

Unfair Dismissal Applications - Ongoing problems - Is there a solution?

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MALLESONS



Agenda

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Growth in Individual
Remedy Applications

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Reasons for Growth
and Case Studies

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Consequences

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Reform options

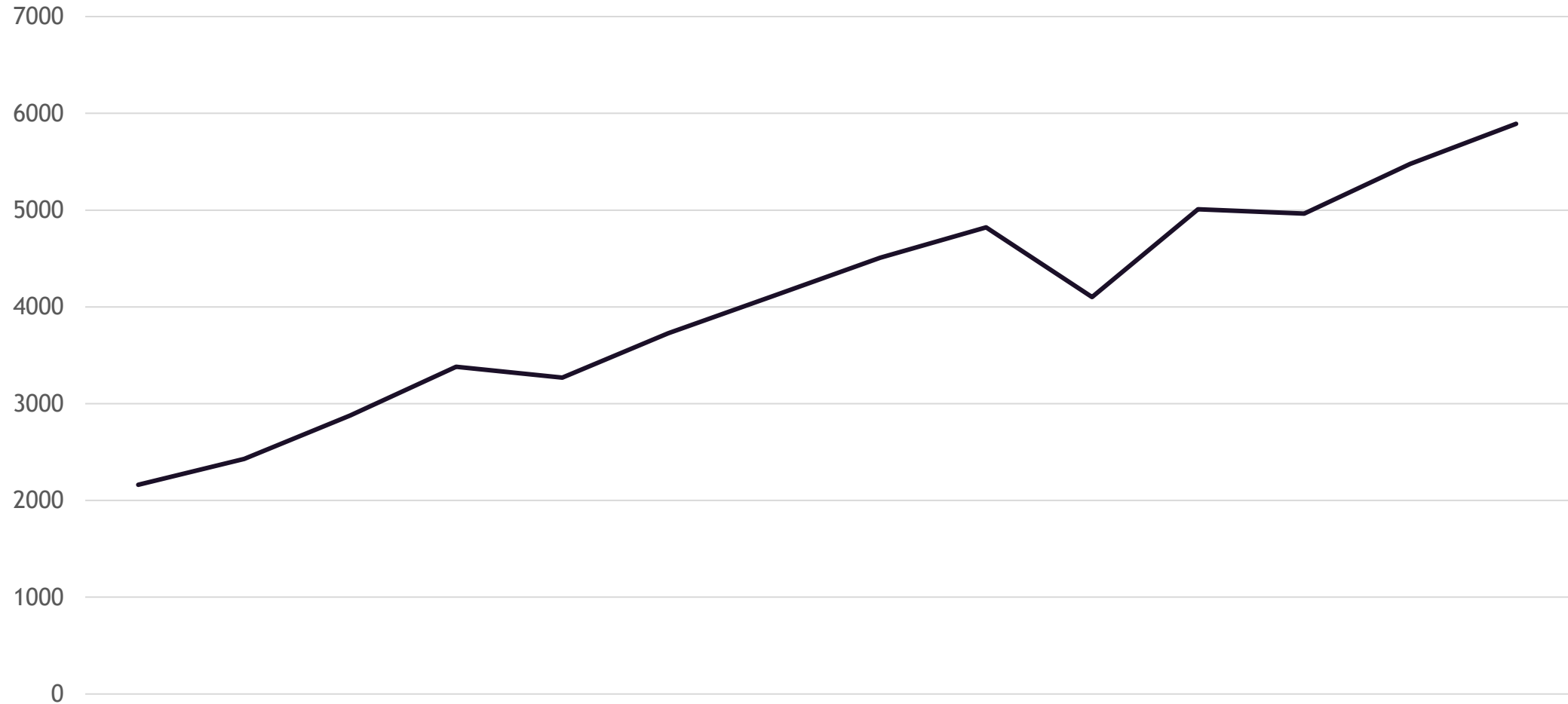
FWC Lodgements Have Escalated

Can AI or No Win-No Fee paid agents be blamed?

Case Type	2025–26 YTD (1 July to 31 December 2025)		
	Lodgments for 2025–26 YTD	3-yr average lodgments	Diff from 3-yr average (+/- %)
s.365 — Application to deal with contraventions involving dismissal	4,464	2,757	+62%
s.372 — Application to deal with other contravention disputes	1,280	545	+135%
s.394 — Application for an unfair dismissal remedy	9,725	6,914	+41%
Total lodgments	27,192	19,371	+40%

General Protections s. 365 Applications

Applications to FWC 2011-2025



Or is the System to Blame?

