

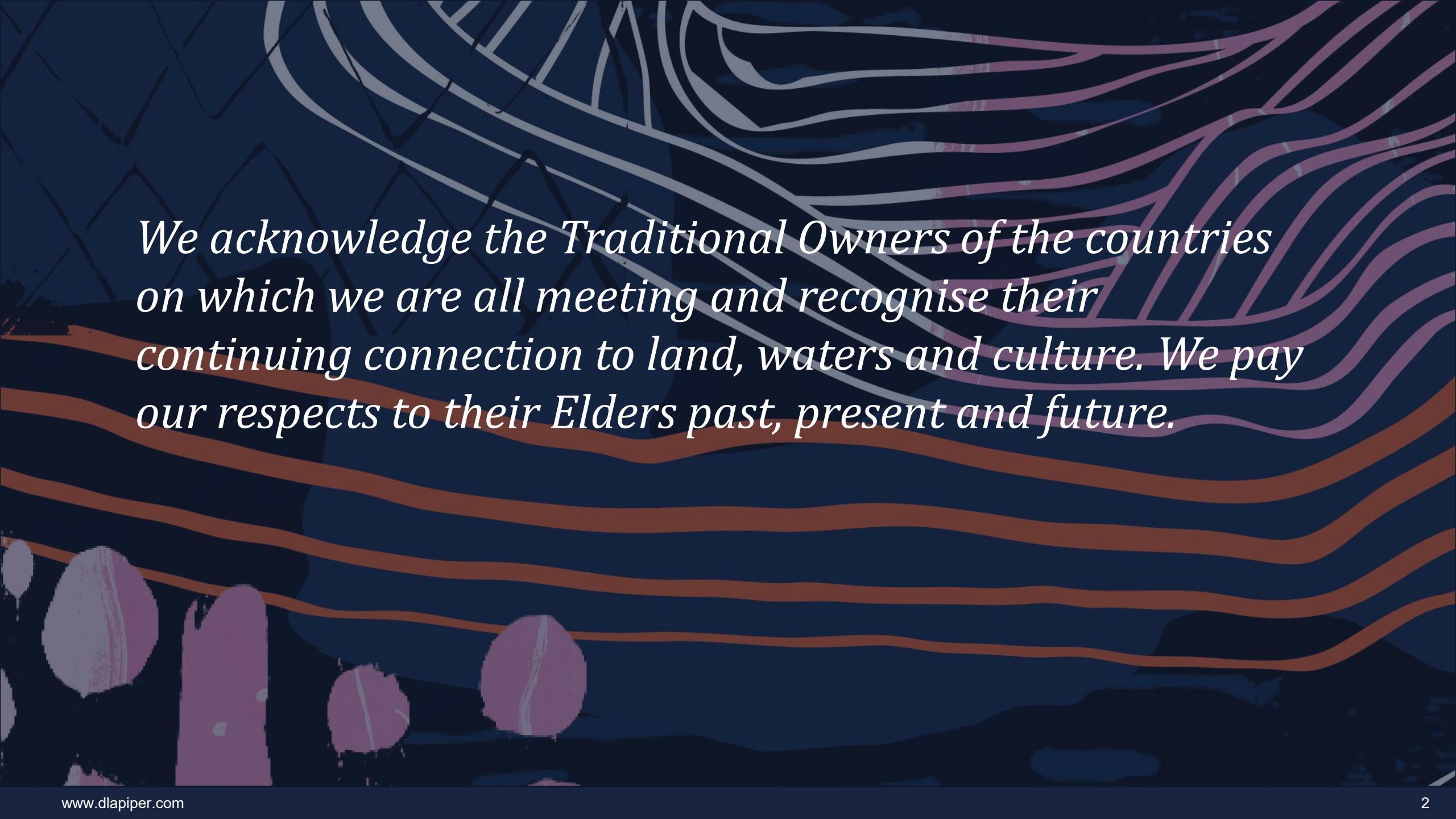
A dramatic aerial photograph of ocean waves, with deep blue and teal tones, creating a textured, swirling pattern across the upper half of the slide.

WIN In-House Counsel Week 2026

Employment law challenges in 2026
– What in house teams need to know

Presenters:

Leanne Nickels, Elizabeth Cole

The background of the slide features a dark blue and black abstract design. It consists of several thick, wavy lines in shades of blue, purple, and brown that curve across the frame. Interspersed among these lines are several large, semi-transparent circles in shades of pink, purple, and white, some with a textured, marbled appearance.

