Fair Work Commission

Benchbook

Sexual harassment disputes

This Benchbook applies in relation to alleged sexual harassment in connection with work that occurs (or commences) on or after 6 March 2023.

Where alleged sexual harassment at work has occurred (or was part of a course of conduct that commenced) before 6 March 2023, see:

Orders to stop sexual harassment: Transitional arrangements Benchbook

About this Benchbook

This Benchbook has been prepared by staff of the Fair Work Commission (the Commission) to assist parties lodging or responding to applications for the Commission to deal with sexual harassment disputes under Part 3-5A of the *Fair Work Act 2009* (Cth) (the Fair Work Act). Information is provided to parties to assist in the preparation of material for matters before the Commission.

The sexual harassment provisions in Part 3-5A of the Fair Work Act commenced operation on 6 March 2023 and apply in relation to alleged sexual harassment in connection with work that occurs (or commences) on or after 6 March 2023.

Where alleged sexual harassment at work occurred (or was part of a course of conduct that commenced) before 6 March 2023, see:

Orders to stop sexual harassment: Transitional arrangements Benchbook.

For information about applications to seek orders to stop bullying at work, see the Commission's Orders to stop bullying Benchbook (also known as the Anti-bullying Benchbook).

Disclaimer

The content of this Benchbook should be used as a general guide only. The Benchbook is not intended to be an authority to be used in support of a case at hearing.

Precautions have been taken to ensure the information is accurate, but the Commonwealth does not guarantee, and accepts no legal liability whatsoever arising from or connected to, the accuracy, reliability, currency or completeness of any material contained in this Benchbook or on any linked site.

The information provided, including cases and commentary, are considered correct as of the date of publication. Changes to legislation and case law will be reflected in updates to this Benchbook from time to time.

This Benchbook is not a substitute for independent professional advice and users should obtain any appropriate professional advice relevant to their particular circumstances.

In many areas of Indigenous Australia, it is considered offensive to publish the names of Aboriginal and Torres Strait Islander people who have recently died. Users are warned that this Benchbook may inadvertently contain such names.

Case examples

Individual cases, including from other jurisdictions, have been selected as examples to help users gain a better understanding of the issues covered. These cases should not be considered exhaustive.

The case examples used in this Benchbook are accompanied by interpretations of the decisions by Commission staff on specific issues which are addressed within the text. The case examples may not reflect all of the issues considered in the relevant decision. In the electronic version of the Benchbook the original text of the decision can be accessed by clicking the link.

Links to external websites

Where this site provides links to external websites, these links are provided for the visitor's convenience and do not constitute endorsement of the material on those sites, or any associated organisation, product or service.

The Commission acknowledges the services provided by AustLII, Thomson Reuters and LexisNexis which were utilised in compiling this Benchbook.

Copyright

First published
[INSERT DATE]

Quick Links

General

Employer or principal

Employee or worker

Person named

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Part 1 – How to use this Benchbook

This Benchbook has links to all of the cases referenced in the footnotes, as well as links to the legislation and other websites.

To access the Benchbook please visit: www.fwc.gov.au/hearings-decisions/case-law-benchbooks

About the Commission

The Fair Work Commission (the Commission) is Australia's national workplace relations tribunal.

Australia has had a national workplace relations tribunal for more than a century and it is one of the country's oldest key institutions. Over time it has undergone many changes in jurisdiction, name, functions and structure. Throughout its history, the tribunal, currently known as the Fair Work Commission, and its predecessors, have made many decisions that have affected the lives of working Australians and their employers. The Commission recognises the importance of promoting public understanding of the role of the tribunal and of capturing and preserving its history for display and research.

The Commission is responsible for applying provisions of the *Fair Work Act 2009* (the Fair Work Act) and the *Fair Work (Registered Organisations) Act 2009* (the Registered Organisations Act).

The Commission has a range of powers and functions under the Fair Work Act including powers to deal with sexual harassment disputes.

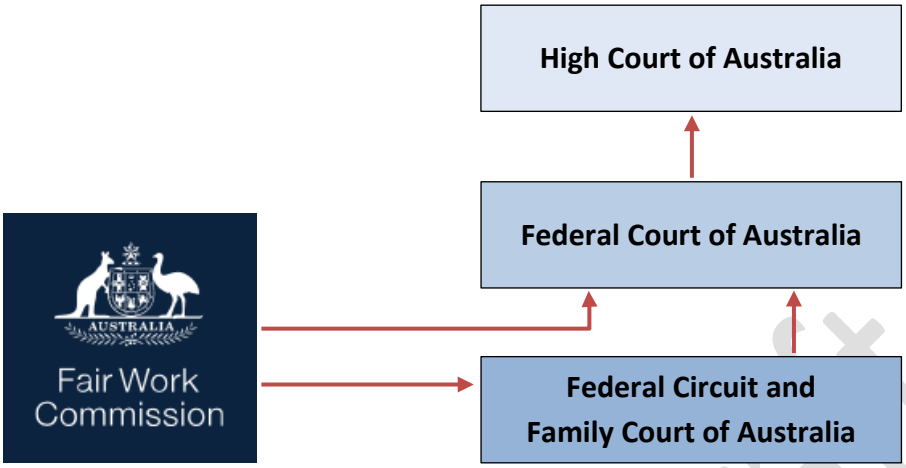
Relationship between the Fair Work Commission and the Courts

See Fair Work Act ss.563–568.

The High Court of Australia is the highest court in the Australian judicial system. The functions of the High Court are to interpret and apply the law of Australia; to decide cases of special federal significance including challenges to the constitutional validity of laws and to hear appeals, by special leave, from Federal, State and Territory courts.

The Federal Court of Australia is a superior court of record and has a broad jurisdiction including over all civil and criminal matters arising in the Fair Work jurisdiction. The Court also has a substantial and diverse appellate jurisdiction, including dealing with applications for judicial reviews of certain Commission decisions.

Some matters lodged with the Commission are conciliated first at the Commission. If the matter does not settle, an applicant can then apply to start proceedings in the Federal Court or the Fair Work Division of the Federal Circuit and Family Court of Australia.



The Commission Structure

The Commission is headed by a President, who is also a Judge of the Federal Court of Australia. Commission Members perform quasi-judicial functions under the Fair Work Act, including conducting public hearings and private conferences for both individual and collective matters. They also perform certain functions under the Registered Organisations Act, including determining applications for registration and cancellation of registration and for alterations to eligibility rules of employee and employer organisations. Commission Members are independent, statutory office holders appointed by the Governor-General on the recommendation of the Australian Government of the day. There are a number of different titles that may apply to Commission Members:

- President
- Vice President
- Deputy President
- Commissioner
- Expert Panel Member.

General information about appearing at the Commission

There are standards for the conduct of all people attending a hearing or conference at the Commission. The standards help the Commission to provide fair hearings for all parties.

Providing fair hearings involves allowing all parties to put their case forward, and to have their case determined impartially and according to law.

The Commission and all parties appearing before it, including representatives, have responsibilities to each other to ensure a fair hearing for all participants.

When coming to the Commission:

- it is important to arrive early for the conference or hearing so that proceedings begin on time
- notify the Commission staff of your arrival by approaching them in the hearing or conference room
- if delayed it is important that contact is made with the appropriate Commission staff before the hearing is due to start
- switch off mobile phone or other electronic devices in the hearing or conference room
- address the Member of the Commission by his or her title (eg Deputy President or Commissioner)
- in a hearing, stand when addressing the Member of the Commission or to question a witness, and
- bring enough copies of documents so everyone involved can have a copy (eg 3 copies: one to keep, one for the other party and one for the Member).

Part 8 – Commission processes for dealing with sexual harassment disputes, contains further information about what will happen at the Commission when you make or respond to an application for the Commission to deal with a sexual harassment dispute.

Name of the Tribunal

The name of the national workplace relations tribunal has changed throughout its history. For consistency, in this document it is referred to as the 'Commission'. The table below outlines the name of the national workplace relations tribunal at various times.

Name	Short title	Dates
Fair Work Commission	the Commission or FWC	1 January 2013–ongoing
Fair Work Australia	FWA	1 July 2009–31 December 2012
Australian Industrial Relations Commission	AIRC, the Commission	1989–2009
Australian Conciliation and Arbitration Commission	the Commission	1973–1989
Commonwealth Conciliation and Arbitration Commission	the Commission	1956–1973
Commonwealth Court of Conciliation and Arbitration		1904–1956

Workplace relations legislation, regulations and rules

The following table sets out legislation dealing with workplace relations and the dates that the law was in operation. The current legislation is the Fair Work Act.

