

DISCRIMINATORY, COERCIVE AND MISLEADING CONDUCT

The model WHS Act aims to provide a balanced and nationally consistent framework to protect the health and safety of workers and workplaces.

Part 6 of the model WHS Act prohibits discriminatory, coercive and misleading conduct in relation to work health and safety (WHS) matters. These protections allow individuals to perform WHS roles and activities, as well as raise health and safety issues or concerns at their workplace, without fear of discrimination or coercion.

Both criminal and civil actions can be brought against a person who engages in discriminatory, coercive or misleading conduct in relation to WHS matters.

Discrimination

The model WHS Act prohibits an individual or business from engaging in discriminatory conduct against a person because of the person's WHS roles or activities.

Protected workers

Workers and prospective workers are protected by the prohibition on discriminatory conduct.

The prohibition also applies to commercial arrangements. A person must not be refused a contract or have a contract terminated because of their WHS roles or activities.

Discriminatory conduct

Examples of discriminatory conduct could include:

- firing a worker
- terminating a contract for services with a worker
- changing a worker's position to their detriment, e.g. by decreasing their salary or by demotion
- treating a worker differently from others
- not hiring someone
- offering a prospective worker less favourable terms and conditions
- terminating a commercial arrangement, e.g. a contract to supply materials to a workplace, or a sub-contracting arrangement.

Organising, or threatening to organise or take, any of the above action is also discriminatory conduct. In addition, a person must not request, instruct, induce, encourage, authorise or assist someone else to engage in discriminatory conduct.

Prohibited reason

Not all discriminatory conduct is unlawful. To be unlawful, discriminatory conduct must be engaged in for a prohibited reason.

The model WHS Act specifies when discriminatory conduct is engaged in for a prohibited reason. This includes conduct that is engaged in because the worker, prospective worker or person engaged in a commercial arrangement:

- is a health and safety representative (HSR) or a member of a health and safety committee, or undertakes another role under the model WHS Act

- does or does not exercise their powers or perform their functions under the model WHS Act
- does or does not exercise their powers or perform their functions under the model WHS Act in a particular way
- assists or gives information to persons exercising a power or performing a function under the model WHS Act
- raises an issue or concern about WHS with persons such as a PCBU, a WHS inspector, an HSR, a member of a health and safety committee, another worker or any other duty holder or person exercising a power or performing a function under the model WHS Act.

Consequences

If the prohibited reason is the *dominant reason* for the discriminatory conduct, that can lead to **criminal action** and penalties.

- 'Dominant' means 'ruling, prevailing or most influential'.
- The dominant reason for a person's conduct is assessed objectively based on all available and relevant information and circumstances.
- This involves determining whether a prohibited reason, more than any other reason, was the dominant reason why a person acted as they did.

If a person is convicted or found guilty in a criminal action, the court can impose penalties and make orders, e.g. an order for compensation or an order that a worker is reinstated or re-employed.

If the prohibited reason is a *substantial reason* for the discriminatory conduct, that can lead to **civil action**.

- While a substantial reason does not need to be the dominant or the only reason for the conduct, it is not sufficient to establish that it was simply one of a number of reasons.
- A defendant may not be liable if they can prove that the conduct was reasonable in the circumstances and that a substantial reason for the conduct was to comply with WHS laws.

If the relevant court or tribunal establishes that a person has engaged in unlawful discriminatory conduct in a civil action, the court or tribunal can make a range of orders. For example, an injunction (to make a person stop an action or take certain action), an order for compensation, an order that a worker is reinstated or re-employed or any other order that the court or tribunal considers appropriate (including a declaratory order).

Both civil and criminal actions can be brought against a person for the same conduct. However, a court cannot make the same orders against a person in both criminal and civil actions.

For **criminal and civil actions**, if it is established that a person has engaged in discriminatory conduct, that person must prove that the conduct was not unlawful by proving that the alleged prohibited reason was not the dominant or substantial reason for the conduct.

Coercion or inducement

A person must not take any action intended to intimidate, force or cause a person to exercise, or not exercise, a health and safety power, function or role. This includes organising, or threatening to organise or take such action.

There is an exception for emergencies. This allows an emergency worker to give reasonable directions in an emergency without it amounting to unlawful coercion or inducement.

If a person has engaged in coercion or inducement, that can lead to criminal or civil action.

In criminal action, a person convicted or found guilty of coercion or inducement can face a penalty. In civil action, the relevant court or tribunal can issue an injunction (to make a person stop an action or to take certain action) or any other order it considers appropriate (including a declaratory order).

Misrepresentation

It is an offence for a person to knowingly or recklessly make a false or misleading representation about another person's:

- rights or obligations under the model WHS laws, e.g. the right to cease work
- ability to initiate or participate in, a process or proceedings under the model WHS laws, e.g. the right to request the election of an HSR or the right of a majority of workers of a work group to remove an HSR elected by them
- ability to make a complaint or inquiry to a person or body empowered under the Act to seek compliance, e.g. claiming that the circumstances do not allow an inspector to be called in to resolve an issue.

This does not apply if the person to whom the representation is made would not be expected to rely on it.

If a person has made misrepresentations, that can lead to criminal action and penalties.

Further advice

[SWA](#) is not a regulator and cannot advise you about discriminatory, coercive or misleading conduct in your workplace. If you need help or you believe you have been subject to discriminatory, coercive or misleading conduct, please [contact](#) your state or territory WHS authority.

Other state, territory and Commonwealth laws also provide protections from discriminatory, coercive and misleading conduct. For example, the general protections in the *Fair Work Act 2009 (Cth)*. For further information on the *Fair Work Act 2009*, please contact the [Fair Work Commission](#) or the [Fair Work Ombudsman](#).