*We acknowledge the Traditional Owners of the countries
on which we are all meeting and recognise their
continuing connection to land, waters and culture. We pay
our respects to their Elders past, present and future.*

Overview



Remote work

Legislative updates



Fair Work
Amendment (Right to
Work from Home) Bill
2025

Working from home –
Clerks – Private
Sector Award 2020
(AM2024/34)

Proposed WFH
legislation for Victoria

Flexible working arrangements & remote work

Case law update



Responding to flexible working arrangement requests

- Employees must clearly articulate how their circumstances directly justify the requested change.
- Employers must strictly follow the procedural steps in s65A of the FW Act.
- Both employees and employers must engage with the specifics: what changes can be made to this employee's working arrangements to accommodate this employee's circumstances.
- Refusals must address the specific arrangement requested, demonstrate clear, substantiated business grounds, and be evidence based.
- Genuine consultation and thorough documentation are essential to defend refusal decisions.

Multiemployer union bargaining

Trends and challenges

Growth in multi-employer and industry wide bargaining

Increased union leverage and activity

Common interest can be established through brand uniformity, franchisor systems or industry similarity – employers cannot rely on operational differences to avoid multi employer bargaining

Multiemployer union bargaining

Case law update

Mining

- *Ulan Coal Mines Pty Ltd v Association of Professional Engineers, Scientists and Managers, Australia* [2025] FCAFC 127

McDonalds

- *Application by Shop, Distributive and Allied Employees Association* [2025] FWCFB 130 (judicial review sought)

Chemist Warehouse

- *Shop, Distributive and Allied Employees Association v Philip Colasante Pharmacies Pty Ltd & Pharmec Pty Ltd and Others* [2025] FWC 2352 (appealed)

Same jobs, same pay

- ‘Same job, same pay’ = labour hire workers must be paid no less than the rate payable to employees directly employed by the host employer undertaking the same work under the relevant workplace instrument, such as an enterprise agreement)
- On application of employees, unions or a ‘regulated host’, the new mechanism enables the FWC to make an order requiring the labour hire employer to pay their employees at least the ‘protected rate of pay’.
- However, the FWC must not make the order unless it is satisfied that the performance of the work is not or will not be for the provision of a service, rather than the supply of labour

Case law update

BHP Coal Pty Ltd
& Ors v Mining
and Energy Union

Skilled Workforce
Solutions (NSW)
Pty Ltd v Mining
and Energy Union
[2025] FCAFC
195

- Pending Full Federal Court review of same job, same pay orders on the basis that provider provides a service rather than supplying labour.

- The FWC exceeded its powers when issuing a same job, same pay order because the order applied to a broader class of employees than the 'regulated employees' the FWC had found justified the making of an order.

Wage theft

- Employers who are found to have intentionally underpaid employees commit a criminal offence.
- Applied from 1 January 2025 (and to earlier conduct if part of a continuing course of action).
 - Fines of up to AUD 8.25 million (or 3x underpayment, if greater) can apply for companies.
 - Fines of up to 1.65 million dollars (or 3x underpayment if greater), up to 10 years prison time or both.
- FWO may agree not to prosecute if a cooperation agreement is formed.

Civil penalties

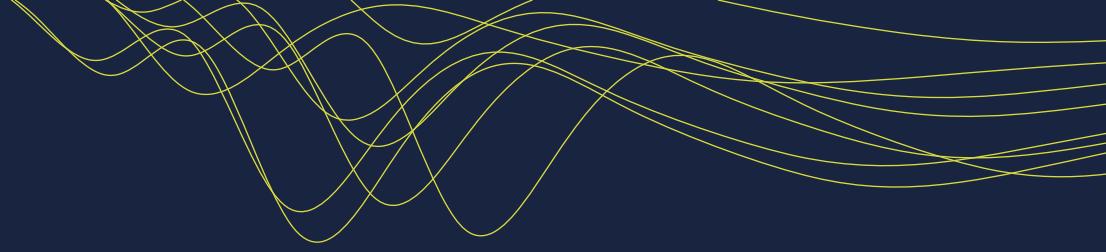
- Employers who are found to have contravened the FW Act are liable to civil penalties
 - Penalties of up to AUD 495,000 (or 3x underpayment, if greater) can be imposed for companies with more than 15 employees.
 - Penalties of up to AUD 4.95mil (or 3x underpayment if greater), can be imposed for companies with more than 15 employees where a Court finds the business knew or was reckless about the contravention
 - Individuals who are knowingly involved may face substantial personal penalties