Name of legislation	Commencement dates
Fair Work Act 2009 **(Cth)**	1 July 2009 and 1 January 2010 (Staged commencement)
Workplace Relations Act 1996 **(Cth)** ***(Incorporating the Workplace Relations Amendment (Work Choices) Act 2005*** **(Cth))**	27 March 2006
Workplace Relations Act 1996 **(Cth)**	25 November 1996
Industrial Relations Act 1988 **(Cth)**	1 March 1989
Fair Work Regulations 2009 **(Cth)**	1 July 2009 and 1 January 2010 (Staged commencement)
Fair Work Commission Rules 2013 **(Cth)**	6 December 2013

Case law

Case law is comprised of previous decisions made by courts and tribunals which help interpret the meaning of legislation and how it applies in a specific case. When a decision is made by a court or tribunal, that interpretation of the law may form a precedent. Decisions of the High Court of Australia are authoritative in all Australian courts and tribunals.

A ***precedent*** is a legal decision which provides guidance for future, similar cases.

An ***authoritative*** decision is one that must be followed on questions of law by lower courts and tribunals.

Referencing

References in this benchbook use the following formats.

Note: In the electronic version of this benchbook the cases referenced in the footnotes are hyperlinked and can be accessed by clicking the links.

Cases

[41] *Elgammal v BlackRange Wealth Management Pty Ltd* [2011] FWAFB 4038 (Harrison SDP, Richards SDP, Williams C, 30 June 2007) at para. 13.

[42] *Visscher v The Honourable President Justice Giudice* [2009] HCA 34 (2 September 2009) at para. 81, [(2009) 239 CLR 361].
[43] ibid.
[44] *Searle v Moly Mines Limited* [2008] AIRCFB 1088 (Giudice J, O'Callaghan SDP, Cribb C, 29 July 2008) at para. 22, [(2008) 174 IR 21]; citing *Byrne v Australian Airlines Ltd* [1995] HCA 24 (11 October 1995) at para. 23, [(1995) 185 CLR 410 at p. 427].

The name of the case will be in italics.

The link will be to the original reference. If a case has been reported then there will also be a reference to the journal the case has been reported in. For example, some of the abbreviations used are:

'HCA' for 'High Court of Australia

'FCAFC' for a 'Full Court of the Federal Court of Australia'

'FWCFB' for a 'Full Bench of the Fair Work Commission'

'FWA' for 'Fair Work Australia'

'IR' for 'Industrial Reports'

'CLR' for 'Commonwealth Law Reports'

Page or paragraph numbers are included at the end of the reference, to provide a pinpoint in the document where appropriate.

If a reference in a footnote is identical to the one immediately before, the term 'ibid.' is commonly used.

Where one case refers to another case, the term 'citing' is used.

Item	Example
Case names	*Elgammal v BlackRange Wealth Management Pty Ltd* *Visscher v The Honourable President Justice Giudice*
Link to case	[2011] FWAFB 4038 (Harrison SDP, Richards SDP, Williams C, 30 June 2007) [2009] HCA 34 (2 September 2009), [(2009) 239 CLR 361]
Page number	(1995) 185 CLR 410 at p. 427
Paragraph number	[2008] AIRCFB 1088 … at para. 22.
Identical reference	[42] *Visscher v The Honourable President Justice Giudice* [2009] HCA 34 (2 September 2009) at para. 81, [(2009) 239 CLR 361].

	[43] ibid.
Reference to other case	[44] *Searle v Moly Mines Limited* [2008] AIRCFB 1088 (Giudice J, O'Callaghan SDP, Cribb C, 29 July 2008) at para. 22; citing *Byrne v Australian Airlines Ltd* [1995] HCA 24 (11 October 1995) at para. 23.

Legislation and Regulations

[3] *Acts Interpretation Act 1901* (Cth) s.36(2).
[4] Fair Work Act s.381(2).
[5] Fair Work Regulations reg 6.08(3).
[6] *Police Administration Act* (NT) s.94.
[7] *Fair Work (Commonwealth Powers) Act 2009* (Vic).
[8] *Industrial Relations (Commonwealth Powers) Act 2009* (NSW).
[9] *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld).

The name of the legislation will be in italics unless a shortened version is being used.

The jurisdiction of the legislation is included in brackets if the full name is used:

'(Cth)' is a Commonwealth law

'(ACT)' is an Australian Capital Territory law

'(NSW)' is a New South Wales law

'(NT)' is a Northern Territory law

'(Qld)' is a Queensland law

'(SA)' is a South Australian law

'(Tas)' is a Tasmanian law

'(Vic)' is a Victorian law

'(WA)' is a Western Australian law

Section, regulation or rule numbers are included at the end of the reference to provide a pinpoint in the legislation where appropriate.

Item	Example
Legislation names	*Acts Interpretation Act 1901* Fair Work Act Fair Work Regulations *Industrial Relations (Commonwealth Powers) Act 2009*
Jurisdiction	*Acts Interpretation Act 1901* (Cth)

	Police Administration Act (NT) *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld)
Section or regulation number	*Acts Interpretation Act 1901* (Cth) s.36(2) Fair Work Act s.381(2) Fair Work Regulations reg 6.08(3)

Guide to symbols

The symbols used in this benchbook are designed to provide assistance with identifying specific issues or to point to additional information that may assist the reader with their understanding of a particular issue.

Important information

Related information – Links to information on related topics

Helpful information

Links to sections of legislation

Links to forms

Glossary of terms

The glossary explains common terms used throughout this benchbook while legislative terms are defined in the relevant sections.

Naming conventions

After an application for the Commission to deal with a sexual harassment dispute is made, the parties are generally referred to as:

Applicant – the person who lodged the application (an aggrieved person or an industrial association entitled to represent their industrial interests)

Aggrieved person – a person who alleges they have been sexually harassed in connection with work,

Respondent – a person alleged to have engaged in sexual harassment, and/or their employer/principal, and

Employer/principal – a business or undertaking that employs or otherwise engages an aggrieved person or a respondent.

Where a matter proceeds to consent arbitration before the Commission, a respondent includes any party who is responding to the sexual harassment dispute application.

In the case of an appeal the parties are referred to as:

- Appellant (the party who lodges the appeal), and
- Respondent (the party who is responding to the appeal).

What is a day?

Section 36(1) of the *Acts Interpretation Act 1901* (Cth)[1] deals with how time is calculated in interpreting the Fair Work Act. It reads:

> *(1) Where in an Act any period of time, dating from a given day, act, or event, is prescribed or allowed for any purpose, the time shall, unless the contrary intention appears, be reckoned exclusive of such day or of the day of such act or event.*

This means that when calculating time you do not count the day on which the relevant act or event occurs or occurred unless the Fair Work Act says otherwise.[2]

[1] The *Acts Interpretation Act 1901* (Cth) as in force on 25 June 2009 applies to the Fair Work Act (see Fair Work Act s.40A).
[2] *Re White's Discounts Pty Ltd t/as Everybody's IGA Everyday and Broken Hill Foodland* PR937496 (AIRCFB, Giudice J, Drake SDP, Lewin C, 12 September 2003) at paras 15–16, [(2003) 128 IR 68].

Adjournment (Adjourn)	When a hearing or conference is rescheduled to a later time or day, or postponed for an indefinite period.
AHRC	Australian Human Rights Commission.
AHRC Act	*Australian Human Rights Commission Act 1986*
Aggrieved person	A person who alleges they have been sexually harassed in connection with work by one or more persons.
Appeal	An application made to the Commission for a single Commission Member's decision to be reviewed by a Full Bench. A person must have the permission of the Commission to appeal a decision. See **Full Bench** and the information about Appeals in Part 11.
Applicant	A person who makes an application to the Commission.
Application	The way of starting a case before the Commission. An application can usually only be made using a form prescribed by the *Fair Work Commission Rules 2013* (Cth).
Arbitration	A process for determining disputes. The parties present their evidence and arguments to a Member of the Commission who makes a binding decision. Arbitration generally involves the examination and cross-examination of witnesses.
Balance of probabilities	The standard of proof in civil matters. A fact is proved to be true on the balance of probabilities if its existence is more probable than not.
Certificate	A certificate issued by the Commission under s.527R(3) of the Fair Work Act where a sexual harassment dispute is unresolved and the dispute does not relate solely to an application for orders to stop sexual harassment. A certificate must usually be issued before an applicant can bring court proceedings or can proceed to consent arbitration by the Commission.
Commission	Fair Work Commission. The Commission is also known as the FWC.
Commission Member	A person appointed by the Governor-General as a Member of the Commission. A Member may be a Commissioner, a Deputy President, a Vice President or the President of the Commission.

