broadcasting Service Corporation \[2025\] FedCFamC2G 2150](#), the applicant worked as a producer for SBS's Greek Language Program for over a decade before her employment was terminated in April 2024. The applicant's role required her to present live radio content from SBS's Melbourne studios. Following the pandemic and the onset of various health conditions, including a knee injury that made travel difficult, the applicant sought to continue working from home indefinitely. When SBS ultimately determined this was not feasible and terminated her employment, the applicant brought claims under the FW Act alleging adverse action, discrimination, coercion, and underpayment. The Court dismissed every claim.

### Inherent requirements

At the heart of this decision is the application of section 351(2)(b) of the FW Act, which provides an exception to the discrimination prohibitions in section 351(1), where the adverse action is taken because of the inherent requirements of the position.

Judge Fary accepted that the applicant's knee injury constituted a disability and was a substantial reason for the termination of her employment. However, the Court found that live broadcasting from SBS's studios - described as "multi-million-dollar facilities" with superior audio quality - was genuinely an inherent requirement of the producer role. Remote broadcasting simply could not replicate the technical standards required.

This finding reinforces that employers are not required to fundamentally alter a position to accommodate an employee's disability. The question is whether the employee can perform the role as it genuinely exists, not as it might be reimagined.

### Reasonable adjustments

What distinguishes this case, and likely contributed to SBS's success, is the employer's documented, good-faith engagement with the reasonable adjustment process. SBS offered a suite of accommodations, including a dedicated desk for solo broadcasting, taxi or car services to address transport difficulties, roster adjustments to remove weekend news duties, and a hybrid arrangement requiring only one day per week onsite for live broadcasts.

The applicant declined each of these offers. She also withdrew consent for SBS to contact her treating doctors, effectively foreclosing further avenues for collaborative problem-solving. The Court characterised SBS's conduct throughout as "fair and reasonable." This assessment likely turned on the quality of the employer's documentation and the consistency of its communications; a reminder that how an employer manages a difficult situation can be just as important as the ultimate decision it reaches.

### Workplace rights

The applicant's adverse action claims under section 340 of the FW Act also failed. While the Court accepted that the applicant had exercised certain workplace rights, including her right to request home-based work under the SBS Enterprise Agreement, it found no causal connection between those rights and her dismissal. The dismissal flowed from SBS's operational assessment that the applicant could not fulfil the inherent requirements of her role, not from any retaliatory motive.

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Notably, the Court rejected the suggestion that pandemic-era working arrangements created ongoing entitlements. Employers who implemented emergency measures during 2020–2022 can take some comfort that those arrangements are unlikely to be treated as binding precedents.

## **Commission upholds dismissal for refusal to comply with hybrid work policy**

In [Mr Richard Johnson v PaperCut Software Pty Ltd \[2026\] FWC 178](#), Mr Johnson made an application under section 394 of the FW Act alleging unfair dismissal after refusing to attend the office three days per week as required under his employer's hybrid work policy. The applicant argued that the employer's mandate to attend the office three days a week contravened his contract. He argued that his failure to comply with an unreasonable direction did not provide a valid basis for dismissal. The contract stated the applicant was "permitted" to work from home and "may be required to work at other locations from time to time". The contract also required compliance with lawful and reasonable directions and policies. It did not specify a primary place of work.

Following staff engagement and consultation, the employer introduced a staged hybrid policy in August 2023, moving all staff to three office days by January 2025. The employer sought to vary the applicant's contract to specify the office as his place of employment, in addition to his home, stating that the worker may be permitted to work from his personal residence in line with relevant policy. The applicant did not agree to the variation and maintained that he had a contract that allowed him to work remotely. From December 2024 to June 2025 there were meetings and four warnings stating that non-compliance with the direction would result in disciplinary action. Ultimately, the applicant did not follow the direction and on 19 June 2025 he was dismissed for failing to comply with the employer's hybrid work policy.

## **Direction lawful and reasonable and dismissal not harsh, unjust or unreasonable**

The Commission held that the employer's direction to attend the office was lawful and reasonable because it fell within the scope of the employment contract and involved no illegality. The contract did not confer an unconditional right to work from home. The word "permitted" and the reference to doing so "in line with relevant policy" made any remote work conditional on the employer's policies, which could change. The employer's hybrid policy was objectively reasonable, developed after consultation, provided flexibility, and allowed a 16 month staged transition. The Commission accepted the employer's position that the applicant was repeatedly warned, given time to comply, and that his refusal left no reasonable alternative to dismissal. The Commission rejected the applicant's arguments that the direction breached his contract or that dismissal was disproportionate and harsh. The application was dismissed.

## **Looking ahead**

As hybrid and remote work arrangements have become entrenched features of Australian workplaces, disputes over the boundaries of flexibility will inevitably continue.

These recent cases are a reminder that workplace legislative rights do not guarantee indefinite flexibility. Employers who navigate the balance between employee protections and legitimate business needs, and can prove that appropriate steps were taken in response to flexible work request, will be well positioned to defend their decisions.



# Is your organisational change psychologically safe?

**Authors:** Trent Sebbens (Partner), Eshani Mendis (Senior Associate) and Amy Ridley (Clerk)



## In brief:

- Over the last six months, the NSW safety regulator, SafeWork NSW, has actively intervened in organisational change processes in response to alleged contraventions of WHS laws, in particular, around managing psychosocial safety.
- Recent regulatory attention has been focused on the tertiary sector, where SafeWork NSW has:
  - » issued a prohibition notice to the University of Technology, Sydney (**UTS**), ordering it to pause staff reductions until it had taken steps to minimise the psychological impact on staff; and
  - » issued an improvement notice to Macquarie University directing it to consult, so far as is reasonably practicable, with workers affected or potentially affected by the proposed workplace changes.
- In both cases, workers raised complaints with the National Tertiary Education Industry Union (**NTEU**) about the respective change processes.
- In addition, recent amendments to Part 5, Division 7A of the *Work Health and Safety Act 2011* (NSW) (**WHS Act**) will provide another pathway for workers, health and safety representatives (**HSRs**), and unions to raise disputes about “WHS matters” directly with the Industrial Relations Commission (**IRC**), rather than seeking the involvement of SafeWork NSW.

## Lessons for employers:

- Safety regulators across Australia have increased their oversight of how persons conducting a business or undertaking (**PCBU**) manage psychosocial risks in the workplace. We are now seeing regulatory intervention in workplace change and redundancy processes, which can cause delay.
- PCBUs should take proactive steps to manage psychosocial risks associated with organisational change, including conducting risk assessments in relation to the proposed workplace change in consultation with affected workers, health and safety representatives and others.
- Consultation is paramount. PCBUs should consult with relevant parties in accordance with any applicable instruments such as an award or enterprise agreement, as well as the consultation requirements under WHS legislation.

Workplace change processes can give rise to psychological risks in the workplace – for workers concerned about what the change may mean for them; their role; their workload and possibly their future employment.

