



# 2025 in numbers



In the period 2024 – 2025...

The **Fair Work Commission** has seen a substantial increase in applications:

- 44,075 total lodgements, representing a 10% increase on 2023-24 levels and a 24% increase above the average lodgements for the last five years
- Unfair dismissal and general protections are among the most common types of applications – the Commission received 16,500 unfair dismissal applications (a 12% increase on 2023-24 levels) and 6,209 general protections (involving dismissal) applications (a 13% increase on 2023-24 levels)
- The statistics on bargaining show the aftershocks of the Closing Loopholes reforms:
  - 4,024 single-enterprise agreements approval applications (slightly lower than 2023-24 levels) and 34 multi-enterprise agreements approval applications (the same as 2023-24 levels)
  - 12 intractable bargaining declaration applications (one more than in 2023-24)
  - however, the number of bargaining disputes fell to 175, down from 203 in 2023-24
- There has been increased activity in the stop bullying and stop sexual harassment jurisdictions:
  - 1,037 stop bullying applications (a 17% increase on 2023-24 levels)
  - 176 stop sexual harassment applications (a 69% increase on 2023-24 levels)



The **Fair Work Ombudsman** recovered over \$358 million in unpaid wages in 2024-25, including \$35.2 million recovered through proactive compliance initiatives, and issued 743 infringement notices



The **Australian Human Rights Commission** received:

- 2,797 complaints in 2024-25 (up from 2,708 in 2023-24), of which disability discrimination continues to be the most common type of complaint
- 626 complaints under the *Sex Discrimination Act 1984* (Cth), the highest number recorded in any reporting year



The **Workplace Gender Equality Agency** reported that:

- 56% of employers reduced their gender pay gap
- despite this, the overall gender pay gap fell by only 0.6 percentage points, with a 21.8% difference in earnings between genders
- at the management level, 66% of organisations were reported to have male-dominated boards in 2024-25, while only 27% of organisations had gender-balanced boards

# 2026 – The Year Ahead

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# Multi-employer enterprise bargaining – union activity has accelerated – don't get caught flat-footed!

## Foreword from our co-editors

We're delighted to present our latest annual update from the national Workplace Relations Team at HFW Australia.

2025 was, as expected, a busy year for employers as the Federal Government's Closing Loopholes reforms were put to the test. As we look to the year ahead and beyond, there are a host of new workplace challenges for employers to navigate – AI is affecting how we work and how employees pursue claims, union-driven multi-employer bargaining is taking flight and employers continue to grapple

with psychosocial safety reforms, just to name a few.

We have compiled this collection with those challenges in mind. You will find a series of articles in response to the key employment, industrial relations, discrimination and safety law issues that should be at the forefront of employers' minds in 2026, with practical insights on how to respond to them.

As always, please contact any member of the HFW team if you would like to discuss any of the issues discussed in the publication

or require any support with workplace relations matters.

All the best.

**Mark & Blade**



**MARK SANT**  
Partner, Australia



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After coming to power the Federal Labor Government changed workplace laws in June 2023 to make it much easier for unions to initiate enterprise bargaining. The rationale was to address a decade of stagnant wage growth by encouraging enterprise bargaining which had stalled. The Federal Labor Government argued that enterprise bargaining leads to higher wage outcomes for employees.

One of these changes involved giving unions the right to initiate bargaining for enterprise agreements that cover more than one employer – this is called 'multi-employer' bargaining. Previously, the scope for multi-employer bargaining was very limited. That has changed radically. While unions were initially slow to take up multi-employer bargaining, they have now accelerated their efforts.

So far, unions have initiated multi-employer bargaining in the following sectors: (1) early childhood education and care; (2) community/ social welfare and disability services; (3) franchise fast food networks (McDonald's); (4) franchise retail networks (Chemist Warehouse); (5) educational institutions (private schools); (6) local councils; (7) group training organisations (apprentices); (8) coal mining; and (9) air conditioning contractors.

Where a multi-employer bargaining authorisation is made by the Fair Work Commission (FWC), employers are required to bargain in good faith for a multi-employer enterprise agreement, and employers are precluded from making (or initiating bargaining to make) a single-employer enterprise agreement.

For unions, the threat of multi-employer bargaining (and the

associated downstream risks for employers – protracted bargaining with several other sector participants at the bargaining table, claims for improved wages and other terms and conditions of employment, the prospect of sector wide industrial action and an intractable bargaining determination being made by the FWC), can be leveraged to encourage an employer to bargain for a single-employer enterprise agreement.

Given the current political and industrial relations landscape, with the Federal Labor Government having more than 2 years still to serve in the current parliamentary term and likely to be re-elected for a further 3 year term given its significant majority, stubborn inflation and cost of living pressures with larger than historical wage outcomes in enterprise bargaining negotiations, employers should be alert to (not alarmed by) the risk multi-employer bargaining presents for their businesses over at least the next 5 years.

### Multi-employer enterprise agreements

There are 2 authorisations which can be obtained from the FWC compelling employers to bargain for multi-employer enterprise agreements: (1) a supported bargaining authorisation; and (2) a single interest authorisation.

### Supported bargaining authorisation

To make this authorisation, the FWC must consider that it is appropriate for employers to bargain together for an enterprise agreement having regard to (amongst other things):

- pay and conditions – what the usual pay and conditions in the industry are, including whether low rates of pay are usual;

- common interests – whether the employers have clearly identifiable common interests, such as: (1) a geographical location; (2) the type of enterprises and the current terms and conditions of employment in those enterprises; and (3) being substantially funded by government; and
- representation – whether the likely number of bargaining representatives will be manageable for a collective bargaining process.

Importantly, the FWC does not need to be satisfied that there is majority employee support for bargaining at each employer to make a supported bargaining authorisation.