Cost of defending estimated as \$18,200.

Less than 2% determined by Arbitration.

2023-24 - 69% unfair

2024-25 - 63% unfair

2025-26 - 65% unfair

Is it easier to pay “go away money?”

“Unmeritorious claimants have little to lose. This is unfair to respondents who have no case to answer. It is unfair to applicants with cases of substance waiting their turn to be heard. The Act allows costs to be ordered in some cases, but very often there are no compensable costs, only wasted time. There is no effective disincentive for speculative claims, and so they come, in great numbers, compounding the Commission’s burgeoning caseload.” - DP Colman

FWC Decisions - Health and Safety

GARBAGE TRUCK
DRIVER AND OH&S REP

Committed a series of
breaches of safety
policies and directions

DOCKWORKER

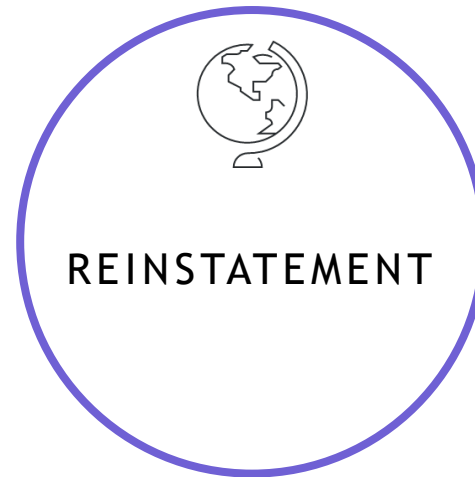
Failed drug and
alcohol test

FIGHTING
MINEWORKER

Exited car, asked
fellow worker to exit,
laid first two punches
- and claimed self
defence

FERRY MASTER

Hit pylon and failed
zero tolerance drug
test



Safety Case Studies

Neething v SC Hydro

Wright DP

[2026] FWC 2411

Mr Neethling was employed by SC Hydro as a Mechanical Fitter and Leading Hand on the Snowy 2.0 Pumped Hydro Electric Upgrade Scheme project (the Project). On 19 January 2026, Mr Neethling was dismissed from his employment because he engaged in a serious breach of safety procedures during a pipe inspection at the Tantangara site.

Mr Neethling initially denied that the safety procedures applied to the pipe inspection because they were not task specific and due to his assessment that the task was low risk. However, during the hearing he accepted that the procedures applied and committed to following them in the future if reinstated.

In summary, I have found that there was a valid reason for Mr Neethling's dismissal but that the dismissal was harsh and unreasonable for reasons which include that Mr Neethling's conduct was not deliberate and did not involve a risk of harm to himself and others. I have also taken into account Mr Neethling's good employment and safety record and that he apologised.

Safety Case Studies

Carmino Fabiano v Elsum Engineering (Aust.) Pty Ltd

DEPUTY PRESIDENT COLMAN

2026 FWC 2291

Mr Fabiano said that dismissal was not the only option available to the company and that he could have been given a warning, as contemplated by the message of 28 January 2026. But after 3 contraventions of a critical safety rule in one week, I consider that the company had little choice. This was serious misconduct. It warranted immediate dismissal. It was not disproportionate because what was at stake was the safety of the workplace, and the authority of management, which Mr Fabiano had flouted.