SafeWork NSW is being called upon by affected employees, and their representatives to intervene to assist with dealing with their risk. In doing so, SafeWork NSW has regulatory tools – including prohibition and improvement notices – that it may issue to address these risks.

### **SafeWork NSW issued a prohibition notice to UTS**

*What is a prohibition notice?*

Under the WHS Act, an inspector may issue a prohibition notice if they reasonably believe that an activity is occurring, or may occur, at a workplace that involves, or will involve, a serious risk to health or safety of a person emanating from an immediate or imminent exposure to a hazard.

In such circumstances, an inspector may direct a person to cease the activity, or specify the manner in which the activity may continue, until the inspector is satisfied that the matter that gives (or will give rise to) the risk has been remedied.

These notices can be issued where psychological risk arises from a prepared change.

*Prohibition notice halts redundancy process*

On 2 September 2025, approximately 800 UTS staff were invited to attend meetings to discuss the possible termination of 150 academic roles as part of a cost-reduction strategy. These meetings were scheduled for 3 September and the change proposal was scheduled to be released the following day, on 4 September.

Before those meetings could take place, SafeWork NSW issued a prohibition notice to UTS, bringing the redundancy process to a halt.

The notice required UTS to suspend its proposed redundancy plan on the basis that it would expose workers to a serious and imminent risk of psychological harm. UTS was ordered to consult with staff in accordance with relevant laws and industrial instruments and ensure any future roll out would adequately manage psychological safety.

SafeWork NSW's intervention is understood to have arisen from staff complaints lodged with the NTEU, which publicly supported the regulator's actions.

### **SafeWork NSW issued an improvement notice to Macquarie University**

*What is an improvement notice?*

Under the WHS Act, an inspector may issue an improvement notice if they reasonably believe that a person is contravening the WHS Act or has contravened a provision in circumstances that make it likely that the contravention will continue or be repeated.

In such circumstances, an inspector may require a person to remedy or prevent the contravention from occurring.

Again, these notices can be issued where there is considered to be steps available to a PCBU to address psychological risk arising from a proposed change.

*Improvement notice directs more consultation*

On 2 October 2025, just weeks after the prohibition notice was issued to UTS, SafeWork NSW issued an improvement notice to Macquarie University due to alleged inadequate staff consultation during job cuts affecting over 75 roles.

The notice alleged that Macquarie University had not, so far as is reasonably practicable, consulted with workers in accordance with the agreed work health and safety consultation procedures on the proposed workplace change. In particular, the notice alleged that Macquarie University had not followed the agreed procedures for consulting workers through the work health and safety committee as specified in the WHS Committee Terms of Reference.

Macquarie University was directed to consult with workers affected or potentially affected by the proposed workplace changes on the following matters:

- identification of hazards
- assessment of risks; and
- decisions on ways to eliminate or minimise risks stemming from the proposed organisational change.

The notice required that consultation be conducted in accordance with the agreed consultation mechanism and include relevant information on the proposed change, a reasonable opportunity for workers to express their views and raise WHS issues stemming from the proposed change, a reasonable opportunity to contribute to the decision making process about the proposed change, take into account worker views and provide an outcome to workers of the results of consultation in a timely manner.

The NTEU has commented that it was its union members who raised the concerns about consultation.

## **New jurisdiction for the Industrial Relations Commission of NSW to resolve WHS matters**

In addition to the intervention of SafeWork NSW, a new dispute resolution pathway has been created for WHS risks. Under Part 5, Division 7A of the *Work Health and Safety Act 2011* (NSW) (**WHS Act**), a PCBU, worker, HSR or Union affected by a "WHS matter" can raise a dispute in the NSW IRC.

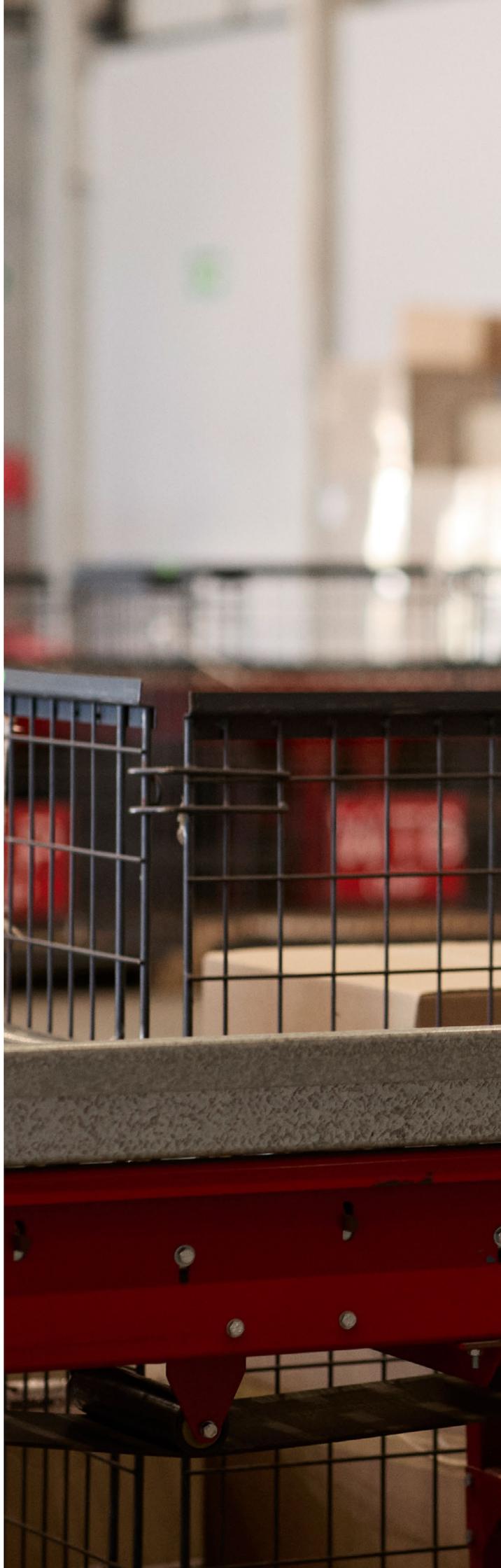
A WHS matter is defined as any of the following:

- a work group determination matter;
- a work group variation matter;
- 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; and
- an issue about cessation of work under Division 6.

These amendments establish a direct pathway to the NSW IRC for the resolution of disputes about WHS matters. A PCBU, worker, HSR and union may now bring disputes to the NSW IRC, which has discretion to deal with them as it sees fit, including through mediation, conciliation or arbitration.

These changes operate as an alternative to the previous inspector-led process, and provide unions with an avenue to initiate and participate in disputes before the NSW IRC relating to a WHS matter. Once a dispute is raised in the NSW IRC any action by a SafeWork NSW inspector about the same dispute must stop.