The FWC cannot make a supported bargaining authorisation where employers are covered by a single-employer enterprise agreement that is within its nominal term – unless the FWC is satisfied that the main intention of an employer in making that agreement was to avoid being included in the authorisation.

Once an employer is named in a supported bargaining authorisation, it can only make a supported bargaining agreement and cannot bargain for any other kind of enterprise agreement.

### Single interest authorisation

To make this authorisation, the FWC must be satisfied that (amongst other things):

- employers have clearly identifiable common interests, and it is not contrary to the public interest to make the authorisation – matters relevant to whether there are common interests include: (1) geographic



location; (2) regulatory regime; and (3) the nature of the enterprises and the terms and conditions of employment in those enterprises;

- employers' operations and business activities are reasonably comparable;
- a majority of employees of each employer want to bargain for the enterprise agreement;
- an employer is not covered by an enterprise agreement which is within its nominal term; and
- an employer and the union have not already agreed in writing to bargain for a single-employer agreement.

The FWC has a discretion to exclude an employer from a single interest authorisation if:

- the employer is bargaining in good faith for an enterprise agreement that will cover the same (or substantially the same) employees;

- there is a history of effective bargaining in relation to one or more enterprise agreements that have covered the same (or substantially the same) employees; and
- less than 9 months have passed since the most recent nominal expiry date of such an enterprise agreement.

#### McDonald's test case

The SDA obtained a supported bargaining authorisation naming all of McDonald's franchisees in South Australia, after McDonald's ignored the union's invitation to bargain.

Key to obtaining the authorisation was that employees were predominantly reliant on award pay rates, there were clearly identifiable common interests between franchisees – they all operated under a standardised licence agreement, adopting a standardised business model, the work performed by

employees was fundamentally the same – standardised positions, position descriptions and remuneration arrangements, and unless the authorisation was made it was unlikely that bargaining would progress.

After securing the authorisation, the SDA applied to extend the authorisation nationally across the entire McDonald's franchise network. This application is currently before the FWC and so too is an appeal against the making of the authorisation before the Federal Court.

Until this application for a supported bargaining authorisation, unions had only invoked the supported bargaining stream for multi-employer bargaining in cases where the relevant employers were reliant on government funding.

The experience of McDonald's demonstrates that all employers operating in non-government funded sectors are vulnerable

to being caught up in a supported bargaining authorisation where they have common interests because they conduct similar businesses and operations and their employees are paid award wages and afforded award terms and conditions of employment and enterprise bargaining has not been successfully pursued by the relevant union.

#### Chemist Warehouse test case

The SDA obtained a single interest authorisation naming six employers operating Chemist Warehouse stores as franchisees in South Australia, covering 13 stores. It was not disputed that the employers carried on reasonably comparable business activities.

As the SDA used the single interest authorisation stream, they were required to show that a majority of employees of each employer wanted to bargain for the enterprise agreement. This was a contested matter before the FWC, with the employers

challenging the legitimacy of the SDA's staff petition which was used as evidence of majority support from the employees. The FWC found that the SDA's petition and explainer were sufficiently clear, and there were no apparent material misrepresentations. The employers have lodged an appeal of this decision, which is pending.

#### What employers should look out for in 2026?

Whilst the focus of unions is currently on national franchise networks, we consider that an employer not actively bargaining for an enterprise agreement which:

- does not have an enterprise agreement in place within nominal term;
- affords its employees terms and conditions of employment broadly in line with a modern award;
- operates in a sector where the union is active; and

- conducts a business that is similar to those of other employers in the sector (also affording employees terms and conditions of employment broadly in line with the award),

are vulnerable to being caught up in a multi-employer bargaining campaign.

These employers should monitor developments in the McDonald's and Chemist Warehouse test cases and explore the options available to them now to take pre-emptive steps to minimise the risk of being caught up in multi-employer bargaining.

Even if such pre-emptive steps are not taken after they are carefully assessed, these employers should develop contingency plans in case they are approached by a union in relation to multi-employer bargaining.

Employers caught flat footed may end up with fewer (and more costly) options!

# Regulating AI in the workplace

In recent years, businesses have increasingly adopted artificial intelligence (AI) as a tool to increase productivity and efficiency, reduce manual processes, innovate and in some sectors, radically transform the way work is performed. Employers are also starting to explore opportunities to utilise AI as a workforce management tool. This rapid development of AI has seemingly outpaced government regulation so far, but in 2026 it is clear the legislation is starting to catch up. This article examines how AI is currently being used by employers to help manage the workforce, how the Australian Government has indicated it will approach regulating AI used in the workplace, and new regulatory developments on the horizon.

## What is AI? What are its current and future applications in the workplace?

In this article, AI refers to technologies which use algorithms to find patterns in large data sets, recognise images and audio, summarise, translate, predict and generate materials and text. These technologies are used to make decisions and solve problems that would usually require human intelligence and input.

Much attention has been given to date to how AI is driving transformation and creating value in the operational sense – consider the banking and finance industry where AI is used to great effect in fraud detection, cybersecurity monitoring and risk management. On the other hand, businesses are also looking inwards – and making investments in AI systems for their workforces that can help them boost efficiencies and save time and money. Employers have reported using AI in this context to help with tasks like:

- generating content, such as communications, presentations, job descriptions or policies;

- analysis and reporting; and
- answering employee questions through employee self-service functions such as chatbots.

Currently, it appears AI is embraced where it can boost efficiency and free up time historically spent on administrative tasks. However, this is only the tip of the iceberg where it comes to AI potential. A small percentage of employers have reported using AI in recruitment to assist with screening and shortlisting, to analyse and monitor performance, make workforce decisions, and automate tasks such as roster allocations and scheduling.