Conciliation	A confidential and informal way of trying to resolve a dispute without requiring a decision of the Commission. A Commission Member or a staff conciliator assists the parties to identify the issues and explore options to settle the dispute by agreement. The conciliator will not decide the case but may make procedural decisions, explain risks and make suggestions.
Conference/Determinative conference	A proceeding conducted by a Commission Member. A conference must be held in private unless the Commission directs otherwise. A Member conference could be a preliminary conference, where the Member tries to resolve the dispute with the parties, including by conciliation, making a recommendation to the parties or expressing an opinion. Where a matter is not resolved, a Member may hold a **determinative conference** to decide the matter. Determinative conferences are also held in private and are less formal than hearings, but will be recorded and will usually result in the Member issuing a binding decision.
Consent arbitration	Process by which a sexual harassment dispute is determined by the Commission. Where a sexual harassment dispute is not resolved and a certificate is issued, at least one applicant and one respondent can consent to arbitration of their dispute by the Commission At the conclusion of the arbitration process the Commission will usually make a binding decision and may express opinions and/or make orders.
Court	In this Benchbook, a reference to 'Court' generally means the Federal Court or the Federal Circuit and Family Court of Australia.
Decision	A determination made by a single member or Full Bench of the Commission.[3] A decision in relation to a matter before the Commission will generally include the names of the parties and outline the basis for the application, comment on the evidence provided and include the judgment of the Commission in relation to the matter.
Defence Regulation	The *Defence Regulation 2016* (Cth).

[3] The General Manager of the Commission, or a member of staff delegated powers under ss.625 or 671 of the Fair Work Act may also make a decision.

Discontinue	Where an applicant elects to end a matter before the Commission, for example, where their matter has settled Once a matter has been discontinued it cannot be restarted.
Employer	See also **Principal**. An employer is the legal entity that employs an employee to do work for them.
Error of law	An error of law is a common ground for legal review. It occurs when a Member of the Commission has misunderstood or misapplied a principle of law; for example, by applying the wrong criteria, or asking the wrong question.
Evidence	Information provided to the Commission which tends to prove or disprove the existence of a particular belief, fact or proposition relevant to a party's case. This can include oral or written witness statements, other documents and objects. Certain evidence may or may not be accepted by the Commission. The Commission is not bound by the rules of evidence but usually follows them in the interests of procedural fairness.
Explanatory Memorandum	Each Bill that is introduced into Commonwealth Parliament has an 'explanatory memorandum' that explains the objectives of the Bill and how it is intended to operate, and provides a plain language rewriting of each provision of the Bill.
Fair Work Act or **FW Act**	The *Fair Work Act 2009* (Cth) is Commonwealth legislation dealing with workplace relations in Australia.
First instance	A decision (or action) which can be considered the first decision (or action) to be made in relation to a matter.
Full Bench	A Full Bench of the Commission comprises at least 3 Commission Members, one of whom must be a presidential member. Full Benches hear appeals, matters of significant national interest and other matters specifically provided for in the Fair Work Act. A Full Bench can give a collective judgment if all of its members agree, or independent judgments if the members' opinions differ.
FWOLA Regulations	*Fair Work and Other Legislation Amendment Regulations 2023.*
Hearing	A proceeding or arbitration conducted before the Commission which is generally open to the public.
'In connection with work'	See Part 5 of this Benchbook.

Individual	A natural person.
Industrial association	An association of employees or independent contractors, or both, (such as a union) or an association of employers.
Industrial instrument	A generic term for a legally binding industrial document which details terms and conditions of employment, such as an enterprise agreement or modern award.
Jurisdiction	The scope of the Commission's powers to deal with matters. The Commonwealth Parliament determines the extent of the Commission's powers, including the types of matters it can deal with and what it can and cannot do.
Lodge	The act of delivering an application or other document to the Commission.
Matter	Cases at the Commission are referred to as matters.
Mediation	An informal way of resolving a dispute without requiring a decision of the Commission. A Commission Member or a mediator assists the parties to identify the issues and explore options to resolve the dispute by agreement. Mediation is a voluntary, private and confidential process.
Member	See **Commission Member**
Mention	A short, recorded hearing before a Commission Member, usually to set a timetable or discuss procedural matters with parties.
Notice of Listing	A formal notice sent by the Commission setting out the time, date and location for a hearing, conference or mention. A Notice of Listing can also include specific directions or requirements that a party must follow.
Notifying parties	Two or more parties that have jointly notified the Commission that they agree to the Commission arbitrating their sexual harassment dispute.
Order	A formal direction of the Commission which gives effect to a decision and is legally enforceable.
Party	A person or organisation involved in a matter before the Commission (other than a member of Commission staff or a Commission Member).
Pecuniary penalty	An order to pay a sum of money which is made by a Court.

Person	A ***person*** is recognised by the law as having rights and obligations. There are 2 categories of person: • a natural person (a human being, such as an aggrieved person), and • an artificial person (an entity to which the law attributes a legal personality – such as a company registered under Corporations law).[4]
Person conducting a business or undertaking or **PCBU**	The legal entity running the business or undertaking, including incorporated entities, sole traders, partners of a partnership and certain senior 'officers' of an unincorporated association.
Principal	See also **Employer** For the purposes of the vicarious liability provisions in s.527E, a ***principal*** is a legal entity that employs or engages a person who has allegedly engaged in sexual harassment in connection with work. In this Benchbook, the expression 'employer/principal' is used more generally to refer to the employer or principal of an aggrieved person or a respondent (a person who has allegedly engaged in sexual harassment).
Procedural fairness	Procedural fairness requires that a person whose interests will be affected by a decision receives a fair and reasonable opportunity to be heard before the decision is made. Procedural fairness is concerned with the decision-making process followed or steps taken by a decision-maker rather than the actual decision itself. The terms 'procedural fairness' and 'natural justice' have similar meanings and can be used interchangeably.
Quash	To set aside or revoke a decision or order so that it has no legal effect.

[4]LexisNexis Australia, *Encyclopaedic Australian Legal Dictionary* (online at 21 July 2021) 'legal person' (def).

Representative	A person who acts on a party's behalf. This could be a lawyer, a paid agent, an employee or employer organisation or someone else. Generally, a lawyer or paid agent can only represent a party in a conference or hearing before the Commission with permission of the Commission. However, there are some exceptions to this – see Part 8 of this Benchbook.
Respect@Work Report	AHRC, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* report (2020).
Respondent	A person who has allegedly engaged in sexual harassment and/or their employer/principal. In this Benchbook, the term 'respondent' is often used in relation to a person who has allegedly engaged in sexual harassment, and employers/principals are discussed separately.
Revised Explanatory Memorandum	Revised Explanatory Memorandum for the Secure Jobs, Better Pay Bill.
Secure Jobs, Better Pay Act	*Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022.*
Secure Jobs, Better Pay Bill	*Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022.*
Service (Serve)	Service of a document means delivering the document to another party or their representative, usually within a specified period. Documents can be served in a number of ways. These are specified in Parts 7 and 8 of the *Fair Work Commission Rules 2013*.
Serving documents	See service.
Settlement	An agreed resolution of a dispute. Generally, a negotiated outcome which all parties agree to be bound by.
Sex Discrimination Act	The *Sex Discrimination Act 1984* (Cth) is Commonwealth legislation dealing with sex discrimination and sexual harassment in Australia.
Sexually harass/sexual harassment	See Fair Work Act s.12 and Sex Discrimination Act s.28A.
Sexual harassment court application	An application to a court under Division 2 of Part 4-1 of the Fair Work Act for orders in relation to a contravention of the prohibition on sexual harassment.

Sexual harassment FWC application	An application made under s.527F for the Commission to deal with a sexual harassment dispute.
WHS	Work health and safety.
WHS Act	The *Work Health and Safety Act 2011* (Cth) is Commonwealth legislation dealing with workplace health and safety.
Witness	A person who gives evidence to the Commission in a matter in relation to something they saw, heard or experienced. An applicant is usually a witness in their own case. A witness is required to take an oath or affirmation before giving evidence at a formal hearing. The witness may be asked questions by the party that called them and may be cross-examined by the opposing party to test their evidence.
Worker	An individual who performs work in any capacity, including as an employee, a contractor, a subcontractor, an outworker, an apprentice, a trainee, a student gaining work experience or a volunteer. A worker has the same meaning as in the WHS Act. See also Definition of 'Worker' in Part 4 of this Benchbook.