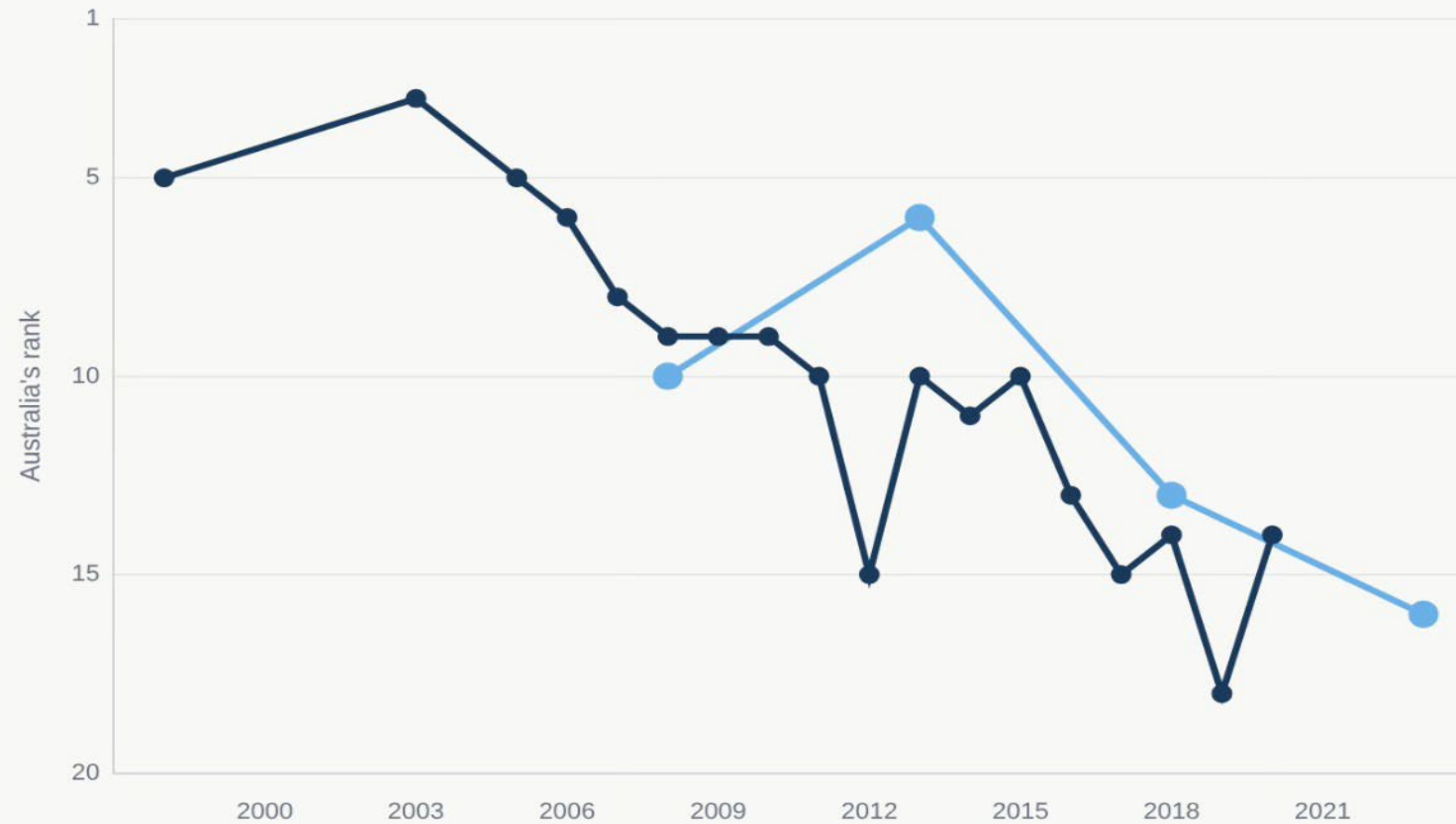
I take into account that Mr Fabiano had worked for the company for over 5 years and that he is 61 years old. I accept that the dismissal took a heavy toll on him. However, the valid reason for dismissal was a very serious matter involving risk to health and safety, and repeated contraventions of a lawful and reasonable direction.

I conclude that Mr Fabiano's dismissal was not harsh, unjust, or unreasonable and that it was not unfair. The application is dismissed.