In the digital age, monitoring and surveillance tools have become increasingly prevalent – capable of listening to and watching employees, monitoring screens and logging keystroke activity data. When paired with the analytic capabilities of AI, future applications could include, perhaps controversially, enabling employers to draw conclusions about employees' performance and even predict their future behaviours, work satisfaction, leadership potential and likelihood of disobedience.

## The debate to regulate

In 2023, the Federal Labor Government at its National Conference opened with a platform seeking to ensure the development of an AI policy that benefited Australians, whilst introducing guardrails and governance measures to safeguard Australian communities and protect against the known and emerging risks associated with AI.

Since then, the Federal Government has launched numerous inquiries into digital transformation and risks of AI.

In September 2024, the Department of Industry, Science and Resources concluded that Australia's regulatory system was not fit for purpose to support the safe and responsible use

of AI in high-risk settings, and proposed the introduction of 10 mandatory guardrails for high-risk AI (including in employment and workplace settings).

A further report issued in January 2025 by the House Standing Committee on Employment, Education and Training set out a further 21 recommendations – including to adopt the mandatory guardrails, classify AI systems used for employment related purposes as high-risk, ban the use of AI to make decisions affecting workers without human oversight, and undertake a review of employment, privacy, work health and safety legislation and modern awards to protect employees from the use of emerging technologies in the workplace.

Despite this, in its national AI plan released in December 2025, the Federal Government seems to have ultimately retreated from implementing mandatory guardrails, instead opting to rely on updating existing, technology-neutral laws and regulatory frameworks to address the risks of AI and treating introducing AI-specific regulation only as a last resort.

## New developments at law

The legal landscape continues to evolve, with the Federal Government passing the *Privacy and Other Legislation Amendment Bill 2024* (Cth) on 29 November 2024, introducing a sweeping range of privacy law reforms (which included the introduction of the new statutory tort of serious invasion of privacy). On the topic of AI, the legislation also introduced new obligations requiring organisations using computer programs to make decisions which could affect individuals, to update their privacy policies to make transparent how personal information would be used by those automated decision-making programs. The privacy reforms with respect to automated decision-making will come into effect from 10 December 2026.



At a State level, on 18 November 2025, the Victorian Government gave in-principle support to 15 of 18 recommendations made following an inquiry into workplace surveillance, including to require employers to ensure human oversight over any automated decision-making using workplace surveillance data that could significantly affect the interests of workers. Victoria currently does not have in place any workplace-specific surveillance legislation and so any forthcoming reform in this area should be monitored closely.

Not to be outdone, on 12 February 2026, the NSW Government passed the *Work Health and Safety Amendment (Digital Work Systems) Bill 2025* (NSW), under which persons conducting a business or undertaking will be required to ensure that the use of 'digital work systems' (defined as an algorithm, AI, automation or online platform)

does not risk workers' health and safety – including by creating risks of unreasonable workloads, performance metrics, monitoring or surveillance of workers, or unlawful discriminatory practices or decision-making in the business. The changes are not yet in effect and will commence by proclamation from a date yet to be announced by the NSW Government.

## What does this mean for employers?

Employers should continue to expect debate around AI regulation in coming years as society weighs the benefits of AI use against its consequences and the associated impacts on people. In the meantime, employers should:

- if operating in NSW, consider whether any of their systems could be caught by the broad definition of a 'digital work system', including technology

such as mobile phone apps, automated rostering systems or monitoring and tracking tools, and be prepared to identify and control work health and safety risks arising from those systems;

- map their use of AI in the workplace and catalogue any tool that uses automated decision-making to influence employee outcomes;
- for those who use automated decision-making or AI tools in recruitment, promotion, training or termination practices, review and update their privacy policies before 10 December 2026;
- stay alert for legislative reform in relation to workplace surveillance, particularly for employers with Victorian operations; and
- stay alert for other legislative developments targeting AI use in the workplace.



## Is ChatGPT the new paid agent? The deluge of claims flooding the Fair Work Commission

The number of dismissal-related claims in the Fair Work Commission are on the rise and there are few signs of this changing in the short term. In 2024-25, the total lodgements in the Commission reached a record 44,075 (see page 2 of this publication) and it is estimated that those numbers will climb to over 50,000 in 2026.

At first blush, one explanation for this trend could be the Commission's expanded jurisdiction following the industrial relations reforms introduced by the Federal Labor Government since coming to power in 2022. However, the President of the Commission has recently observed that the increase in total lodgements is due to the increase to the traditional matter types (unfair dismissal and general protections claims), which is further attributed to the rise in generative AI.

General protections dismissal related applications are up 62%, non-dismissal related contravention disputes (e.g. non-dismissal general protection applications) are up 135% and unfair dismissal applications are up 41% compared to the three-year average. We are increasingly seeing applications which are drafted, wholly or partly, with the assistance of generative AI. This is placing strain on both the Commission which has to deal with those claims, and employers who need to respond to them. This is compounded by some architectural features of the *Fair Work Act 2009* (Cth) (**FW Act**) which require the Commission to determine certain jurisdictional matters before even proceeding to a conciliation in general protections matters.

There are ripple effects at the Federal Court and Federal Circuit and Family Court level. There is currently a combined total of over 1,000 cases in those jurisdictions, with a 128% increase in cases in the Federal Court and 60% increase in cases in the Federal Circuit and Family Court, compared to the three-year average.

### The problem

A dismissed employee has a number of potential claims available to them in the Commission. Such an employee may lodge an unfair dismissal claim on the basis that the dismissal was harsh, unjust or unreasonable. For an employee, the drawback of this claim is that there are eligibility requirements based on their length of service, the high-income threshold and modern award coverage.

