

## Costs in federal discrimination claims

March 2026

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*This information sheet provides general information and is not intended as legal advice. Any person considering commencing a federal discrimination claim should seek independent legal advice.*

### Introduction

In October 2024, changes were made to how legal costs can be awarded in unlawful discrimination claims run in the federal courts. These changes to the *Australian Human Rights Commission Act 1986* (Cth) ('AHRC Act')<sup>1</sup> implement an 'equal access' costs protection model. This means people who allege they have experienced discrimination (the 'applicant') can now generally take their claims to court without the significant financial risk of having to pay the legal costs of the other party to their claim (the 'respondent').

The main changes are:

1. If a federal court finds a respondent is responsible for at least one ground of unlawful discrimination, the respondent must pay the applicant's legal costs, except costs incurred as a result of the applicant's 'unreasonable acts or omissions' (see below).
2. If a federal court finds no unlawful discrimination, each party will need to pay for their own legal costs. The applicant will not be ordered to pay another party's costs unless an exception applies. Where a matter is brought by a representative body on behalf of a person or group of people and an exception applies, cost orders cannot be made against the person on whose behalf the application was made, only the representative body.<sup>2</sup>

### What do the cost reforms apply to?

The 'equal access' cost reforms apply to unlawful discrimination proceedings (including appeals):

- pursued under section 46PO of the AHRC Act (ie claims under any of the *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth));
- in the Federal Court of Australia or Federal Circuit and Family Court of Australia; and
- lodged on or after 2 October 2024.

These changes do not apply to complaints made under state or territory anti-discrimination laws.

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<sup>1</sup> *Australian Human Rights Commission Act 1986* (Cth) ('AHRC Act') s 46PSA.

<sup>2</sup> AHRC Act s 46PSA(7).

## Exceptions: when might an applicant have to pay another party's costs?

There are some circumstances where an applicant may still be ordered to pay the costs incurred by another party, regardless of whether there is a finding of discrimination or not. These include when:

- the applicant instituted the proceedings 'vexatiously or without reasonable cause', or
- the applicant's 'unreasonable act or omission' caused the other party to incur the costs; or
- all of the following apply:
  - the other party is a respondent who was successful in the proceedings;
  - the respondent does not have a significant power advantage over the applicant;
  - the respondent does not have significant financial or other resources relative to the applicant.<sup>3</sup>

Examples of respondents who might not have a significant power advantage, or financial or other resources relative to an applicant, could include some individuals and small businesses.<sup>4</sup>

However, a person or small business could still have a significant power advantage over an applicant where, for example, they are an applicant's employer, or a more senior, older or longstanding employee.<sup>5</sup>

### What is an 'unreasonable act or omission'?

The Government has clarified that 'unreasonable acts or omissions' could arise where the applicant has unreasonably caused unnecessary delays to the court case, failed to comply with court orders and rules, or otherwise abused the processes of the court.<sup>6</sup> They have said:

"Unreasonable act or omission"... is intended to be a high threshold and reserved for rare cases. For example, a mere refusal of a settlement offer, refusal to participate in a conciliation, the running of novel arguments, a self-represented litigant's lack of legal expertise or acts done because of disability are not intended to amount to an unreasonable act or omission, absent consideration of other circumstances. While the court has the discretion to consider things said in conciliation when considering costs, the fact that an offer has been made and been rejected, or the fact that a party did not attend the conciliation, is not itself sufficient to establish unreasonableness. The circumstances of an act or omission must be considered holistically. For example, an applicant may reasonably refuse a settlement offer that includes an acceptable monetary component. This could be due to the circumstances of the offer. For example, the inclusion of a confidentiality clause, a lack of non-monetary remedies or a failure to accept that the respondent unlawfully discriminated against the applicant. It may also not be unreasonable for an applicant to refuse a settlement offer in circumstances where the applicant is unable to assess whether the offer is reasonable or appropriate. For example, this could be due to insufficient jurisprudence relevant to the matter, or a lack of legal representation or legal advice.<sup>7</sup>

Applicants should get legal advice about their case to understand when this exception might apply.

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<sup>3</sup> AHRC Act s 46PSA(6).

<sup>4</sup> Explanatory Memorandum, Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (Cth), 4 [6].

<sup>5</sup> Ibid 15 [18].

<sup>6</sup> Addendum to Explanatory Memorandum, Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (Cth), 2 [1].  
Ibid 3 [2].