Part 2 – Overview of this Benchbook

This Benchbook explains the sexual harassment laws in Part 3-5A of the Fair Work Act and the process for making a sexual harassment dispute application, **where the alleged sexual harassment occurs or commences on or after 6 March 2023.**

This Benchbook has been arranged to reflect the process users would follow when applying for the Commission to deal with a sexual harassment dispute under Part 3-5A. Issues that may arise at a certain point during the process will be addressed as they come up. As a result, this Benchbook may not deal with issues in the same order as the Fair Work Act.

If the alleged sexual harassment at work **occurred, or was part of a course of conduct that commenced, before 6 March 2023**, please refer to the Orders to stop sexual harassment: Transitional arrangements Benchbook instead.

See also the Orders to stop bullying Benchbook (also known as the Anti-bullying Benchbook), for information on the process users would follow when applying for an order to stop bullying at work.

Overview of the Commission's sexual harassment jurisdiction

Persons have been able to apply to the Commission for orders to stop sexual harassment at work since 11 November 2021.[5]

The way the Commission deals with workplace sexual harassment has changed from 6 March 2023 as a result of amendments to the Fair Work Act made by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*.

Part 3-5A of the Fair Work Act prohibits sexual harassment in connection with work, where the sexual harassment occurred or commenced on or after 6 March 2023.[6] This implements recommendation 28 of the *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* report (Respect@Work Report).

The prohibition on sexual harassment applies broadly to workers, prospective workers and persons conducting businesses or undertakings. Principals may, in some circumstances, also be vicariously

[5] From 11 November 2021, Part 6-4B of the Fair Work Act provided for persons to apply to the Commission for orders to stop sexual harassment at work, to stop bullying at work, or both. Since 6 March 2023, Part 6-4B no longer deals with sexual harassment at work (except as a transitional provision).
[6] Fair Work Act, s.527D(1). Where alleged sexual harassment occurred or commenced before 6 March 2023, see the Orders to stop sexual harassment: Transitional arrangements Benchbook.

liable for acts of their employees or agents and the Commonwealth may be vicariously liable for the acts of defence members.[7]

Under Part 3-5A, an applicant (an aggrieved person or an industrial association entitled to represent the industrial interests of an aggrieved person) can ask the Commission to deal with the dispute by:

- making an order to stop sexual harassment in connection with work, or
- dealing with the dispute (other than by arbitration), or
- both making an order to stop sexual harassment **and** otherwise dealing with the dispute.

An application for a stop sexual harassment order is directed toward preventing future harassment. Where the Commission is satisfied that unlawful sexual harassment has occurred and there is a risk of the person continuing to be sexually harassed in connection with work, the Commission can make any preventative order considered appropriate (other than the payment of money).

An application for the Commission to deal with the dispute (other than by arbitration) is directed to both past and future harm caused by sexual harassment. The Commission can deal with the dispute (including by conciliation, mediation, making a recommendation or expressing an opinion). If the dispute is not resolved, the dispute may proceed to consent arbitration in the Commission or to court, by a sexual harassment court application.

Where alleged sexual harassment occurred or commenced before 6 March 2023, the stop sexual harassment provisions in Part 6-4B of the Fair Work Act (as it was just before 6 March 2023) continue to apply. Under these transitional arrangements, workers who believe they were sexually harassed at work before 6 March 2023 can apply for orders to stop sexual harassment under Part 6-4B (as it was just before 6 March 2023). Please refer to the Orders to stop sexual harassment: Transitional arrangements Benchbook.

From 6 March 2023, applications for orders to stop bullying are made separately to an application to stop sexual harassment. The Commission deals with bullying at work and sexual harassment disputes in different ways. For further information about applications for orders to stop bullying at work, please refer to the Orders to stop bullying Benchbook (also known as the Anti-bullying Benchbook).

Who can apply for the Commission to deal with a sexual harassment dispute?

An aggrieved person can apply for the Commission to deal with a sexual harassment dispute if:

[7] Revised Explanatory Memorandum, [12] and [419]. See Part 4 regarding the vicarious liability of employers and principals.

- they are a worker[8] in a business or undertaking; seeking to become a worker in a particular business or undertaking; or a person conducting a business or undertaking,[9] and
- they allege they have been sexually harassed in connection with work by one or more persons.[10]

An industrial association that is entitled to represent the industrial interests of an aggrieved person can also apply for the Commission to deal with a sexual harassment dispute.

Related information

- Part 4 – Who is covered by the sexual harassment laws?

When does sexual harassment in connection with work occur?

See Fair Work Act ss.527D(1) and 12 and Sex Discrimination Act s.28A

Part 3-5A of the Fair Work Act applies to sexual harassment 'in connection with' work ie to sexual harassment that occurs 'in connection with' the person harassed being a worker, a prospective worker or a person conducting a business or undertaking. This is a broader concept than sexual harassment 'at work' (see Part 6-4B of the Fair Work Act as it was immediately before 6 March 2023).

'In connection with work' simply means in some way related to or associated with work.[11] For example, sexual harassment in connection with work could occur where:

- a worker is sexually harassed by another worker at their workplace, or
- a business owner is sexually harassed by another person at their workplace (such as by a customer, client, supplier, or a visitor to the workplace), or
- a person applying for work is sexually harassed in a job interview.

Related information

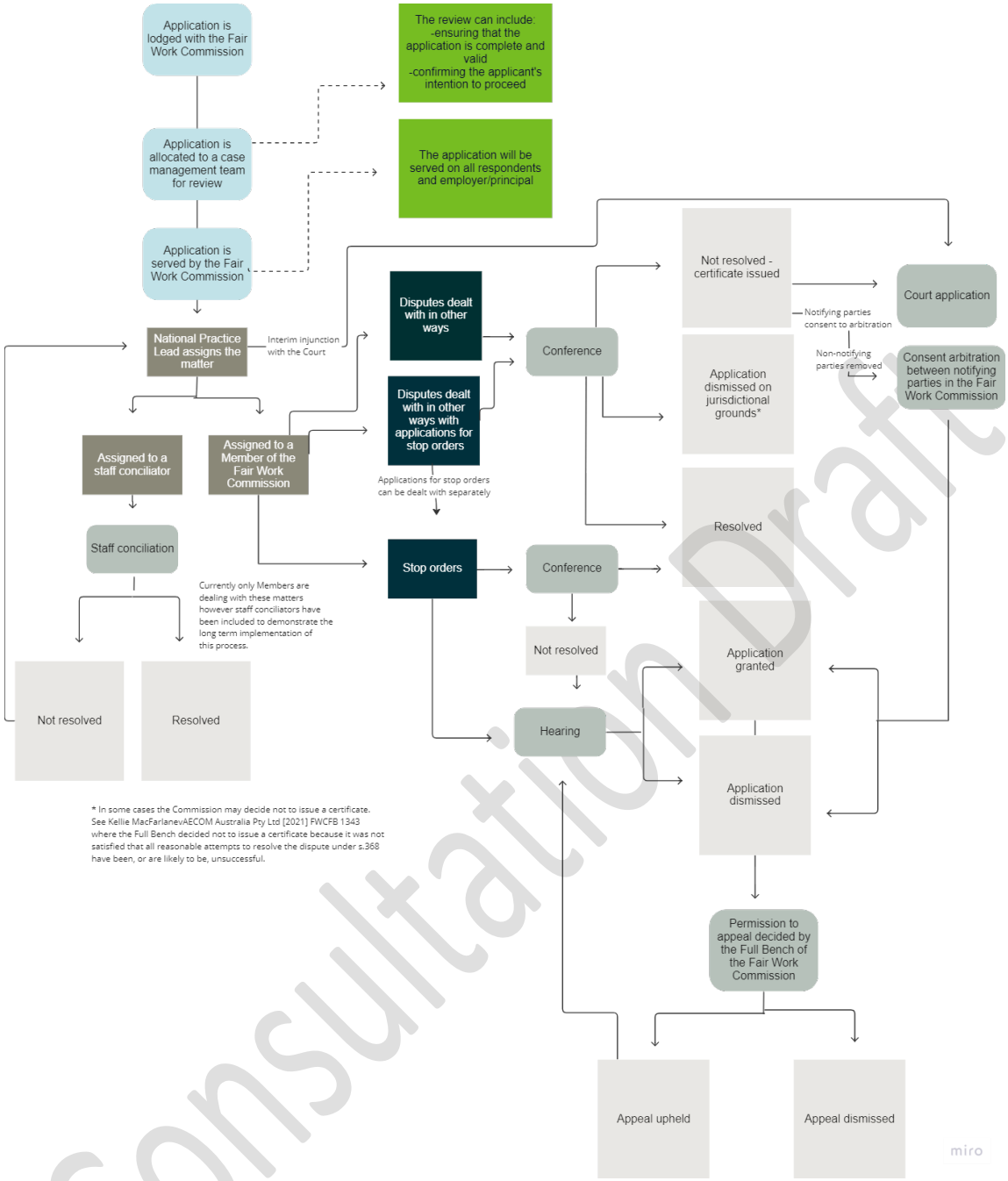
- Part 3 –What is sexual harassment?