**'Most recently, an employee who tries to access an application form using the Fair Work Commission's website will need to navigate an online questionnaire as to their eligibility to make a claim.'**

There is also a compensation cap at 26 weeks' pay. The claim must usually be brought within a strict 21 day deadline running from the date of dismissal.

An employee may instead lodge a general protections claim. To bring a general protections claim, an employee needs to allege the possession or exercise of a 'workplace right' (e.g. they made a complaint or inquiry in relation to their employment) and that their employer subjected them to 'adverse action' (e.g. by dismissing them). The onus then shifts to the employer to prove that they did not take adverse action because of a prohibited reason. For an employee, the benefit of this claim is that there is a reverse onus of proof, no minimum service eligibility period and potentially uncapped damages. A 21-day deadline applies for dismissal related general protections claims (which requires an employee to have actually been dismissed), but there is also a non-dismissal related avenue which has a statutory limitation period of six years.

The Commission has previously expressed concerns that general protections claims were being used as 'pseudo' unfair dismissal claims. The statistics show that two thirds of general protections claims were lodged by employees who were ineligible to bring an unfair dismissal claim. Certain employee representatives, known as 'paid agents', are said to have contributed to the rise in pseudo unfair dismissal claims – with the operating model that employers would rather settle at a compulsory conciliation rather than risk the matter going to court.

The cost of making an unfair dismissal or general protections claim is relatively modest. The Commission currently imposes an \$89.70 application fee (which can be waived on the grounds of financial hardship). There are also cost protections for an unsuccessful litigant.

One (potentially unintentional) feature of the FW Act is that if an employer raises a jurisdictional objection to a general protections claim – such as an objection on the basis that the claim is out of time or the employee was not dismissed – this triggers an interlocutory stage where the Commission must determine the objection before even holding a conciliation conference in the matter.

This means that making a jurisdictional objection can result in the parties needing to file evidence and submissions and attend a hearing on that issue, only to be able to proceed to a conciliation conference if the employer is unsuccessful in that objection.

Now add to these matters the advent of easily accessible generative AI. AI tools direct an employee where to go to lodge a claim, advise what type of claim to bring, and will draft the claim for the employee. It is arguably becoming the new 'paid agents' in the Commission and has resulted in a deluge of unmeritorious, and sometimes undecipherable, claims.

### Recent changes to stem the tide

The Commission has introduced changes to plug this gap and has intimated further changes. It has

amended the form for general protections applications so that employees are required to articulate the alleged contraventions the employer has engaged in. The Commission is also holding shorter conciliation conferences (usually one hour) focused almost entirely on settlement, rather than the merits (or otherwise) of the application. Most recently, an employee who tries to access an application form using the FWC's website will need to navigate an online questionnaire as to their eligibility to make a claim.

### Proposed further reforms

There appears to be appetite from the Commission, Federal Government and employer groups for further reforms. The Commission has proposed including a generative AI disclosure requirement in its application forms. The President of the Commission is also pushing for legislative reform to resolve the jurisdictional objection anomaly set out above. The Federal Government has indicated it is open to those reforms. Employer groups are pushing for more radical reforms, such as increasing application fees, imposing compensation caps and removing the reverse onus.

### What this means for employers

The changes to the Commission's processes to respond to the influx of claims have so far been incremental and often at the discretion of the member presiding over the relevant matter. Here, experience counts and so if faced with a claim and an unfamiliar process, please reach out to a member of the HFW team to help your business navigate the situation.

# Employers beware: How the *FWO v Coles and Woolworths* decision has changed the rules for set-off for award-covered employees

Annual salaries have long been used by Australian employers as a simple means to remunerate employees, including those covered by an award. However, the use of such annual salaries for award-covered employees is in the spotlight following a case in September 2025 involving the Fair Work Ombudsman (FWO) and Coles and Woolworths.

In one of the most significant decisions of 2025, the Federal Court held that employers must ensure that employees paid an annual salary receive their minimum award entitlements each pay period, and that employers cannot offset above-award payments in one pay period against underpayments in another pay period. This has significant implications for employers who rely on set-off clauses to pay annual salaries to award covered employees.

## Federal Court proceedings

The Federal Court proceedings involved four matters heard in parallel, including enforcement proceedings brought by the FWO against Coles and Woolworths and class actions brought by employees of Coles and Woolworths. Broadly, the proceedings alleged that the supermarkets had underpaid a number of store managers and supervisors who were covered by the *General Retail Industry Award (GRIA)* as the supermarkets had failed to ensure the employees received their minimum award entitlements **each pay period**.

In defending the claims, Coles and Woolworths sought to rely on contractual set-off clauses which the supermarkets said allowed them to off-set annual salary payments against minimum award entitlements across multiple pay periods, and not just within the

same pay period. The Woolworths contracts attempted to off-set annual salary payments against minimum award entitlements across a 26 week period, whilst the Coles contracts did not contain a time limitation for the set-off arrangement (i.e. presumably attempting to off-set across all pay periods).

The Federal Court rejected the approach of Coles and Woolworths, holding that an employer can only off-set annual salary payments against minimum award entitlements within the same pay period. In reaching this decision, the Federal Court relied upon the pay frequency provisions in GRIA which required award entitlements to be actually 'paid' either weekly or fortnightly, as well as section 323 of the *Fair Work Act 2009 (Cth) (FW Act)* which requires employees to be paid for the performance of work 'in full' at least monthly.

In addition to the significant finding regarding set-off clauses, the Federal Court also held that Coles and Woolworths had contravened the record-keeping obligations in the *FW Act* and *Fair Work Regulations 2009 (Cth)* to:

- keep records of any penalty rates, allowances or loadings that are payable (where an employee is entitled to be paid such entitlements); and
- keep records of the number of overtime hours worked each day (including start and end times of the overtime).