Red tape is growing

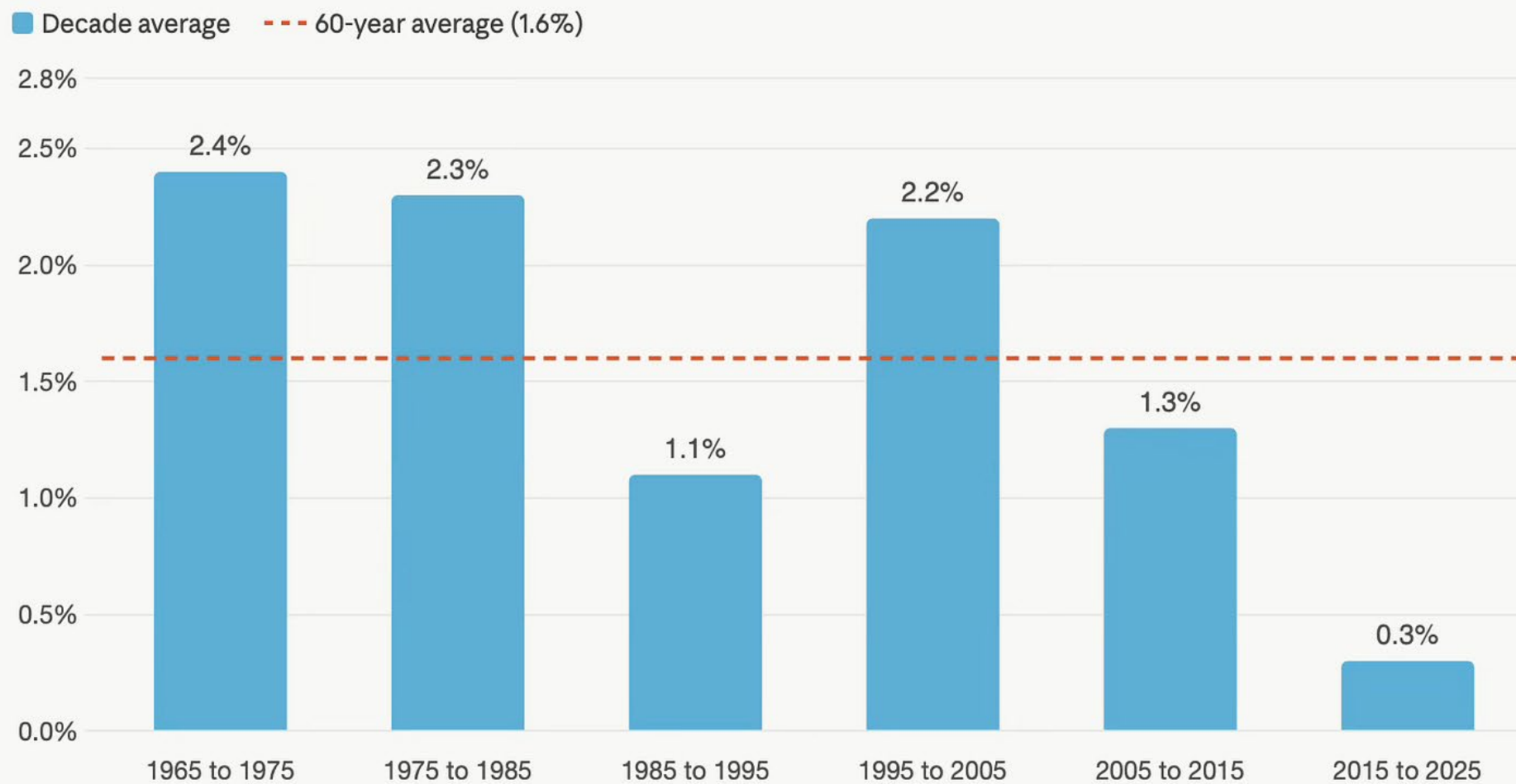
Australia's rank (lower is better)

— World Bank Ease of Doing Business Index — OECD Product Market Regulation Index



Source: Productivity Commission (2025).

Australia's productivity is far below its 60 year average



Labour productivity calculated as GDP per hour worked. Source: PC estimates based on ABS (2026) and Feenstra et al. (2015).

Source: Productivity Commission, Quarterly productivity bulletin, March 2026

History of Unfair Dismissal Laws in Australia

- NSW - Industrial Justice - Loty and Holloway
- State legislation - SA, Vic
- Federal Award - TCR case - Byrne and Frew
- Judicial Remedy - IR Court - eg Selvachandran
- AIRC/FWA/FWC -Tribunal remedy

History of Unfair Dismissal Laws in Australia

Loty and Holloway v AWU
[1971] AR (NSW) 95

“A Fair Go all Round”

“As an industrial tribunal’s objective in reinstatement cases is always industrial justice, it must also in each such case give weight to:

- (a) the importance, but not the inviolability, of the employer’s right to manage his business,
- (b) the nature and quality of the employee’s work,
- (c) the circumstances concerning the employee’s dismissal, and
- (d) the likely practical outcome if an order of reinstatement be made.”

Unfair Dismissal Laws in Australia

The Current Test

“In order to be a valid reason, the reason for the dismissal should be “sound, defensible or well founded” and should not be “capricious, fanciful, spiteful or prejudiced.” However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.

The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence in the proceedings before it. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination.”

Unfair Dismissal Laws in the UK

The Current Test

British Leyland UK
Ltd v Swift (1981)

“The correct test is: Was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view, another quite reasonably take a different view.”