[8] As defined in the *Work Health and Safety Act 2011* (Cth); see Fair Work Act s.527D(2).
[9] Fair Work Act s.527F (subject to some limitations in relation to the Defence Force, Australia's security agencies and the Australian Federal Police).
[10] Fair Work Act s.527F(1).
[11] See *South Pacific Resort Hotels Pty Ltd v Trainor* [2005] FCAFC 130 at [70], where Kiefel J said (in the context of the vicarious liability provision in s.106(1) of the Sex Discrimination Act) that '[i]t is consonant with its purpose to read the words "in connection with the employment of the employee" as requiring that the unlawful acts in question be in some way related to or associated with the employment.'

- Part 4 – Who is covered by the sexual harassment laws to stop sexual harassment at work?
- Part 5 – When is a worker sexually harassed in connection with work?

Process for dealing with sexual harassment disputes under Part 3-5A of the Fair Work Act

The diagram below sets out the Commission's usual process for dealing with applications for the Commission to deal with sexual harassment disputes:



Other avenues for dealing with sexual harassment

In addition to the Commission's sexual harassment disputes jurisdiction, there are other options for people who want to make a complaint about workplace sexual harassment.

Part 3-5A of the Fair Work Act preserves the concurrent operation of state and territory laws dealing with sexual harassment, including anti-discrimination laws, occupational health and safety laws and criminal laws.[12]

Complaints may be made under federal, state and territory laws dealing with human rights, anti-discrimination and equal opportunity. For example, the Sex Discrimination Act prohibits sexual harassment in the workplace and in other areas of public life, and each state and territory also has its own anti-discrimination legislation which prohibits sexual harassment in the workplace and in other areas of public life.[13]

The Australian Human Rights Commission (AHRC) and anti-discrimination bodies in the states and territories can deal with complaints about sexual harassment (depending on matters including where the conduct occurred). To find out more about the requirements for making a complaint to those bodies, how to do so and the remedies available, visit:

- the AHRC website, which includes information about sexual harassment
- the human rights, anti-discrimination or equal opportunity commission in your state or territory:
    - ACT Human Rights Commission
    - Anti-Discrimination NSW
    - NT Anti-Discrimination Commission
    - Queensland Human Rights Commission
    - Office of the Commissioner for Equal Opportunity SA
    - Equal Opportunity Tasmania
    - Victorian Equal Opportunity and Human Rights Commission
    - Equal Opportunity Commission [WA]

The Fair Work Act generally prevents a person from pursuing multiple remedies for sexual harassment under both the Fair Work Act and an anti-discrimination law or under the *Australian Human Rights Commission Act 1986* (AHRC Act).[14] The Revised Explanatory Memorandum for *the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (Revised Explanatory Memorandum) explains:

> 'For example, a person could not seek a remedy for a contravention of the prohibition on sexual harassment in connection with work under both the [Fair Work] Act and the [Sex Discrimination] Act.'[15]

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[12] Fair Work Act, s.527CA.

[13] *Anti-Discrimination Act 1977* (NSW), *Anti-Discrimination Act 1992* (NT), *Anti-Discrimination Act 1991* (Qld), *Anti-Discrimination Act 1998* (Tas), *Discrimination Act 1991* (ACT), *Equal Opportunity Act 1984* (SA), *Equal Opportunity Act 2010* (Vic), *Equal Opportunity Act 1984* (WA).

[14] Fair Work Act, s.743B.

[15] Revised Explanatory Memorandum at [540]. While a person who had made an application for a stop sexual harassment order would not be prevented from pursuing a remedy in relation to the conduct under an anti-discrimination law or under the AHRC Act, if the person later made an application to the Commission seeking a

Workplace sexual harassment may also be dealt with under work health and safety (WHS) laws. There is no limitation on an applicant making or continuing an application or proceeding under a WHS law in addition to an application in the Commission to deal with a sexual harassment dispute that includes an application for a stop sexual harassment order.[16]

Since 2012, the Commonwealth and most states have adopted the national model WHS laws. As a result, the WHS legislation in most jurisdictions is very similar.

Under the model WHS laws, businesses and organisations must provide a safe workplace, including by reducing the risk of exposure of people in their workplace to health and safety risks. Sexual harassment is a known health and safety risk. To find out more, visit:

- Fair Work Ombudsman for advice on sexual harassment in the workplace
- Safe Work Australia, the statutory body that develops national WHS policy
- Federal, state and territory work health and safety authorities:
    - Comcare
    - WorkSafe ACT
    - SafeWork NSW
    - NT WorkSafe
    - Workplace Health and Safety Queensland
    - SafeWork SA
    - WorkSafe Tasmania
    - WorkSafe Victoria
    - WorkSafe WA

Workplace sexual harassment that involves criminal behaviour may be the subject of a complaint to, and investigation by, the police.

Finally, depending on the circumstances, there may be other options for the Commission to deal with sexual harassment. These include applications under the general protections, unfair dismissal and/or unlawful termination provisions of the Act.

Related information

- General Protections Benchbook
- Unfair Dismissals Benchbook
- Unlawful Termination

remedy in relation to the sexual harassment, they would be prevented from also seeking a remedy under any such law: see Revised Explanatory Memorandum at [541].

[16] Fair Work Act s.527L.

Where to get legal help

Workplace Advice Service

The Workplace Advice Service is a free legal assistance program facilitated by the Commission for eligible employees and employers who have a concern or enquiry regarding dismissal, general protections, workplace bullying or sexual harassment.

The Commission's role is to connect eligible persons with lawyers who may be able to help them. These lawyers work at law firms and other legal organisations that are completely independent of the Commission. The eligibility quiz on the Commission's website helps employers and employees to find out if they are eligible for up to 1 hour of free legal advice through the service.

Other legal help

You can find a community legal centre in your area by searching the Community Legal Centres website. The 'where to find legal help' page of the Commission's website includes contact details for some of the main community legal centres in each state and territory who may be able to assist with free legal advice or other advisory services.

Law Institutes and law societies in each state or territory may be able to refer a party to a private solicitor who specialises in workplace law.

Unions and employer organisations may also be able to provide advice and assistance for their members.

Part 3 –What is sexual harassment?

The prohibition on workplace sexual harassment

See Fair Work Act ss.527D

Section 527D(1) of Part 3-5A of the Fair Work Act prohibits sexual harassment in connection with work.

A person (the first person) must not **sexually harass** another person (the second person) who is:

- a worker in a business or undertaking, or
- seeking to become a worker in a particular business or undertaking, or
- conducting a business or undertaking

if the harassment occurs in connection with the second person being a worker or seeking to become a worker in a particular business or undertaking, or being a person conducting a business or undertaking.

This is a civil remedy provision.

The prohibition applies where the sexual harassment occurred, or is part of a course of conduct that commenced, **on or after 6 March 2023**.

Definition of sexual harassment

See Fair Work Act ss.527D and 12 and Sex Discrimination Act s.28A

A person sexually harasses another person if:

- they make an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
- they engage in other unwelcome conduct of a sexual nature in relation to the person harassed;

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.[17]

The circumstances to be taken into account include, but are not limited to, the following:

- the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;

[17] Fair Work Act s.12 and Sex Discrimination Act s.28A(1).

- the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;
- any disability of the person harassed;
- any other relevant circumstances.[18]

'Conduct of a sexual nature', for the purposes of the definition of sexual harassment, includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.[19]

Examples of sexual harassment

Sexual harassment can be a single incident[20] or something that happens more than once.