We anticipate that the heightened focus on psychosocial risks by both SafeWork NSW and unions, coupled with the changes to the WHS Act which strengthen union powers, will lead to a rise in disputes raised in the NSW IRC. This could include unions directly raising disputes in the NSW IRC about psychosocial risks and consultation processes undertaken as part of organisational change processes, rather than raising such matters with SafeWork NSW.





# “Same Job Same Pay”: From concept to execution

**Authors:** Shelley Williams (Partner) and Georgina Adair (Lawyer)



## In brief:

- “Same Job Same Pay” has moved from concept to execution. Just over one year on from the introduction of the ‘Closing Loopholes’ reforms, the Fair Work Commission has granted 92 regulated labour hire arrangement (**RLHA Orders**), across various sectors, including mining, aviation, meat processing and warehousing.
- As more applications and orders are made, and decisions are challenged, employers will gain clearer insights into the application of the exemption criteria that will allow for strategic workforce planning.
- Ms Susan Booth, former Fair Work Commissioner, has been engaged to undertake an [independent review](#) of the Same Job Same Pay reforms. Ms Booth is engaging with stakeholders across industry, unions and the legal profession. She is expected to provide practical recommendations to improve clarity and implementation in July 2026.

## Lessons for employers:

- While not all employers who utilise labour hire workers will necessarily find themselves subject of an RLHA Order application, prudent employers should assess the likelihood of an application being made, and factor potential cost and liability impacts into workforce and commercial planning.
- Because the coverage of an RLHA Order turns on the performance of equivalent work by regulated employees, regulated employers should review classification structures in applicable host instruments, particularly where broad classification structures may capture regulated employees, and compare applicable rates of pay to identify areas of risk.
- If regulated employers do find themselves as a party to an RLHA Order application, they should seek to lead contemporaneous documents and witness accounts addressing who directs the work, how outputs are specified and measured, and the level of operational integration.
- The terms of a labour hire service agreement alone are not a determinative factor in finding work performed by regulated employees is for the provision of a service. However, recent decisions should incentivise regulated employers to review workforce structures and consider negotiation strategies to provide for genuine and discrete outcome-based service contracts, managed by the labour hire provider, distinct from the day-to-day direction of the host employer.

## Regulated Labour Hire Arrangement Orders

Since 1 November 2024, as a result of reforms introduced by the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*, the Commission has had the power to make an RLHA Order. An RLHA Order requires that labour hire employees working for a host employer be paid at least the same rate of pay (under the relevant workplace instrument) as employees of the host employer who are performing the same kind of work.

The Commission must make an RLHA Order if they can be satisfied of certain statutory pre-conditions, however the Commission also must not make an RLHA Order if:

- the performance of work is, or will be, for the provision of a service (as distinct from the supply of labour); or
- it is not fair and reasonable in all the circumstances to do so.

## BHP Coal and Same Job Same Pay

BHP Coal Pty Ltd has applied to the High Court for special leave to appeal the decision of the Full Federal Court after it dismissed BHP's challenge to the RLHA Orders made by the Commission in July 2025.

The RLHA Orders were made on application from the MEU and AMWU in July 2024, in respect of the employees of OS Production and OS Maintenance (**OS Parties**) (and Workpac Pty Ltd, WorkPac Mining Pty Ltd, and Ready Workforce Pty Ltd), employed at three open cut, black coal mines in the Bowen Basin in Queensland, for all of which BHP is the regulated host. The effect of the RLHA Orders was that certain employees of the OS Parties would be entitled to the same pay, as specified in *BMA Enterprise Agreement 2022*, as those employed by BHP performing the same job.

At the Commission, BHP and the OS Parties argued the Commission could not be satisfied that the performance of work by the employees of the OS Parties was not or would not be for the provision of a service, and the Commission was therefore precluded from making the RLHA Orders. The Commission disagreed, preferring the arguments advanced by the Unions, that the OS Parties were supplying labour to BHP.

BHP applied to the Federal Court for judicial review of the Commission's decision, arguing the Commission failed to

apply the correct test and misdirected themselves when considering whether the service exemption applied. The Federal Court, in dismissing the application, seemingly drew concepts from the 'multi-factorial test', asserting that assessment of the service contractor exemption will turn on fact-specific assessments of how the contracting arrangements operate in practice, rather than mere reliance on the explicit terms of the contract.

### *Bengalla Mining Company and Skilled Workforce Solutions*

The MEU is also responsible for another Commission decision to grant RLHA Orders in respect of employees of CoreStaff NSW Pty Ltd and Skilled Workforce Solutions (NSW) Pty Ltd, who perform work for Bengalla Mining Company at the Bengalla Mine.

In considering whether an exemption applied, the Commission had regard to the work actually performed by regulated workers at the Bengalla Mine, the degree of day-to-day direction by Bengalla and the extent to which the regulated workers were embedded in Bengalla's systems before ultimately granting the RLHA Order.

Skilled appealed to the Full Court of the Federal Court, arguing the Commission failed to specify the regulated employees to be covered by the RLHA Order with sufficient precision and that the RLHA Orders were uncertain and void. The Full Court found that while the Commission had reached a state of satisfaction as to a confined class of regulated employees, they proceeded to make findings in relation to a broader class of employees, and then framed the RLHA Orders by reference to that broader group, and, in doing so, exceeded its powers.

On remittal, the Commission made an RLHA Order on the same terms as made initially, this time precisely specifying the regulated employees to be covered by the RLHA Order in accordance with the guidance from the Full Court.

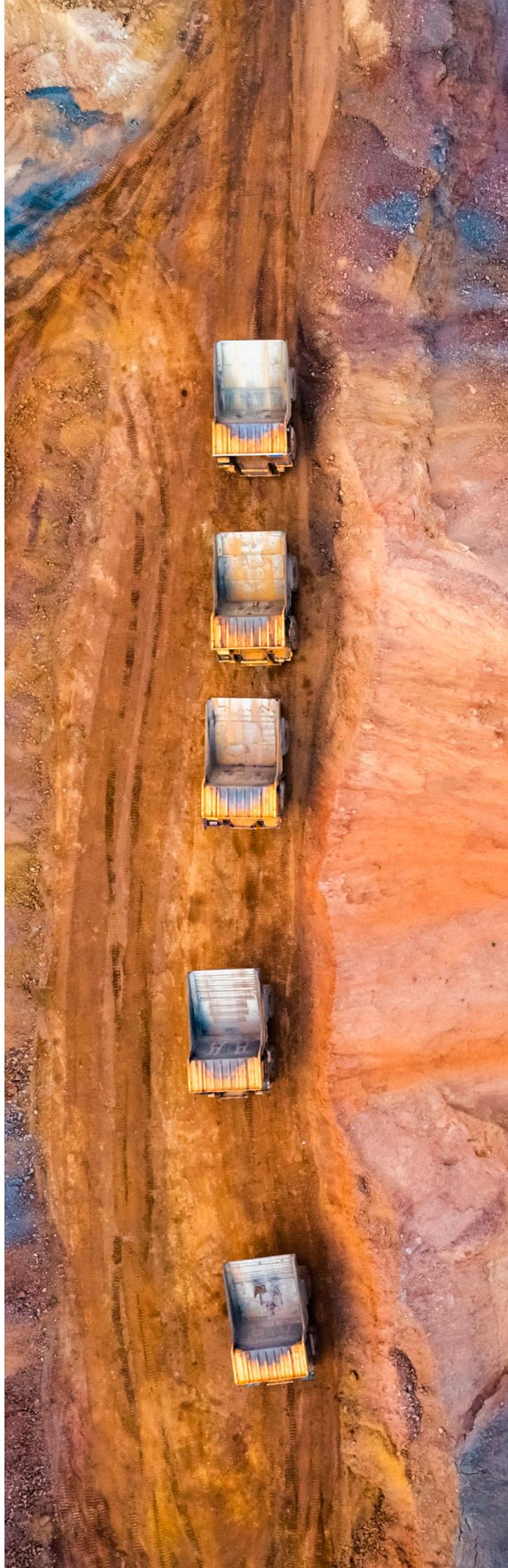
## Review of Closing Loopholes Acts by Susan Booth