The supermarkets argued that they did not need to separately keep records of overtime hours, and penalty rates and allowances, as employees paid an all-inclusive annual salary in accordance

with a set-off clause were not separately paid these amounts. In the alternative, the supermarkets argued that they had complied with the record-keeping obligations as the penalty rates and allowances payable, and the number of overtime hours worked, could be determined from the rosters and time and attendance records.

The Federal Court disagreed, holding that:

- the payment of an annual salary in accordance with a contractual set-off clause did not relieve the supermarkets of the above record-keeping obligations; and
- as the records needed to be 'readily accessible', employers could not rely on two different data sets to satisfy the record-keeping requirement, with the record instead needing to contain sufficient information for an employee to understand why the entitlement was being paid and how the payment had been calculated.

## What to expect in 2026?

The Coles and Woolworths decision has (and will continue to have) significant implications for employers relying on set-off clauses to pay annual salaries to award-covered employees.

It is widely anticipated that there will be an appeal by Coles and Woolworths this year due to the significant financial implications of the initial judgment for the supermarkets (being an additional \$500 million in underpayments for Woolworths and \$250 million in underpayments for Coles).



However, in the meantime, pay period set-off is the 'law of the land', meaning that employers who pay annual salaries in accordance with a set-off clause for award-covered employees need to have systems and processes in place to ensure that employees are receiving their minimum award entitlements each pay period.

Employers who set and forget annual salaries for award-covered employees are at high risk of underpayment claims, and breaches of record-keeping requirements. It is not enough to assume all is well because 'we pay above-award'.

To mitigate against these risks, employers should consider:

- introducing a pay period reconciliation to ensure that the salary paid to an employee in a pay period is sufficient to satisfy minimum award entitlements;
- if a pay period reconciliation is not practical, then fixing the work pattern of award-covered employees, and calculating the minimum award entitlements for that work pattern to ensure the salary payments are sufficient each pay period to satisfy the minimum award entitlements;
- reviewing record-keeping practices for award-covered employees paid an annual salary, and making necessary changes to ensure that there is a sufficient record of overtime hours worked, and sufficient details of penalty rates, loadings and allowances that are payable;
- utilising annualised wage provisions in awards (such as the *Hospitality Industry General Award 2020* and the *Clerks – Private Sector Award 2020*) as typically these allow for a yearly reconciliation of the annualised wage paid against minimum award entitlements; and
- reviewing contractual set-off clauses to ensure the drafting is sufficient to allow for pay period set-off of minimum award entitlements.

# How the law and employers are responding to flexible work

In recent years, we've seen the biggest disruption to the traditional 9 to 5, work from the office model, with flexible work emerging as one of the headline issues for employers and employees. We've seen high-profile disputes litigated in the Fair Work Commission regarding employees' right to request flexible work arrangements under the *Fair Work Act 2009* (Cth) (**FW Act**) and public backlash from Canberra's public servants to the federal opposition's planned policy to force public servants back to the office five days a week, making it clear that employees feel passionately about being able to work flexibly. So, knowing how closely employees hold flexibility to their hearts, how is the law and how are employers responding to flexible work?

The law seems to be responding to flexible work by fuelling momentum behind the idea. In the second half of 2025, moves were made at the state and federal levels to enshrine a statutory right to work from home.

At a state level, the Victorian Government announced that it would introduce legislation to provide employees with a right to work from home for at least two days per week for employees in the public and private sector if an employee could reasonably do their job from home. This is despite serious legal questions over whether the laws would be constitutional given most employment in Australia is regulated by federal legislation.

At the federal level, the Greens introduced a bill to amend the FW Act to expand an employee's right to request flexible work arrangements and to legislate an employee's right to work from home at least two days a week as long as it is 'reasonable and practicable'. As at March 2026, the bill is currently before a Senate inquiry. The Federal Government has not expressed its support for



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a federal statutory right to work from home, however, once the Senate inquiry releases its report, we expect to know more about the likelihood this bill would pass.

In the Fair Work Commission, proceedings to develop a working from home term for the *Clerks Award – Private Sector Award 2020* are also well underway, with the Commission in the process of hearing submissions on the proposed term. While the unions and employer groups both support varying the award to make working from home easier, there has been fierce debate over the form the work from home clause should take. The unions are pushing to introduce a term giving employees a right and set process to follow to request to work from home. On the other hand, the employer groups are interested in using the facilitative agreement provisions in the award to allow for working from home arrangements, which would allow for the variation of other award provisions for employees working from home, such as when overtime and penalty rates are triggered or breaks taken.

The matter was listed for a hearing before the Fair Work Commission in early February so it seems likely we will soon know the final form of the clause the FW Commission decides on and whether any other variations to the Clerks Award are made.

Such developments indicate that the law seems to be responding to flexible work with the same favourable sentiment employees have towards it. So, what of employers then?

Based on the attention given by the national media last year to *Chandler v Westpac Banking Corporation* [2025] FWC 3115, you might think that employers are anti-flexible work. In that case, Westpac refused a flexible work arrangement request from a part-time employee to perform all her work remotely, despite the fact she had been successfully working to this arrangement for many years. Westpac also did not follow the procedural requirements employers must follow when responding to flexible work arrangement requests.

It was for these reasons that the FW Commission approved the employee's request, reflecting that the Commission recognises that there has been a shift in the type of work arrangements employees can effectively perform their work in, and that employers should be recognising this as well. And that, in our view, is how most employers are actually responding to flexible work in practice (particularly employers in 'white collar' sectors).

While employers may not go as far as supporting a statutory right to work from home, many have recognised the potential flexible

work has for increasing not only the productivity, but the wellbeing of their employees. In January of this year, the Productivity Commission released a report which showed that around 40% of all employees in Australia work flexibly and they do this with agreement and endorsement from their employers who have introduced flexible work policies and practices that suit their businesses.