Examples of conduct of which may constitute a sexual advance, a request for sexual favours or other conduct of a sexual nature include:

- sexually suggestive comments or jokes;
- intrusive questions about private life or physical appearance;
- unwanted invitations to go on dates, or requests or pressure for sex;
- unwanted written declarations of love;
- sending sexually explicit or suggestive pictures or gifts to a worker, or displaying sexually explicit or suggestive pictures, posters, screensavers or objects in the work environment;
- intimidating or threatening behaviours such as inappropriate staring or leering, sexual gestures, or following, watching or loitering;
- inappropriate physical contact, such as deliberately brushing up against a person, or unwelcome touching, hugging, cornering or kissing;
- behaviours that may be offences under criminal laws, such as actual or attempted rape or sexual assault, indecent exposure or stalking;
- sexually explicit or suggestive emails, SMS or social media (including the use of emojis with sexual connotations), indecent phone calls, circulating pornography or other sexually graphic

[18] Fair Work Act s.12 and Sex Discrimination Act s.28A(1A).
[19] Fair Work Act s.12 and Sex Discrimination Act s.28A(2).
[20] *Hall v Sheiban* (1989) 20 FCR 217 (15 March 1989).

imagery, unwelcome sexual advances online, or sharing or threatening to share intimate images or film without consent.[21]

Effects of sexual harassment

Sexual harassment can have significant negative consequences for an individual's health and wellbeing.[22] These can include:

- financial loss
- impacts on career progression, such as diminished productivity and performance, negative career expectations, reduced job satisfaction, increased absences, and job loss
- strained relationships
- stress and psychological distress
- symptoms of or development of mental health conditions, such as anxiety disorders, depressive disorders, post-traumatic stress disorder, and adjustment disorders
- symptoms of or development of physical health conditions, such as headaches, hair loss, weight fluctuation, sleep deprivation and sleep disturbances, gastric issues, respiratory issues, exhaustion, nausea, musculoskeletal pain and muscle tension. [23]

Sexual harassment can also have detrimental consequences for the workplace, such as low morale, increased risk of injury and/or absenteeism, and reputational risk.

To apply to the Commission to deal with a sexual harassment dispute, an applicant does not need to show that the sexual harassment poses a risk to their health and safety. Sexual harassment is a known safety risk. This is different to the Commission's power to make orders to stop bullying at work, where an applicant must demonstrate that there is a risk to health and safety as a result of the bullying behaviour.[24]

Related information

Part 5 – When is a worker sexually harassed in connection with work?

[21] See, eg AHRC, *Respect@Work* report, pp 17-18. Note also, in respect of unwelcomed sexual intercourse, *Aldridge v Booth* [1988] FCA 170 at paras. 63, 72 and 73; *Ewin v Vergara (No 3)* [2013] FCA 1311 at paras. 25, 444 and 465 (not disturbed on appeal: *Vergara v Ewin* [2014] FCAFC 100).
[22] AHRC, *Respect@Work* report, at p. 299.
[23] ibid.
[24] *Re G.C.* [2014] FWC 6988 (Hampton C, 9 December 2014) at para. 50.

Part 4 – Who is covered by the sexual harassment laws?

See Fair Work Act ss.527D and 527G

Who is eligible to apply?

The provisions in Part 3-5A rely on the external affairs power in the *Australian Constitution*. They are intended to protect everyone in Australian workplaces from sexual harassment, including workers, prospective workers in a business or undertaking and conducting a business or undertaking. There are some limitations in relation to the Defence Force, Australian security agencies and the Australian Federal Police.[25]

An aggrieved person can apply for the Commission to deal with a sexual harassment dispute if they are:

- a worker in a business or undertaking, or
- seeking to become a worker in a particular business or undertaking, or
- conducting a business or undertaking, and

the harassment occurs in connection with them being a worker or seeking to become a worker in a particular business or undertaking, or being a person conducting a business or undertaking.[26]

For the purposes of Part 3-5A:

- 'worker' has the same meaning as in the *Work Health and Safety Act 2011*,[27] and
- a person is 'a worker in a business or undertaking' if the person carries out work for a person conducting a business or undertaking.[28]

Related information

- Who is a 'worker' in a business or undertaking?

The Commission may decide not to deal with a sexual harassment dispute if it is made **more than 24 months** (2 years) after the last time sexual harassment allegedly occurred. If the Commission decides not to deal with an application for this reason, the application will be dismissed.[29]

[25] Revised Explanatory Memorandum at [424].
[26] Fair Work Act, s.527D(1).
[27] Fair Work Act, s.527D(2).
[28] Fair Work Act, s.527D(3).
[29] Fair Work Act, s.527G.

Who is a 'worker' in a business or undertaking?

Contains issues that may form the basis of a jurisdictional issue

Most workers and prospective workers (persons seeking to become a worker in a particular business or undertaking) can apply for the Commission to deal with a sexual harassment dispute. This includes business owners who work in the business.

Unlike the Commission's stop bullying jurisdiction in Part 6-4B of the Fair Work Act, the Commission's sexual harassment disputes jurisdiction is not confined to workers at work in a constitutionally-covered business.[30] This means that the laws apply to a broader range of workers, as well as prospective workers.[31]

Businesses are usually enterprises operated with the aim of making a profit, and 'have a degree of organisation, system and continuity'.[32]

Undertakings usually have 'elements of organisation, systems and possibly continuity, but are usually not profit-making or commercial in nature'.[33]

The *Work Health and Safety Act 2011* (Cth) (WHS Act) provides that a worker is a person who carries out work in any capacity for a person conducting a business or undertaking, including any of the following:[34]

[30] A 'constitutionally-covered business' is a constitutional corporation (a foreign corporation, or a trading or financial corporation formed within the limits of the Commonwealth); the Commonwealth; a Commonwealth authority; a body corporate incorporated in a Territory, or a business or undertaking that is conducted principally in a Territory or Commonwealth place (see s.789FD(3), in relation to the stop bullying jurisdiction). This limitation also applies to the Commission's stop sexual harassment jurisdiction (where the alleged sexual harassment occurred or commenced before 6 March 2023), under transitional arrangements in the Secure Jobs, Better Pay Act.

[31] For example, the Commission has held that local government entities conduct a business or undertaking (as irrespective of whether a particular local government entity has a profit-making objective, it has elements of organisation, systems and continuity), but has found in some stop bullying cases that a particular entity was not a constitutionally-covered business: see *Applications by Mr Martin Cooper and Mr Lancelot Bagster* [2017] FWC 5974 (Anderson DP, 15 November 2017) at [45], cf *Matina Bastakos* [2018] FWC 7650 (McKinnon C, 18 December 2018).
The Commission has also been prepared to assume that a State public school, whilst not a constitutionally-covered business for the purposes of the stop bullying jurisdiction, is a business or undertaking within the meaning of the WHS Act: see *S.W.* [2014] FWC 3288 (Hampton C, 2 June 2014), *A.B.* [2014] FWC 6723 (Hampton C, 30 September 2014) and *Shoshana Amzalak* [2016] FWC 6590 (Hampton C, 27 September 2016).

[32] SafeWork Australia – *Interpretive Guidelines to model WHS Act* – The meaning of 'person conducting a business or undertaking', at p. 1.

[33] ibid.

[34] WHS Act s.7(1).

- an employee[35]
- a contractor or subcontractor[36]
- an employee of a contractor or subcontractor[37]
- an employee of a labour hire company who has been assigned to work in the person's business or undertaking
- an outworker[38]
- an apprentice or trainee
- a student gaining work experience
- a volunteer – except a person volunteering with a wholly 'volunteer association' with no employees (whether incorporated or not)[39]
- a business owner who works in the business.[40]

A person is also a 'worker' if they are a member of the Australian Federal Police (including the Commissioner and Deputy Commissioner) or a Commonwealth statutory office holder.[41]

If a person performs work but does not do so for a person conducting a business or undertaking, the person is not a 'worker' for the purposes of the workplace sexual harassment laws.

The following case examples are drawn from the Commission's stop bullying case law. The definition of 'worker' in s.789FC(2) of Part 6-4B of the Fair Work Act also applies the definition in the WHS Act.[42]

[35] For a discussion of the difference between employees and contractors, see, for example, *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1; *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2; *Murphy v Chapple* [2022] FCAFC 165; *Chambers and O'Brien v Broadway Homes Pty Ltd* [2022] FWCFB 129 at [74]; *Deliveroo Australia P/L v Franco* [2022] FWCFB 156; 317 IR 253.[36] ibid.[37] ibid.