The Department of Employment and Workplace Relations has appointed former Fair Work Commissioner and Senior Member of the Queensland Civil and Administrative Tribunal, Ms Susan Booth, to conduct an [independent review](#) of the Closing Loopholes reforms, including Same Job Same Pay.

The review will assess whether the Same Job Same Pay framework is operating as intended, is clear and workable for businesses and workers, and is not giving rise to unintended consequences.

In particular, the review is examining the operation of key concepts such as:

- 'equivalent work'
- the protected rate of pay
- the service-provider and fair and reasonable exclusion
- the interaction between RLHA Orders and enterprise bargaining
- the administrative and compliance burden on employers and labour hire providers (including impacts on regional and small operators); and
- whether further legislative amendments or guidance materials are desirable.





# IR developments to watch in 2026

**Authors:** Shelley Williams (Partner), Emma Vautin (Counsel) and Lily Pang (Lawyer)



## In brief:

- The Fair Work Commission is actively reviewing a number of modern awards with respect to part-time employment provisions, work value considerations (which will affect classifications/pay rates) and work from home provisions.
- A new (broadened) delegates' rights term has been included in all modern awards, following a Full Federal Court decision that found previous terms inserted by the FWC were too restrictive.
- The Victorian Labour Hire Authority has enhanced powers to address unlawful conduct in the labour hire and construction industry.
- The Commission made its first community of interest determination in the context of the Net Zero Economy Authority's (NZE) just transition scheme, with more applications expected in 2026.

## Lessons for employers:

- It is crucial for employers to monitor changes to awards, as these changes can create new obligations and, for enterprise agreement covered employees, impact the Better Off Overall Test (BOOT). While the part-time review is in its early stages, it will likely result in significant changes to the way that part-time employees can be rostered and the payment of overtime on additional hours.
- Any employer who is likely to be affected by changes to modern awards has the right to be heard by the Commission. Employers should be giving consideration to what these changes mean for them and whether there is value in getting involved in award variation proceedings.
- For our clients in the energy sector with planned closures of coal-fired or gas-fired power stations, be prepared to engage with the NZEA on community of interest processes, including applications to the Commission for Energy Industry Jobs Plans. This involves proactively engaging with and supporting employees facing transition at the earliest opportunity.

From award review processes in the Fair Work Commission, decisions on workplace delegates rights, to enhanced labour hire regulator powers in Victoria and the NZEA's just transition scheme, there are some big industrial relations developments on the horizon for 2026.

Here, we have rounded up the key developments for employers to watch in 2026.



## Award review processes

Under the *Fair Work Act 2009* (Cth), the Commission can commence reviews into modern awards under its own initiative. There are currently reviews ongoing with respect to:

- part-time provisions within modern awards
- gender-based undervaluation in modern award classifications and minimum wage rates; and
- work from home provisions within the Clerks – Private Sector Award 2020 (**Clerks Award**).

### *Review of part-time provisions within modern awards*

On 24 July 2025, the Commission [commenced a review](#) into part-time provisions within 11 modern awards (AM2025/17) of its own initiative under section 157(3)(a) of the FW Act.

The *Final Report of the Modern Awards Review 2023-24* resulted in the Commission identifying award provisions that required the Commission's priority attention. The Commission's [final list of issues](#) for consideration include:

- whether a standardised part-time employment term should be established (including with respect to minimum/maximum hours)
- the definition of part-time employment (including in relation to and as distinct from casual employment)
- processes for agreeing on part-time hours between employers and employees; and
- considerations regarding the application of overtime penalties, time off in lieu, rostering and meal breaks for part time employees.

11 modern awards will be subject to the review, including the Clerks Award, the Fast Food Industry Award, the General Retail Industry Award, and the Hospitality Industry Award.

The Commission is currently conducting a research program to support and inform this review, involving the collection of data from employers and employees covered by the relevant awards.

We do not anticipate a decision on part-time provisions will be issued this year, however, it will be important to

monitor for developments as any change to the part-time provisions in modern awards will significantly impact employers.

For example, if a standardised part-time term is established, the minimum engagement period for a part-time employee may change. Currently, the minimum engagement period is variable between industries, with the Children's Services Award requiring a 2 hour minimum engagement period, and the Clerks Private Sector Award requiring a 3 hour minimum engagement period for part-time employees.

At this stage, it is not clear whether the Commission will review part-time provisions in other modern awards once the current review is complete.

### *Gender-based undervaluation review*

On 7 June 2024, the Commission initiated a review into pay equity in the care and community sector.

The [decision to conduct the gender-based undervaluation review](#) arose out of amendments made to the FW Act by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth). This Act required the Commission to take into account the need to achieve gender equality, including by ensuring equal remuneration for work of equal or comparable value and eliminating gender-based undervaluation of work, in setting modern award minimum rates of pay.

The purpose of this review is to consider whether the classifications in five priority modern awards have been the subject of gender-based undervaluation being:

- Aboriginal and Torres Strait Islander Health Workers and Practitioners and Aboriginal Community Controlled Health Services Award 2020 – AM2024/22
- Children's Services Award 2010 – AM2024/23
- Health Professionals and Support Services Award 2020 – AM2024/20 (**HPSS Award**)
- Pharmacy Industry Award 2020 – AM2024/19; and
- Social, Community, Home Care and Disability Services Industry Award 2010 (**SCHADS Award**) – AM2024/21, AM2024/25, AM2024/27.

Achieving gender equality includes ensuring equal remuneration for work of equal or comparable value and eliminating gender-based undervaluation of work in the setting of minimum rates of pay in modern awards.

Work value reasons are reasons justifying the amount that employees should be paid for doing particular work, including reasons related to the nature of the work, the level of skill or responsibility involved, and the conditions under which the work is done.

The Commission has issued final decisions in four out of the five priority awards for review – the SCHADS Award is the only award yet to be finalised.