The supermarkets decision

Set-off Record keeping

- Woolworths and Coles could *not* set off above award-payments made in one pay period against underpayments in another pay period. Set-off clauses will only be enforceable to operate within the same pay period.
- Employers must maintain detailed records of overtime and working hours for award covered employees. Reliance on rosters, clock on/clock off times or estimates alone is insufficient.

Legislative reforms and reviews



Baby Priya's Act

Payday super

Review of NES entitlements

Non competes

Digital work systems – NSW

Sexual harassment and NDAs – Victoria

Baby Priya's Act (commenced 7 November 2025)

- Prohibits employers from refusing or cancelling employer-funded paid parental leave when a child is stillborn or dies.
- Limited exceptions apply including where an existing employment contract or enterprise agreement entered into before 7 November 2025 expressly permits cancellation of employer funded leave in these circumstances. However, employers cannot introduce such terms post 7 November 2025.
- **Next steps:** Review employment contracts and enterprise agreements to ensure any terms are compliant and not varied post 7 November 2025 in a way that undermines the protection.

Payday Super (commencing 1 July 2026)

- Employers must pay make minimum superannuation contributions in line with each pay cycle, so contributions are received by the employee's super fund within 7 business days of payday (subject to limited exceptions).
- Late/missed payments can trigger Super Guarantee Charge (SGC) components and late payment penalties (generally 25% of outstanding SGC, increasing to 50% if the employer was liable for the same penalty in the previous 24 months).
- **Next steps:** Review payroll systems and update internal governance and monitoring processes ahead of **1 July 2026**.

Review of NES entitlements

- First major federal inquiry into the National Employment Standards (NES) since they were introduced in 2009
- The House of Representatives Standing Committee on Employment, Workplace Relations, Skills and training will require into the operation and adequacy of the NES, including the extent to which the NES is fit for purpose having regard to the changing nature of work
- FWA requests, casual employment, parental leave and family and domestic violence leave are excluded from the review
- **Next steps:** The Committee is seeking written submissions by **27 February 2026**. Watch this space.

Proposed non-compete bans

- Proposed ban on non-compete clauses for low- and middle-income workers who earn less than the high-income threshold (currently \$183,100)
- The Government is also considering related reforms including:
 - Restricting client and co-worker non-solicitation clauses
 - Banning no-poach agreements between businesses
 - Banning wage-fixing agreements and
 - Examining how non-compete clauses should be treated for workers who earn above the high-income threshold
- Treasury is also considering whether to extend the ban to independent contractors, especially where their role and conditions are comparable to those of an employee.
- **Next steps:** Consultation is ongoing. Subject to legislation passing, reforms are expected to be introduced in 2027.

Digital work systems – NSW

- The *Work Health and Safety Amendment Digital Bill 2026 (NSW)* updates WHS laws in NSW to include “digital work systems”: AI, algorithms, automation and online platforms
- Employers must assess and manage risks created by digital work systems, including excessive workloads, unreasonable performance metrics, intrusive monitoring, and discriminatory automated decisions.
- WHS entry permit holders gain new powers to access and inspect digital work systems, with notice requirements and confidentiality guidelines to protect proprietary and personal information
- **Next steps:** review and risk-assess all AI and digital systems used in work allocation, monitoring or decision-making to ensure compliance with the new WHS duties and prepare for potential inspections.

Sexual harassment and NDAs – Victoria

- Restriction on the use of NDAs/confidentiality terms in the settlement of sexual harassment claims by employees, shifting control towards complainants
- Non-compliant NDAs will not be enforceable to the extent that the NDA prevents the complainant from disclosing the respondent's identity or the conduct comprising the sexual harassment.
- Employers are prohibited from entering into an NDA with a respondent to a sexual harassment allegation that would prevent an investigation into workplace sexual harassment or the employer from disclosing material information about workplace sexual harassment to a prospective employer.
- **Next steps:** settlement agreement templates and contractual confidentiality and non-disparagement clauses

WIN In-House Counsel Week

Thank you for joining our webinar:

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What in house teams need to know

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