[36] ibid.[37] ibid.

[37] ibid.

[38] Fair Work Act s.12.

[39] WHS Act ss.5(7) and 5(8) and Note to Fair Work Act s.527D(2). See also *Workplace Health and Safety Regulations 2011* (Cth), reg 7(3). For a discussion on the definition of worker regarding volunteers, see *Bibawi v Stepping Stone Clubhouse Inc t/a Stepping Stone & Others* [2019 FWCFB 1314 (Hatcher VP, Sams DP, Hampton C, 13 March 2019) at paras 17–21. For factual circumstances involving volunteers from the stop bullying case law, see *Re Cowie* [2016] FWC 7886 (Hampton C, 21 November 2016) at paras. 1, 8 and 9; *Ryan v RSL Queensland* [2018] FWC 761 (Asbury DP, 6 February 2018) at para. 6; *Re Legge* [2019] FWC 5874 (Hampton C, 4 September 2019); *Collins v Team Rubicon Australia* [2020] FWC 2412 (Clancy DP, 7 May 2020) at para. 13.

[40] WHS Act s.7(3).

[41] WHS Act s.7(2).

[42] See also *Re Manderson* [2015] FWC 8231 (Hampton C, 7 December 2015). The applicant was both a director and a worker of a business that provided caretaking services at a holiday resort that also had long term property owners. The Commission found that as the applicant was an employee of his own business which also employed other people, he was engaged by a PCBU and was therefore a 'worker' for the purposes of the WHS Act and the Fair Work Act.

Summary of case examples

Examples of someone who is a Worker*	Examples of someone who is NOT a Worker*
Chairperson of statutory corporation	Carer – recipient of social security payments
Participant in a government-funded work program	

*Each case depends on its own facts and circumstances. Outcomes for similar work may be different because of the context in which the work is performed.

Case example: **Recipient of carer's payment – NOT a worker**

Balthazaar v Department of Human Services (Commonwealth) [2014] FWC 2076 (Watson VP, 2 April 2014).

Facts

An application was made for an order against the Commonwealth Department of Human Services (Department) to stop bullying. The applicant received a carer's payment and submitted that, because of those payments, he was an employee and/or outworker and/or volunteer who carried out work for the Department.

Outcome

The Commission found that a person in receipt of carer payments was not a person performing work of the Department and there was no sound basis to classify the relationship as 'employer and employee', 'principal and contractor' or one involving a volunteer. The applicant did not meet the definition of 'worker' in the Fair Work Act.

Relevance

The Commission found that, while providing constant care constitutes 'work' in the broad sense, the question was whether the applicant carried out work **for** the Department. In receiving a carer payment under s.198 of the *Social Security Act 1991* (Cth) (SS Act), a carer is not carrying out work for the Department. The applicant's work as a carer was carried out as part of his parental responsibilities for the benefit of his child. The Commission concluded that payments arising from the SS Act are social security payments aimed at assisting people in the applicant's situation and the receivers of their care.

Case example: **Chairperson of Board of statutory corporation - a worker**

Application by Trevor Yawiriki Adamson [2017] FWC 1976 (Hampton C, 19 May 2017).

Facts

Mr Adamson was the Chairperson of the Executive Board of the Anangu Pitjantjatjara Yankunytjatjara Inc (APY Inc). He alleged that he experienced bullying behaviour from the General Manager and the Deputy Chairperson of the Executive Board.

Outcome

The Commissioner found that Mr Adamson as Chairperson had a specific role under the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) and was paid significant remuneration for this work. This remuneration was well beyond the sitting fees for general members of the Executive Board and exceeded cost reimbursement. This fact, while not decisive, was more consistent with the notion that work was being undertaken. The Commissioner found that Mr Adamson was a worker for the purposes of the WHS Act and the Fair Work Act.

Relevance

When determining whether an applicant is a worker, it is necessary to examine if the applicant meets the definition of a worker for the purpose of the Fair Work Act and/or the WHS Act. In general terms the WHS Act provides that a worker is a person who carries out work in any capacity for a person conducting a business or undertaking. In this matter, the Commissioner found that the Mr Adamson's activities in attending to his duties as Chairperson amounted to the carrying out of work for APY Inc.

Case example: **Volunteer participant in government-funded program – a worker**

Bibawi v Stepping Stone Clubhouse Inc t/a Stepping Stone & Others [2019] FWCFB 1314
(Hatcher VP, Sams DP, Hampton C, 13 March 2019).
Decision at first instance [2018] FWC 7471 (Booth C, 14 December 2018).

Facts

Stepping Stone is a community organisation which provides services and support for people living with mental illness. It operates a 'clubhouse' in which persons suffering from mental illness may voluntarily participate in order to engage in social, working, educational and recreational activity as well as to access support services. Mr Bibawi participated in a number of programs offered by Stepping Stone since he became a participant in 2012. From 2012 he participated in a program known as the 'Work-ordered Day'.

As a result of his participation in the Work-ordered Day program, Mr Bibawi became eligible for a Mobility Allowance. This is a benefit paid by Centrelink to assist persons with a disability, illness or injury to defray travel costs for work, study or looking for work. In order to become eligible, the person must undertake paid work, self-employment, voluntary work, vocational training, independent living or life skills training or any combination of these for at least 32 hours every 4 weeks on a continuing basis. Stepping Stone assisted Mr Bibawi to obtain the allowance in 2015.

Mr Bibawi made an application for an order to stop bullying against Stepping Stone alleging that a number of employees of the service had engaged in bullying behaviour such as continuous intimidation, aggressive behaviour, threatening and stalking.

Outcome

At first instance the Commission dismissed Mr Bibawi's application for an order to stop bullying. An application to stop bullying can only be made by a 'worker' defined in s.789FC of the Fair Work Act as having the same meaning as s.7 of the WHS Act. The Commission found that Mr Bibawi did not satisfy the definition and that it had no jurisdiction to determine the application. It was not in dispute that Stepping Stone is not a volunteer association as it employs a number of mental health support workers.

On appeal Mr Bibawi argued he undertook work 'in any capacity for' Stepping Stone, consistent with the WHS Act definition. The Full Bench found Mr Bibawi satisfied the definition of 'worker' and could make an application for an order to stop bullying under s.789FC.

Relevance

The Full Bench found that even though the work performed by Mr Bibawi was done as part of a program funded by the Government, s.7(1) of the WHS Act did not exclude Mr Bibawi from the definition of 'worker' for this reason. Mr Bibawi's performance of the work was intended to improve his well-being and mental health, but that did not mean it was not work. The definition does not require that work be performed for a particular purpose and, in respect of volunteer and unpaid work in particular, there may be a wide range of motivations and objectives for the work being done.

Limits on the application of Part 3-5A

Defence Force, Australia's security agencies and the Australian Federal Police

Nothing in the stop sexual harassment order provisions in Part 3-5A requires or permits a person to take, or to refrain from taking, any action if this would be, or could reasonably be expected to be, prejudicial to Australia's defence, national security, or existing or future covert or international operations of the Australian Federal Police (AFP).[43]

Section 527F(3) of the Fair Work Act prevents a defence member, as defined in the *Defence Force Discipline Act 1982*, from applying for a stop sexual harassment order in relation to sexual harassment that occurred while they were a defence member, except as provided by the regulations (see below).

The Revised Explanatory Memorandum explains:

> '470. This means stop sexual harassment orders are not available to:
>
> - members of the Permanent Navy, the Regular Army or the Permanent Air Force; and
> - members of the Reserves who are sexually harassed while rendering continuous full-time service, or while on duty or in uniform, except to the extent provided by the FW Regulations.'

The *Fair Work and Other Legislation Amendment Regulations 2023* (FWOLA Regulations)[44] amend the Fair Work Regulations to specify the circumstances in which a defence member[45] is not prohibited from applying to the Commission for a stop sexual harassment order.[46] These amendments commenced on 21 March 2023.

A defence member is not prevented from bringing an application under s.527F where one or more of the respondents (ie the persons who have allegedly engaged in sexual harassment) was not a defence member at the time the harassment allegedly occurred, or is not a defence member at the time the application is made. [47] The Explanatory Memorandum for the FWOLA Regulations states that '[persons who are defence members could also be named as respondents to an application where they engaged in the same conduct as a non-defence member who is named as a respondent to an application.'[48]

[43] Fair Work Act, s.527M.

[44] Fair Work and Other Legislation Amendment Regulations 2023.