We do not expect a decision for the SCHADS Award to be issued until the second half of this year, at the earliest.

### *Work from home*

On 29 August 2024, the [Commission decided to commence a new matter](#) to develop a working from home term in the Clerks Award. The Commission's considerations here include:

- How should 'working from home' be defined?
- Would an appropriate 'working from home' term include a right for employees to request working from home arrangements? If so, in what circumstances should a right to request be available and in what circumstances would a request be able to be refused by the employer? Alternatively, should such a clause be facilitative in nature only?

The Clerks Award currently includes a flexible working clause that is reflective of the request for flexible working arrangements as provided for within the National Employment Standards. The purpose of this review is to develop a working from home term within the Clerks Award which facilitates employers and employees making feasible arrangements for working at home.

The Commission's review remains underway, and the submissions to date acknowledge that there is some overlap between a proposed working from home clause, and the current flexible working clause. The submissions also indicate that there may be changes in respect of:

- the ordinary hours of work (currently between 7am to 7pm Monday to Friday; 7am to 12.30 pm on Saturday) in circumstances where an employee working from home has a high degree of autonomy over when they work
- hours of work attracting penalty rates while working from home
- allowances for employees working remotely (as standard allowances such as first aid allowances, uniform allowances and meal allowances may no longer be applicable in a work from home context); and
- the timing and duration of breaks to be taken while working from home

The next step in the review will involve the Commission hearing oral submissions and cross examination of witnesses, which will likely take us to mid-year. Once this process is complete, we will get a better sense of timing from the Commission with respect to the procedural next steps in the review.

### *Delegates' rights decision*

On 23 January 2026, the Commission included a broader delegates' rights terms in all modern awards. This broader term provides that:

- workplace delegates can represent all employees in an enterprise (and not just the employees of the employer); and
- workplace delegates can communicate with workers about their industrial interests generally (and not just for the purpose of representing their industrial interests).

The broader term also removed restrictions on the exercise of the delegates' rights that were inconsistent with the FW Act.

This broader term arose out of a Full Federal Court decision (Wheelahan, Jackson and Dowling JJ) from December 2025 which found that the delegates' rights term previously included by the Commission was too restrictive. The Commission was previously [required to include a delegates' rights term](#) as part of amendments made to the FW Act made by the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) in June 2024.

### *Labour Hire Licensing in Victoria*

Since the [Labour Hire Legislation Amendment \(Licensing\) Bill](#) was passed in December 2025, the Victorian Labour Hire Authority (LHA) now has further powers to address unlawful conduct in the labour hire and construction industry.

The amended *Labour Hire Licensing Act 2018 (Vic)*:

- adds circumstances in which a person may not be a "fit and proper person" to operate a labour hire business, including where a close associate (such as a person is under the control of, or substantially influenced by, another person) is not fit and proper
- clarifies the definition of "labour hire services", to better cover arrangements in the supply of labour and activities set out in labour hire regulations (as opposed to genuine subcontracting arrangements)
- strengthens LHA's powers for an inspector to request information, as part of its broader monitoring, investigation and enforcement functions; and
- broadens LHA's ability to publish information (such as business names, license numbers and alleged contraventions) in connection with its regulatory functions to promote compliance and educate host employers and labour hire providers.

The LHA will have stronger information sharing, monitoring, investigation and enforcement powers (implemented progressively) to promote compliance within the construction industry.

### *Just transition scheme/orders*

The *Net Zero Economy Authority Act 2024 (Cth) (NZE Act)* establishes the Net Zero Economy Authority. One of the functions of the NZEA is to assist workers from closing coal and gas-fired power stations prepare for and access new employment, with the support of their employers.

The NZEA must commence a community of interest (COI) process if notice in relation to the closure (in whole or in part) of a coal-fired power station or a gas-fired power station is provided. This process identifies the impacted employers, impacted employees and the transitioning employees, and employers that may be able to offer employment to the transition employees.

The purpose of this process is to determine whether an Energy Industry Jobs Plan (EJIP) is required to support impacted employees. After this process, the CEO may apply to the Fair Work Commission for a COI determination for relevant parties to be heard on the transition. If a determination is made, the obligations for impacted employers towards employees who have expressed interest in finding other employment can involve:

- making a financial contribution towards the cost of career planning/financial advice
- making a financial contribution towards the cost of training to find other employment
- providing employees with time off work, or access to flexible work, to participate in attending recruitment-related activities; and
- engaging with employee organisations and receiving employers.

Employers are otherwise also required to cooperate with the NZEA in relation to its processes and next steps.

In November 2025, the Fair Work Commission made a COI determination establishing an EJIP for the closure of AGL's Torrens Island B Power Station. The next step is for AGL and the relevant unions to agree on terms and specific actions AGL will take under the EJIP. If agreement cannot be reached after three months of negotiations, either AGL or a relevant union can apply to the Commission for a determination in relation to those transition obligations.

The COI process for the closure of Yallourn Power Station in July 2028 commenced in December 2025 and closed on 6 February 2026. Depending on the outcome of that process, we may see a further application to the Commission for a COI determination. These processes will become more common as Australia aims to transition to net zero by 2050.

# You've been notified: Safe Work Australia expands model incident notification duties

**Authors:** Scarlet Reid (Partner), Eshani Mendis (Senior Associate) and Amy Ridley (Summer Clerk)



## In brief:

- On 5 December 2025, Safe Work Australia published significant amendments to the notification requirements under the *Model Work Health and Safety Act 2011* (Cth) (**Model WHS Act**), introduced by the [Model Work Health and Safety Legislation Amendment \(Incident Notification\) 2025](#).
- These amendments:
  - » expand the notification obligations of persons conducting a business or undertaking (**PCBU**) by introducing new notification duties for extended worker absences, violent incidents (including sexual assault) and work-related suicides or attempted suicides; and
  - » clarify and extend the definitions of 'serious injury or illness' and 'dangerous incident'.
- While the Model WHS Law has been updated, these reforms will not take legal effect in a state or territory until they have been adopted into local WHS laws.
- Safe Work Australia has published a detailed [Notifiable incidents, extended absences and suicides handbook](#) to assist PCBUs in understanding the new provisions.

## Lessons for employers:

- Each jurisdiction has the discretion to decide when, and to what extent, they will adopt these changes. As such, it is important for PCBUs to keep an eye out for local reforms.
- Once adopted at a state and/or territory level, PCBUs will need to act promptly to update incident reporting systems and educate relevant staff of the expansive reporting obligations.
- PCBUs can expect increased regulatory oversight by regulators of compliance with the duty to notify a "notifiable incident".



## Duty to notify of a 'relevant occurrence'

The Model WHS Act has changed the terminology associated with notification duties. A PCBU must now notify the regulator where there has been a 'relevant occurrence', which is defined more broadly than the former 'notifiable incident'.