## What this means for employers

Given the current climate, the best approach an employer can have is usually making flexible work 'work' for their business. Practically, this means employers should:

- consider promulgating a workplace policy setting out their position on working from home with enough flexibility to appropriately respond to flexible working arrangements requests;
- train managers and team leaders to understand the procedural requirements for responding to flexible working arrangements and know when to escalate those requests to the business' human resources function; and
- if employing employees covered by the *Clerks Award – Private Sector Award 2020*, monitor for developments in the proposed flexible working variations to that award.



# Albo axes non-competes – what employers need to know about upcoming changes to post-employment restrictions in Australia

In March 2025, the Federal Labor Government announced a ban on non-compete clauses in Australia for workers earning under the high-income threshold. Legislation is yet to be passed to enact the ban. However, in July 2025 the Government released a Consultation Paper seeking feedback on the proposed non-compete ban (as well as other associated changes).

The non-compete ban (and potentially other associated changes) are intended to take effect by 2027, giving employers plenty of time to make any necessary changes.

## Non-compete clauses – the current approach

Non-compete clauses are restrictions in employment (and other) contracts that attempt to prevent employees (and other workers) from working for a competitor after they leave their current employment

(or engagement). Employers frequently use non-compete clauses as a means to protect their confidential information as well as other business interests such as maintaining client connections.

Non-compete clauses (and other restraints of trade) are only enforceable to the extent reasonably necessary to protect a legitimate business interest. This means when an employee with a non-compete clause leaves their employer to work for a competitor, there is a live legal issue regarding whether the non-compete clause is enforceable as a matter of law. The practical effect of this is that employees are often reluctant to engage in conduct that might breach a non-compete clause in their contract, even though a court may ultimately find the clause was unenforceable because it was not reasonably necessary to protect a legitimate business interest. Employees are also often reluctant to challenge the enforceability of

non-compete clauses in court due to the significant legal costs involved. This so-called ‘chilling effect’ of non-compete clauses (i.e. the possibility and cost of legal action discouraging workers from moving jobs) is the stated reason why the government is proposing to ban them.

## What we know about the proposed ban so far

At this stage, the Government has announced:

- it will amend the *Fair Work Act 2009* (Cth) to ban the use of non-compete clauses for workers earning under the high-income threshold (currently \$183,100) from 2027;
- such a ban will not extend to non-compete clauses associated with the sale of businesses;
- it will ban ‘no poach’ agreements between businesses that block workers from being hired by competitors; and

- it will also ban anti-competitive wage fixing arrangements between businesses, which cap the pay and conditions of workers at the businesses (without their knowledge).

The Consultation Paper issued by the Government in July 2025 also gives some insight into other changes the Government might implement. These include:

- whether the ban on non-compete clauses should be prospective only (i.e. for contracts entered into after the ban comes into effect sometime in 2027), or whether it should apply to existing contracts as well;
- whether there should be any exemptions to the ban of non-compete clauses for workers earning less than the high-income threshold which would need to be justified on strong public policy or national interest grounds;
- introducing civil penalties for employers who continue to include unlawful restraints in employment contracts after the ban comes into effect (similar to the current prohibitions on pay secrecy terms);
- empowering the Fair Work Commission to resolve disputes between parties in relation to non-compete clauses (such as

whether a contractual clause constitutes a non-compete or whether an exemption applies)

- banning or placing limitations on non-compete clauses for workers earning above the high-income threshold (with options including introducing mandatory compensation requirements for the duration of the restraint, or introducing a statutory limitation on the duration of the non-compete clause);
- banning or limiting the use of non-solicitation clauses (including client non-solicitation clauses and co-worker non-solicitation clauses);
- prohibiting the use of ‘cascading’ restraints (i.e. the use of alternate, overlapping restraints of reducing duration or area, which allows a court to ‘sever’ part of the restraint if that part is unenforceable, leaving the rest of the restraint intact); and
- banning ‘exclusive service’ clauses in employment contracts, particularly those prohibiting part time or casual employees from having other employment.

## What does this mean for employers?

Employers who currently rely on non-compete clauses to protect their business interests will need

to revise their approach prior to the ban coming into effect in 2027. Given that consultation on proposed changes has already occurred and the intended effective date for the ban is 2027, we expect the Federal Government to try and legislate the changes sometime in 2026.

Employers should keep a close eye out for the exact scope of the changes when the Government passes the legislation, as given the matters consulted on by the Government, there are likely to be other associated changes (see above) not just a ban on non-compete clauses for workers under the high-income threshold.

In the meantime, employers should consider the following:

- reviewing and updating template contracts to remove non-compete clauses (for those earning less than the high-income threshold);
- updating existing clauses in template contracts protecting confidential information and intellectual property; and
- including longer notice periods and gardening leave clauses in employment contracts for key employees, as a means to protect business interests in circumstances where a non-compete clause cannot be used.



# How the law continues to respond to workplace sexual harassment: NDAs, sexual harassment damages, and the positive duty

Several years on from the landmark Respect@Work reforms which introduced the positive duty to eliminate sexual harassment and other forms of sex discrimination, legislators, courts and anti-discrimination bodies continue to respond to the scourge of workplace sexual harassment and there appears to be no signs of losing momentum. The figures on the number of sexual harassment complaints show that 2025 was a record year as the number of complaints continues to climb (see page 2 of this

publication). In this article, we set out some developments in this space that employers should be monitoring throughout 2026.