Unfair Dismissal Laws in the UK

The Current Test

British Home Stores v
Burchell [1978] IRLR 379

To decide if a conduct-based dismissal was fair in the UK, the tribunal uses a famous legal framework known as the Burchell test. The tribunal looks at three specific things:



Genuineness: Did the employer *genuinely believe* the employee was guilty of the misconduct?



Reasonable Grounds: Did the employer have *reasonable grounds* on which to base that belief?



Reasonable Investigation: Had the employer carried out *as much investigation into the matter as was reasonable* in the circumstances before reaching that conclusion?

If the employer satisfies all three parts of this test, the dismissal will generally be deemed substantively fair, even if it is later proven that the employee was completely innocent.

Unfair Dismissal Laws in the UK

The Substitution Error

Finding Fault in the Law of
Unfair Dismissal: Philippa Collins
The Industrial Law Journal,
Volume 51, Issue 3, September
2022, Pages 598-625.

A substitution mindset occurs when a tribunal sympathises with an employee, decides the penalty was too harsh (e.g., they would have issued a final warning instead of dismissal), and invalidates the dismissal based on that personal opinion.

Reform Proposals

Unfair Dismissal



Unfair dismissal applications should be triaged and require the establishment of a prima facie case of unfairness before being subject to conciliation or arbitration.



Reinstatement should not be available if it may impact on the health and safety of employees.



The test for an unfair dismissal should be altered so that an application can only succeed if the employer acted unreasonably in deciding to terminate employment.



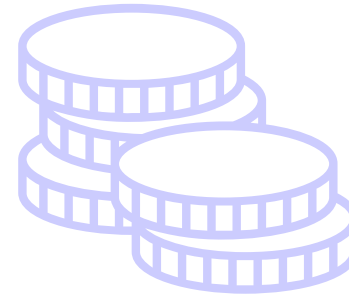
The Small Business Unfair Dismissal Code needs to be rewritten.

Reform Proposals

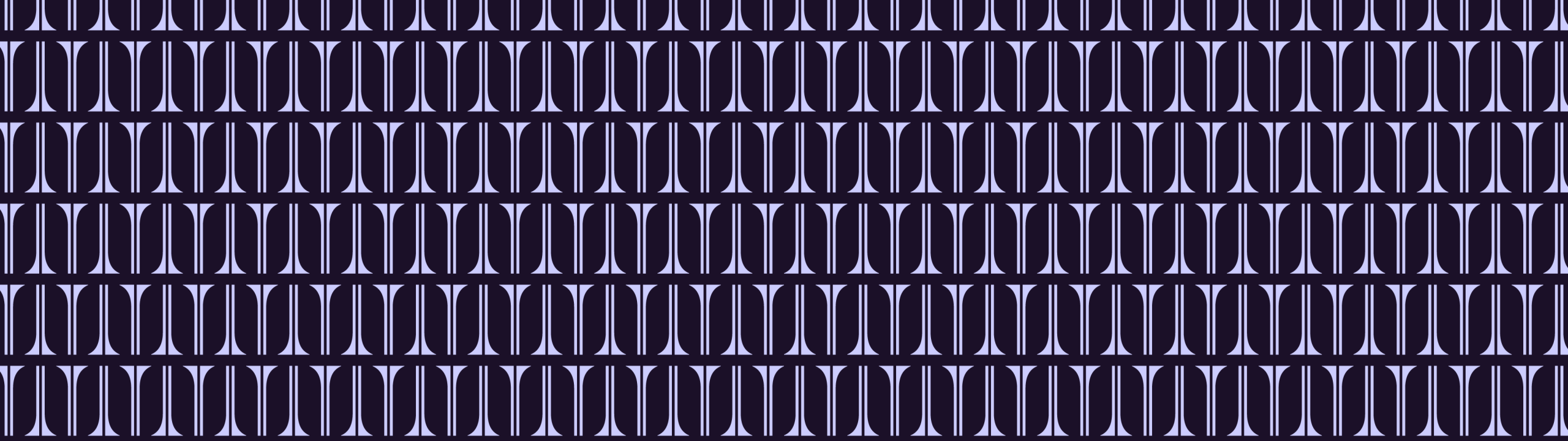
General protections



General protection provisions should be revised so that a remedy will only be available if the employer's sole or primary reason for taking an action is not a lawful reason.



Costs should be available to successful parties in general protection conciliation and court proceedings.



Questions?