A 'relevant occurrence' includes:

- a notifiable incident (***broadened category***)
- a notifiable extended absence (of 15 or more consecutive calendar days) (***new category***); and
- a notifiable act of suicide (which includes suspected and attempted suicides) (***new category***).

## Broadened definition of 'notifiable incident'

The definition of 'notifiable incident' has been broadened by expanding existing incident definitions and introducing a new incident category.

A notifiable incident now means any of the following arising from the conduct of a business or undertaking:

- the death of a person
- serious injury or illness of a person (***expanded definition***)
- a dangerous incident (***expanded definition***); and
- a violent incident (***new***).

## Expanded definition of 'serious injury or illness'

Importantly, an objective test has been introduced into the meaning of 'serious injury or illness'. The term now includes "an injury or illness that would **ordinarily require** the person to have immediate treatment as an in-patient of a hospital, **whether or not treatment is available or sought**".

The reform also extends the list of specified injuries and illnesses that **would ordinarily require** the person to have immediate treatment, **whether or not treatment is available or sought**, to include:

- a spinal injury (including a fracture of one or more vertebrae)
- a fracture of the pelvis, skull or other facial bones
- another kind of serious bone fracture; and
- a serious crush injury.

The definition has also introduced two new categories of serious injury or illness being:

- a serious brain injury or illness resulting from a significant blow, knock or other shock to the person's head, whether or not immediate treatment is sought or there are repeated blows, knocks or other shocks to the person's head; and
- an injury or illness for which the person seeks treatment from a relevant registered health professional within 48 hours after exposure to a substance.

These amendments acknowledge that an incident can still be a serious injury or illness (and therefore notifiable) whether or not a person actually sought or received treatment.

## Expanded definition of 'dangerous incident'

A number of events have been added to the list of incidents that are considered dangerous where they occur in relation to a workplace and immediately or imminently expose a person to a serious risk to their health or safety.

The new events include:

- electrical explosions and arc flash explosions (which include an uncontrolled fire, implosion, or explosion)
- mobile plant incidents (where the mobile plant overturns or partially overturns, collides with a person or thing, pins a person to the ground, ejects a person, malfunctions or moves while not under control); and
- a serious fall of a person (where a person falls from one level onto a lower level; into a hole, trench, pit or void; into a body of water; or onto a dangerous surface or object).

## New 'violent incident' category

The new notifiable category of 'violent incidents' is defined to include the following events arising from the conduct of the business or undertaking that exposes a person to a serious risk of psychological harm:

- a sexual assault or suspected sexual assault
- a physical assault, including with bodily fluids
- deliberate deprivation of a person's liberty without lawful authority; and
- a threat to do any of the above where there is a reasonable belief that, at the time the threat is made, the person making the threat intends to and has the means to carry it out.

## Notifiable 'extended absence'

The amendments introduce a new notification duty for 'notifiable extended absences'. This is defined to mean an absence that is reasonably attributable to a physical or psychological injury or illness arising from the conduct of a business or undertaking where:

- the worker has been absent from work for 15 or more consecutive calendar days; or
- the worker anticipates, on the basis of a medical practitioner's opinion, being absent from work for 15 consecutive days or more and notifies the PCBU of the anticipated absence.

A PCBU must notify the regulator within 14 days of becoming aware of the extended absence (or anticipated extended absence).

The term 'reasonably attributable' is not defined in the amendments however the Explanatory Memorandum states that it requires a causal link between the absence and the physical or psychological injury or illness. In establishing whether an injury or illness satisfies this causal test, PCBUs are not required to conduct an investigation or make inquiries of family, friends or the person who was absent from work for the purposes of determining whether the absence is notifiable. Rather, they must simply consider all relevant available information.

## Notifiable 'suicides'

This amendment introduces a new notification duty to immediately notify the regulator of a 'notifiable suicide'. This amendment comes after recent uncertainty as to whether PCBUs need to notify WHS regulators about particular suicide-related events.

The term 'notifiable suicide' in relation to a worker is defined to mean a death by suicide or suspected suicide or an attempted, or suspected attempted suicide, that meets one of the following criteria:

- it occurred at a time when the worker is not on leave and would ordinarily be working; or
- it occurred at, or in the immediate vicinity of, the worker's workplace or another workplace managed or controlled by the same PCBU for which the worker works; or
- it occurred in relevant accommodation (accommodation owned by, or under the management or control of the PCBU for which the worker works or accommodation otherwise supplied or paid for, whether directly or indirectly, by the PCBU for which the worker works); or

- it made use of one or more things available to the worker because of the worker's work or at the worker's workplace; or
- it occurred when the worker is wearing the worker's usual work uniform at a time or in a place the worker would not ordinarily be expected to wear the uniform; or
- the worker had or has a psychological injury or illness arising from the conduct of the business or undertaking; or
- the worker is or has been, exposed to frequent, prolonged or severe psychosocial hazards because of the worker's work or at the worker's workplace; or
- it occurred in circumstances where the PCBU had notice, or was otherwise aware, of a link with the worker's work or workplace.

PCBUs are also required to immediately notify the regulator about a suicide or attempted suicide of a person other than a worker where the suicide or attempted suicide occurred at a workplace and the risk was reasonably foreseeable due to the nature of the workplace and presence of one or more physical hazards that could be used in a suicide.

According to the Explanatory Memorandum, in determining whether there is a link between a suicide and the worker's work or workplace, it is intended that a PCBU should consider all relevant available information.

## Other amendments

The Model WHS Act also creates an obligation for a PCBU and a person with management or control of a workplace to notify each other when they become aware of a relevant occurrence, so far as is reasonably practicable.

Finally, further amendments have been made to expand the duty to preserve an incident site to also include the preservation of any relevant evidence including electronic and digital records and witness details.



# A new era for employee rights: Singapore's statutory tort of discrimination

**Authors:** Clarence Ding (Partner), Karen Mitra (Counsel) and Ariane Kea (Lawyer)



## In brief:

- Singapore's Parliament has passed its first workplace anti-discrimination legislation, fundamentally reshaping how workplace discrimination will be regulated. Marking a landmark shift from Singapore's previous guidelines-based regime anchored in the [Tripartite Guidelines on Fair Employment Practices \(TGFEF\)](#), the enactment of the [Workplace Fairness Act 2025 \(WFA\)](#) and the [Workplace Fairness \(Dispute Resolution\) Act 2025 \(WF\(DR\)A\)](#) has significantly broadened access to legal recourse for employees who face discriminatory employment decisions.
- The WFA prohibits employment decisions that adversely affect an individual on the ground of a protected characteristic across the employment lifecycle, including during recruitment, in-employment and termination. The WF(DR)A establishes a structured dispute resolution framework, where claims can be brought in either the Employment Claims Tribunal (**ECT**) (for claim amounts up to SGD 250,000) or the General Division of the High Court (for claim amounts exceeding SGD 250,000), after completion of mandatory mediation.
- The legislation is expected to come into force in 2027 and signals a stronger regulatory stance against workplace discrimination, with increased scrutiny of employer hiring and employment practices. The framework nevertheless incorporates procedural safeguards to mitigate against floodgates of vexatious claims, with the courts being empowered to strike out frivolous and vexatious claims and make adverse cost orders against such claimants. This reflects Singapore's characteristically calibrated approach to balancing employee access to justice with protections against unmeritorious litigation.
- The legislation represents a novel approach to discrimination. Unlike the position in Australia, the Singapore approach does not impose a comparator requirement and does not cover indirect discrimination. Further, it includes express exceptions to allow employers to discriminate in favour of Singapore citizens and permanent resident employees, as well as seniors – notwithstanding Singapore's traditional rejection of special measures and insistence on meritocracy.
- As discrimination complaints have historically been channelled informally to government bodies such as the Tripartite Alliance for Fair and Progressive Employment Practices, we expect to see an increase in claims being pursued through formal legal processes from 2027 and beyond, once the legislation comes into force.