## Victorian NDA restrictions

In November 2025, the Victorian government passed the *Restricting Non-disclosure Agreements (Sexual Harassment at Work) Act 2025* which places restrictions on the use of non-disclosure agreements (NDAs) in workplace sexual harassment cases. The changes will commence by proclamation, most likely on 1 July 2026 and employers

with Victorian operations should be preparing for their introduction.

These legislative changes came about after an inquiry was conducted by the Victorian Government, which recommended further reforms in response to concerns that NDAs are being misused to promote a culture of secrecy by silencing victims of workplace sexual harassment, protecting the reputation of employers, avoiding full liability for workplace sexual harassment and by concealing serial offenders.

## What do employers need to know about the new laws?

NDAs require one or both parties to the agreement to keep certain matters confidential. In workplace sexual harassment disputes, NDAs may be used to resolve allegations without the need for litigation, with the employer paying a settlement sum to a complainant in exchange for the complainant not disclosing any allegations of sexual harassment, the identity of the alleged sexual harasser and the terms of settlement.

The Victorian legislation still permits the use of NDAs as an option to settle workplace sexual harassment cases but places the following restrictions on their use:

- NDAs must be requested by the complainant, and it must be the complainant's express wish and preference to enter into an agreement;
- employers must provide a mandatory 'workplace non disclosure agreement information statement' to the complainant before entering into an NDA (yet to be published);
- before entering into an NDA, the complainant has a period of 21 days to review the agreement, obtain legal advice and decide if they wish to enter into an NDA (which may be reduced or waived altogether);
- before entering into an agreement, all parties to the agreement must acknowledge the above points;
- the employer, the respondent, and the representative of the employer or the respondent cannot exert undue influence or undue pressure on the complainant as to their decision on whether or not to enter into an agreement;
- NDAs cannot prevent parties from disclosing material information about workplace sexual harassment to certain persons (including lawyers,

police, religious ministers, or a friend or family member who has agreed to keep the information confidential), and bodies such as the Australian Human Rights Commission; and

- complainants may terminate an NDA after it has been in operation for one year.

If these conditions are not met, the NDA will not be enforceable against a complainant to the extent it prevents a complainant from disclosing material information about workplace sexual harassment.

## Landmark damages in workplace sexual harassment case

Courts have also been responding to workplace sexual harassment by continuing the upwards trend of the amount of damages being awarded to successful complainants.

For example, in 2019, an employee who was subjected to sexual harassment by her manager was awarded \$120,000 in general damages,<sup>1</sup> and later in 2023, an employee who experienced similar conduct by her manager was awarded \$140,000 in general damages.<sup>2</sup>

In August 2025, the Federal Court of Australia in *Magar v Khan* [2025] FCA 874 awarded record-breaking damages of \$160,000 to a complainant at a Mad Mex franchise who was sexually harassed and victimised by her manager.

In that case, the court reinforced the importance of an employer's responsibility to create a respectful workplace culture. The court found that the manager created and fostered a hostile workplace environment that '*tolerated overt and outspoken sexist and boorish behaviour*' and that normalising such behaviour can escalate into sexual harassment.

Notably, the court provided insight into the types of conduct that could be characterised as 'harassment on the ground of

sex' under s 28AA of the *Sex Discrimination Act 1984* (Cth). The court considered circumstances in which the manager and other senior employees made sexual comments about other female employees and customers of the store and whether this amounted to 'harassment on the ground of sex'. However, the court ultimately found that this conduct could not be characterised as 'harassment on the ground of sex' in relation to the complainant, because the conduct did not occur 'in relation' to the complainant (i.e. it was not about, or directed at, the complainant).

## Key takeaways

In our experience, most employers understand the importance of preventing sexual harassment and other forms of sex discrimination and are committed to discharging their positive duty to do so. However, the damages awarded in *Magar v Khan* shows the pitfalls of getting it wrong. Employers should intervene early in known problematic workplace behaviours and lower-level conduct such as sexist 'banter', as this type of conduct creates conditions for sexual harassment to occur (rather than waiting to receive complaints from employees about such matters).

Diligent employers will have developed and implemented a comprehensive sexual harassment management plan, reviewed their workplace policies, deliver regular and meaningful training on sexual harassment, provide clear reporting channels for complainants and continuously monitor and review whether current measures are effective to eliminate, as far as possible, sexual harassment in the workplace. We are increasingly seeing these measures being seen as a bare minimum.

The Victorian NDA reforms have the potential to disrupt the way employers deal with settling sexual harassment claims and, whilst confined to Victoria at this stage, may have flow on effects outside of that jurisdiction.

1 Hill v Hughes [2019] FCCA 1267

2 Taylor v August and Pemberton Pty Ltd [2023] FCA 1313



## New frontiers of psychosocial hazard reforms

In this article, we explore the new frontiers of psychosocial hazard reforms, including proposed notification obligations with respect to psychological injuries under the model work health and safety (WHS) laws, followed by a case study on the psychosocial hazards that can emerge from antisocial behaviour from individuals within the union movement.

### New notification obligations

On 4 December 2025, the Model WHS Act was amended to implement a recommendation by Safe Work Australia to broaden notification obligations with respect to psychosocial hazards (among other things). The recommendation arose from a review commissioned by the federal safety regulator and was adopted by the Commonwealth, State and Territory ministers responsible for WHS laws in May 2021. In particular, Safe Work Australia recommended that notification obligations regarding safety incidents be reviewed to include notification of psychological injuries and capture incidents, injuries and illnesses emerging from new work practices and work arrangements.

The changes to the Model WHS Act will take effect in each State and

Territory, and the Commonwealth, when amendments are made to the WHS Act in the particular jurisdiction and so duty holders should be on the lookout for changes in their jurisdiction.