## Lessons for employers:

Given the upcoming legislation, it is crucial for employers of Singapore based employees to:

- **Review internal policies for compliance:** Employers should conduct a review of existing workplace policies, codes of conduct and recruitment practices to ensure that they do not contain discriminatory directions, instructions or policies. Particular attention should be paid to globally or regionally standardised policies, given the differences between Singapore's framework and anti-discrimination laws in other jurisdictions. This may prove a challenge for some international employers, whose global policies would not allow for "positive" nationality-based discrimination.
- **Train managers and decision-makers on non-discriminatory practices:** Employers should consider providing regular training and guidance to staff on the protected characteristics and how these apply in day-to-day decision-making. This training should be tailored to specific roles, such as recruitment personnel and those involved in performance management, and should take into account workplace and cultural norms relevant to Singapore. There remains an ongoing tension between global anti-discrimination policies and Singapore specific requirements to e.g. collect information on race and religion to ensure appropriate employee deductions.
- **Maintain comprehensive record-keeping:** Employers should keep clear and contemporaneous documentation of employment decisions, which will be essential in defending discrimination claims. Employers should also train staff on how to keep comprehensive and detailed records in preparation for any discrimination claim, including the legitimate business reasons underlying decisions.

## From guidelines to statute: Codifying anti-discrimination protections

Singapore's approach to workplace discrimination has historically relied primarily on soft law instruments, such as the TGFEF. Employers found to have engaged in discriminatory practices could be subject to regulatory or enforcement action, including curtailment of their work pass privileges. However, despite regulatory expectations of fair employment practices being clearly articulated, there remained a gap in Singapore's anti-discrimination framework – that employees adversely affected by discriminatory decisions had no legal avenue to challenge those decisions or receive personal redress in relation to that conduct.

Singapore's inaugural anti-discrimination legislation was enacted to provide a framework for individuals who experience workplace discrimination to seek redress and comprises two parts:

- a. the WFA establishes the substantive framework by setting out the protected characteristics and prohibited employment decisions; and
- b. the WF(DR)A complements the WFA by establishing the procedural pathway for discrimination claims – including mandatory mediation and adjudication before the ECT or the General Division of the High Court.

Employers with fewer than 25 employees will initially be exempt from the WFA, although this threshold is expected to be reviewed (and potentially lowered) after 5 years. The 25 employee threshold applies to each individual corporate entity, rather than aggregated across group entities. For entities operating through a branch structure, it is currently unclear how overseas employees will be treated when calculating headcount.

## What constitutes discrimination?

Unlike anti-discrimination laws in most common law jurisdictions, the WFA does not apply broadly in relation to public life. It is extremely narrow in scope, being limited to the making of an employment decision that adversely affects an individual on the ground of a protected characteristic. The legislation applies to decisions across the employment lifecycle:

- a. recruitment (e.g. decision to hire or not hire an individual);
- b. in-employment (e.g. performance evaluations, promotion decisions or access to training); and
- c. termination (e.g. dismissal or retrenchment).

While employers are generally accustomed to maintaining documentation for decisions affecting existing employees, the inclusion of recruitment decisions expands potential exposure, as individuals who are not employees may also bring claims. This underscores the importance of keeping comprehensive and contemporaneous records of employment decisions, particularly at the recruitment stage as well as during performance management, to help mitigate the risk of disputes. Australian employers are already exposed to the risk of discrimination claims in recruitment processes.

Additionally, as the WFA prohibits the issuance, communication or publication of any discriminatory direction, instruction or policy in writing, it is prudent for employers to have their internal policies reviewed periodically, particularly for companies with policies that have global or regional applicability, given that the protections differ widely in different jurisdictions.

Notable departures from anti-discrimination frameworks in other common law jurisdictions, such as Australia, include:

- **No "comparator test":** The WFA expressly states that it is not necessary to prove that the individual was treated or affected differently compared to any other individual to establish discrimination. This marks a significant departure from comparator-based regimes in jurisdictions such as Australia and Hong Kong, where claimants typically must demonstrate less favourable treatment relative to an actual or hypothetical comparator.
- **No indirect discrimination:** The legislation is confined to prohibiting direct discrimination, which may limit its effectiveness in tackling more subtle or systemic forms of discrimination (e.g. where apparently neutral policies or practices have the effect of putting persons with a particular protected characteristic at a disadvantage).
- **No reasonable accommodation:** [The Tripartite Committee on Workplace Fairness \(Tripartite Committee\)](#) has stated (and the Singapore Government has accepted) that the decision not to

include a duty to provide reasonable accommodation is based on concerns that it may lead to increased litigation, including over what is "reasonable". However, the absence of such a duty may diminish the scope of anti-discrimination protection in practice, as individuals may face unintended exclusion arising from a workplace's design or standard operating practices (e.g. reliance on solely oral communications where there is a deaf employee). As such practices may not amount to discrimination under the legislation, affected individuals may have no clear legal avenue for recourse. To address this, the Ministry of Manpower has announced that it intends to issue a *Tripartite Advisory for Reasonable Accommodations* around the time the WFA comes into force. The advisory is intended to raise awareness of reasonable accommodation principles and provide practical guidance to employers.

- **No special measures provisions:** Despite including express exceptions to allow discrimination in favour of Singapore citizens and permanent residents, as well as older employees and those with disabilities, there is no general provision to allow employers to take action to support groups in need of additional support. This has traditionally been an area of particular concern for international employers seeking, for example, to address gender pay or representation gaps.

### Protected characteristics and exceptions

Singapore has adopted 11 protected characteristics, namely, age, nationality, sex, marital status, pregnancy, caregiving responsibilities, race, religion, language ability, disability, and mental health condition.

Notably and in contrast to Australia, the WFA expressly excludes sexual orientation and gender identity from the definition of the protected characteristic of "sex". This was a deliberate decision by the Tripartite Committee, which recommended keeping the legislation "tightly scoped to protect against the more common and familiar forms of discrimination" in Singapore, and that the TGFEF will continue to be retained to protect against any form of discrimination not currently protected under the WFA.