### What will be required of duty holders?

Once introduced, the WHS regulator in your jurisdiction will need to be notified when you become aware of workplace incidents resulting in psychological illness or injury, psychological illness or injury with a causal link to the workplace for which a worker is absent from work for 15 or more days and suicides and attempted suicides with a possible causal link to the workplace (i.e. occurs when a worker is on leave but ordinarily would be at work, occurs in the immediate vicinity of a workplace, occurs in work provided accommodation, occurs when a worker is wearing work uniform or when the worker had or has a psychological injury or illness arising from the conduct of the business).

If you are not already complying with the psychosocial risk management obligations that were introduced into the WHS regulations in most jurisdictions in mid-late 2022, with Victoria the

last to introduce regulations in December 2025, this work needs to be completed, and staff trained on how it works within your safety management system. This will now need to be supplemented by ensuring that your reporting systems from both the safety function (with respect to incidents) and human resources regarding extended absences from work that are known to involve psychological injury or illness along with human resources investigations of workplace complaints where exposure to psychosocial risk is alleged, to assess whether the WHS regulator needs to be notified.

This increased visibility of WHS regulators over psychological injury and illness with a causal link to workplaces will, as a consequence, trigger investigations and require proper documentation relating to the notifiable injuries and illnesses and internal investigations to determine whether there is potential exposure to liability, and to manage the organisation's response to any regulatory investigation.

In the next section of this article, we explore an emerging area of psychosocial hazards that may trigger the notification obligations set out above.

## Case study: Employee organisations and psychosocial hazards

We are increasingly seeing employers in industries with heavy union saturation complain of the psychosocial hazards that can result from antisocial and belligerent union behaviour. Those hazards need to be identified and managed like other hazards in the workplace.

### Union data says there is a problem

In November 2025, the Australian Council of Trade Unions (ACTU) released the results of its Work Shouldn't Hurt Survey, which reveals that 1 in 5 Australian workers sustained a mental health injury in the previous year, with this number rising to 1 in 4 Australians under the age of 34. The ACTU are not alone in the union movement for seeking to call out psychosocial hazards. The Australian Services Union has also created a toolkit for mentally healthy workplaces to help people identify and correct psychosocial hazards.

### Antisocial and aggressive behaviour is known to be part of the problem

The primary duty of care under WHS laws to ensure the health and safety of workers as far as is reasonably practicable falls overwhelmingly on employers, not unions.

Unfortunately, there are many public, identifiable instances where

unions and their officers and delegates have been responsible for the creation of psychosocial hazards, carrying out the very sort of activity that the union movement states it is seeking to stamp out:

- In August 2024, the ABC aired footage of union members physically blocking vehicles at a Brisbane worksite, and abusing the occupants of the vehicles by swearing and yelling at them. In that case, the occupants of the vehicles were members of a different union. This sort of conduct has a real risk of causing mental injury to the occupants of the vehicles who are subject to the abuse, and to workers who witness such conduct.
- In August 2025, media reported on CCTV footage of a union official in Perth allegedly butting heads with the manager of a construction site and making a throat slitting gesture. This is a psychosocial hazard not only for the person towards whom this behaviour was directed, but also for any employees who witnessed any intimidating or threatening behaviour.

Given the duties WHS laws imposed on employers, employers should be considering what measures

can be taken to protect employees from this type of conduct.

### How can employers discharge their duties in the face of dangerous behaviour?

Many employers will be familiar with the process of requiring any persons entering onto their premises to undertake a short safety induction and requiring them to abide by the safety requirements of the site. Site attendees may be required to sign a declaration stating that they have understood the induction, will abide by all safety rules, and that they forfeit their right to be on-site should they breach any safety conditions.

This process can apply to any site visitors, including union officials exercising right of entry, provided that the induction is not unreasonably long or unnecessarily arduous. Critically, there is no reason why any induction, and any conditions visitors are required to abide by while on-site, cannot include an agreement not to engage in behaviour that may cause psychosocial hazards or mental harm to employees and other workers on-site, at the risk of being removed from site. All safety inductions, agreements to abide by safety rules, and examples of actual antisocial, aggressive or other behaviours that violate the required standards should be documented and kept. Of course, any criminal behaviour should be reported to the police.

Treating psychosocial hazards as you would any other threat to the health and safety of employees and other attendees of the workplace is an entirely appropriate, and expected, step that an employer should be taking to ensure the safety of their workplaces.





## Our Workplace services

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- Performance, discipline and dismissal
- Sexual harassment, bullying and discrimination
- Foreign workers
- Contracts, awards, enterprise agreements and policies
- Managing ill and injured workers
- Redundancy and consultation
- Workplace privacy and surveillance

### Strategy

- Labour engagement models
- Workplace change and restructuring
- Enterprise bargaining
- Industrial relations strategy

### Disputes

- Restraints and confidential information
- Defending employee claims
- Executive claims

### Investigations

- Conducting workplace investigations and legal risk reviews
- Investigations training and coaching
- Investigations management and advice

### Health and safety

- Understanding statutory duties and obligations
- Developing and implementing appropriate safety policies, procedures and best practice
- Liaising with and responding to requests from safety regulators
- Responding to workplace safety incidents
- Conducting investigations and maintaining legal professional privilege over documents
- Defending workplace safety prosecutions

### Executive remuneration and benefits

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- Incentive and bonus schemes
- Corporations Act and ASX Listing Rules compliance

### Industrial relations

- Responding to industrial action
- Enterprise bargaining and other collective and disputes
- Contingency planning
- Management of transfer of business provisions arising from outsourcing/insourcing
- Union management

### Risk and compliance

- Board advisory and reputation management
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- Due diligence
- Supply chain management
- Workplace training programmes

### Crisis management

- Risk assessment and mitigation
- Preparing documented crisis plans and processes  
Crisis response
- Managing communications and public relations
- Post-crisis assessment and recovery strategies

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