The definition of "pregnancy" is also framed broadly. It includes not only a woman's current pregnancy, but also the fact that she has expressed a desire or intent to bear children. While this is a progressive and inclusive step, it remains to be seen how such protection will operate in practice, particularly in evidentiary terms.

Notably, disability and mental health conditions are separate characteristics. This is likely because the definition of "disability" has been drafted very narrowly, being that the person has any one or more of the following:

- autism
- any intellectual disability
- any physical disability; and
- any sensory disability.

This very narrow definition (in contrast to the definition applied in jurisdictions such as Australia and Hong Kong) might not otherwise capture an employee with a mental health condition.

The WFA also recognises permissible differential treatment in limited circumstances:

- **Genuine job requirement:** It is not discrimination to make an employment decision on the ground of a protected characteristic if that characteristic is a genuine requirement of the job (e.g. requirement of passing a hearing test for an audio production manager role).
- **Age and disability:** Designed to promote employment opportunities for vulnerable groups, the legislation permits employers to prefer the hiring of seniors or persons with disabilities.
- **Citizens and permanent residents:** While nationality is a protected characteristic, the WFA expressly permits employers to make employment decisions that prefer Singapore citizens and permanent residents, on the basis that they have a long-term stake in Singapore's progress and remain the core of Singapore's workforce.

### Statutory tort of discrimination

Under the WF(DR)A, employees may bring a claim against employers for discriminatory decisions, in the ECT (for claim amounts up to SGD 250,000) and in the General Division of the High Court (for claim amounts exceeding SGD 250,000). These claims can only be brought after completion of mandatory mediation.

Parties cannot be represented by lawyers in the ECT, and leave may not be applied for legal representation even in complex cases. While this is consistent with the ECT's design as an accessible and expedient forum, it may present practical challenges for companies with only a branch presence in Singapore, which may not have in-house legal counsel or dedicated HR functions to manage such claims. At present, in-house legal practitioners remain able to represent an employer, as the restriction on appearance applies only to those holding a Singapore practising certificate.

While legal representation is permitted at the General Division of the High Court, this only applies to claims which exceed SGD 250,000. This excludes all pre-employment claims (which are subject to a limit of SGD 5,000). Employees may be incentivised to limit their claims to SGD 250,000 to proceed in the ECT, where the employer cannot be legally represented and because there is lack of clarity at this time on how such claims will be valued.

### **Deterrence of frivolous claims**

While the WFA and the WF(DR)A significantly expand the avenues which employees may use to seek redress, Singapore's traditionally calibrated approach to employment dispute resolution remains evident. Procedural safeguards are built into the framework to mitigate the risk of unmeritorious and opportunistic claims. These include mandatory mediation as a pre-requisite to bringing a claim, and the courts being empowered to strike out frivolous and vexatious claims. In appropriate cases, vexatious claimants may also be subject to adverse cost orders, police investigation for abuse of court process and restrictions on commencing further proceedings. Together, these measures underscore Singapore's long-standing preference for balancing access to justice with safeguards against a flood of unmeritorious claims or imposing undue litigation pressures on employers.

The prohibition against contracting out of the ECT's jurisdiction, or otherwise preventing an individual from bringing a claim before the ECT, will also extend to discrimination claims heard by the ECT. This has material implications for employers managing higher-risk exits, as contractual releases and waivers of the type commonly included in separation agreements will not preclude an employee from initiating discrimination proceedings before the ECT.

Overall, the introduction of the WFA and the WF(DR)A represents a significant step forward in Singapore's employment law regime. While Singapore remains a pro-business jurisdiction, particular aspects of the operation of the legislation may require employers to rethink their strategy in relation to high risk dismissals.





# Contacts



**Trent Sebbens**  
**Partner – Employment**  
T +61 2 9258 6313  
M +61 447 643 090  
trent.sebbens@ashurst.com



**Scarlet Reid**  
**Partner – Employment**  
T +61 2 9258 6088  
M +61 416 147 544  
scarlet.reid@ashurst.com



**Shelley Williams**  
**Partner – Employment**  
T +61 7 3259 7306  
M +61 439 268 928  
shelley.williams@ashurst.com



**Clarence Ding**  
**Partner – Employment**  
T +65 6416 3343  
M +65 9728 8694  
clarence.ding@ashurst.com

## Ashurst Australia

### Sydney

Lea Constantine	T +61 2 9258 6446
Talia Firth	T +61 2 9258 5640
Jennie Mansfield	T +61 2 9258 6400
Scarlet Reid	T +61 7 9258 6088
Trent Sebbens	T +61 7 9258 6313
Kathy Srdanovic	T +61 7 9258 6171
Stephen Woodbury	T +61 7 9258 6444

### Melbourne

Jane Harvey	T +61 3 9679 3054
Jon Lovell	T +61 3 9679 3559
Peter McNulty	T +61 3 9679 3636

### Brisbane

Tamara Lutvey	T +61 7 3259 7334
Shelley Williams	T +61 7 3259 7306

### Perth

Julia Sutherland	T +61 8 9366 8732
------------------	-------------------

## Ashurst Europe

### Frankfurt

Dr Andreas Mauroschat	T +49 69 97 11 28 19
-----------------------	----------------------

### London

Dan Ornstein	T +44 20 7859 1679
Crowley Woodford	T +44 20 7859 1463
Ruth Buchanan	T +44 20 7859 2820

## Ashurst Asia

### Hong Kong

James Comber	T +852 2846 8916
Patrick Phua	T +852 2846 8989
Jeannette Tam	T +65 6416 0270

### Port Moresby

Tureia Sample	T +675 309 6140
---------------	-----------------

### Shanghai

Michael Sheng	T +86 21 6263 1818
---------------	--------------------

### Singapore

Clarence Ding	T +65 6416 3343
Karen Mitra	T +65 6602 9179
Jeannette Tam	T +65 6416 0270

### Tokyo

Kensuke Inoue	T +81 3 5405 6223
---------------	-------------------

### Jakarta

Norman Ibnuaji	T +62 212 996 9280
----------------	--------------------

### Madrid

Cristina Grande	T +34 91 364 9422
-----------------	-------------------

### Paris

Muriel Pariente	T +33 1 53 53 54 75
-----------------	---------------------



# Ashurst

## **Sydney**

Level 8,  
39 Martin Place  
Sydney NSW 2000  
**T** +61 2 9258 6000  
**F** +61 2 9258 6999

## **Melbourne**

Level 16,  
80 Collins Street  
Melbourne VIC 3000  
**T** +61 3 9679 3000  
**F** +61 3 9679 3111

## **Brisbane**

Level 38, Riverside Centre  
123 Eagle Street  
Brisbane QLD 4000  
**T** +61 7 3259 7000  
**F** +61 7 3259 7111

## **Perth**

Level 10, Brookfield Place  
123 St Georges Terrace  
Perth WA 6000  
**T** +61 8 9366 8000  
**F** +61 8 9366 8111

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