[45] As defined in the *Defence Force Discipline Act 1982* – see Fair Work Regulations, reg.3.29A(4). Section 3 of the *Defence Force Discipline Act 1982* defines 'defence member' as a member of the Permanent Navy, the Regular Army or the Permanent Air Force; or a member of the Reserves who is rendering continuous full-time service or is on duty or in uniform.

[46] Fair Work Regulations, reg.3.29A.

[47] Fair Work Regulations, reg.3.29A(2).

[48] Explanatory Memorandum for the FWOLA Regulations, p.4.

The amendments also specify circumstances in which a defence member is permitted to make an application under s.527F where a respondent was a defence member at the time the alleged sexual harassment occurred.[49]

An aggrieved person may make an application where they have first applied under s.37G of the *Defence Regulation 2016* (Defence Regulation) for review of a decision made in response to an application for a stop sexual harassment direction under s.37C of those regulations, and either a stop sexual harassment direction was not issued or a direction was issued but the applicant is dissatisfied with the direction.[50] The Explanatory Memorandum for the FWOLA Regulations states that '[t]his provision is intended to enable defence members to access the FWC to obtain an SSHO, but only where the applicant has exhausted the internal dispute resolution process to stop sexual harassment in the workplace available to them under the *Defence Regulation 2016*.'[51]

An aggrieved person may also make an application where:

- they are not eligible to apply to use the process under Part 6A of the Defence Regulation to resolve the dispute (for example, because they are undertaking a placement in a workplace that is not a Defence workplace),[52] or
- the process under Part 6A of the Defence Regulation is available but is not suitable because a respondent who allegedly engaged in sexual harassment would be involved in conducting the process and there is no other person who is authorised or empowered to do so.[53]

The *Defence Amendment (Stop Sexual Harassment Directions) Regulations 2023* (the DASSHD Regulations)[54] amend the Defence Regulation to cover situations not covered by the FWOLA Regulations. These amendments commenced on 21 March 2023.

The DASSHD Regulations insert a new Part 6A in the Defence Regulation, to provide for a process for directions to stop sexual harassment against certain defence members and other persons, which may be enforced under internal Defence and Australian Public Service (APS) processes. The amendments provide for specified persons to apply to an authorised application officer for a stop sexual harassment direction, where:

- a defence member alleges sexual harassment by another defence member
- a defence member alleges sexual harassment in a Defence workplace, or
- a person alleges sexual harassment and is excluded from applying to the Commission by virtue of a Chief of the Defence Force declaration in relation to their participation in a specified activity.[55]

[49] Fair Work Regulations, reg.3.29A(3).
[50] Fair Work Regulations, reg.3.29A(3)(a).
[51] Explanatory Memorandum for the FWOLA Regulations, p.4.
[52] Fair Work Regulations, reg.3.29A(3)(b)
[53] Fair Work Regulations, reg.3.29A(3)(c).
[54] Defence Amendment (Stop Sexual Harassment Directions) Regulations 2023 (legislation.gov.au).
[55] Defence Regulation, reg.37C, and see the Explanatory Statement for the *Defence Amendment (Stop Sexual Harassment Directions) Regulations 2023* at p.2 'Impact and Effect'.

Section 527J(4) of the Fair Work Act allows the Commission to dismiss an application, to the extent it consists of an application for a stop sexual harassment order, if it considers that the application might involve matters relating to Australia's defence, national security, or existing or future covert or international operations.

The Chief of the Defence Force, the Director-General of Security and the Director-General of the Australian Secret Intelligence Service (ASIS) may also limit or exclude provisions dealing with stop sexual harassment orders by legislative instrument, subject to the Minister's approval (see further below).

These limitations only apply in relation to stop sexual harassment orders.

Defence members can apply for the Commission to otherwise deal with a sexual harassment dispute (other than by arbitration), and all workers, prospective workers and persons conducting businesses or undertakings, including those in the Defence Force and security personnel, can apply for other remedies for sexual harassment in connection with work under Part 3-5A of the Fair Work Act. [56]

Under s.527E(2A) (subject to s.527E(2B)), the Commonwealth may be vicariously liable for any sexual harassment perpetrated by a defence member, if done in connection with the person's service as a defence member.

Declarations that laws dealing with stop sexual harassment orders do not apply

See Fair Work Act ss.527N-527Q

The Chief of the Defence Force, Director-General of Security or the Director-General of the Australian Secret Intelligence Service (ASIS) have the power to make declarations altering the application of the stop sexual harassment order provisions, with the approval of the Commonwealth Minister:[57]

Declarations by the Chief of the Defence Force[58]

The Chief of the Defence Force[59] may, by legislative instrument, declare that all or some of the stop sexual harassment order provisions do not apply in relation to a specified activity.

Declarations by the Director-General of Security[60]

The Director-General of Security[61] may, by legislative instrument, declare that all or some of the stop sexual harassment order provisions do not apply in relation to a person carrying out work for the Director-General of Security.

[56] See Revised Explanatory Memorandum at [472] and [75].
[57] Fair Work Act, ss.527N-527Q.
[58] Fair Work Act. S.527N.
[59] See *Defence Act 1903* (Cth) s.9.
[60] Fair Work Act, s.527P.
[61] See *Australian Security Intelligence Organisation Act 1979* (Cth) s.7.

Declarations by the Director-General of ASIS[62]

The Director-General of the ASIS[63] may, by legislative instrument, declare that all or some of the stop sexual harassment order provisions do not apply in relation to a person carrying out work for the Director-General of ASIS.

The laws dealing with orders to stop sexual harassment in connection with work do not require or permit a person to consider any action which could be prejudicial to Australia's defence or national security, or an existing or future covert or international operation of the AFP.[64]

This means the Commission may be unable to make orders, or a person may be excused for contravening orders of the Commission, if doing so could reasonably be expected to compromise Australia's defence or national security, or an operation of the AFP.

Australian employers and Australian-based employees

Where a person is a worker in a business or undertaking but the primary place of work is overseas, the person may fall outside the geographic application of the Fair Work Act.

Part 1-3 of the Fair Work Act sets out the application of the Act. The Fair Work Act 'applies geographically in Australia and in other areas or circumstances in relation to which Australia has sovereign rights,'[65] including in respect of Australian employers and Australian-based employees. The *Fair Work Regulations 2013* modify and extend the geographic application of the Fair Work Act.

The definitions of 'Australian employer' and 'Australian-based employee' in s.35 of the Fair Work Act 'encompass employers and employees with a substantial connection to Australia.'[66] Section 35 provides:

> **35 Meanings of *Australian employer* and *Australian-based employee***
>
> (1) An ***Australian employer*** is an employer that:
>
> (a) is a trading corporation formed within the limits of the Commonwealth (within the meaning of paragraph 51(xx) of the Constitution); or
>
> (b) is a financial corporation formed within the limits of the Commonwealth (within the meaning of paragraph 51(xx) of the Constitution); or
>
> (c) is the Commonwealth; or
>
> (d) is a Commonwealth authority; or
>
> (e) is a body corporate incorporated in a Territory; or

[62] Fair Work Act, s,527Q

[63] See *Intelligence Services Act 2001* (Cth) s.17.

[64] Fair Work Act, s.527M.

[65] See Division 3 – Geographical application of this Act' and the Explanatory Memorandum for the Fair Work Bill 2008 at para.153 (subject to any modifications prescribed by the regulations that are necessary to adapt the workplace relations system in the specified areas).

[66] Explanatory Memorandum for the Fair Work Bill 2008 at para. 168.

(f) carries on in Australia, in the exclusive economic zone or in the waters above the continental shelf an activity (whether of a commercial, governmental or other nature), and whose central management and control is in Australia; or

(g) is prescribed by the regulations.

(2) An ***Australian-based employee*** is an employee:

(a) whose primary place of work is in Australia; or

(b) who is employed by an Australian employer (whether the employee is located in Australia or elsewhere); or

(c) who is prescribed by the regulations.

(3) However, paragraph (2)(b) does not apply to an employee who is engaged outside Australia and the external Territories to perform duties outside Australia and the external Territories.

The following 2 case examples from the Commission's stop bullying and unfair dismissals jurisdictions consider the application of the Fair Work Act provisions to employees working overseas and to corporations based overseas.

Case example: **Foreign Government Ministry – not an Australian-based employee**

Re Stancu [2015] FWC 1999 (Lee C, 26 March 2015).

Facts

The applicant made an application under s.789FC of the Fair Work Act for an order to stop bullying. He was a volunteer with Australian Volunteers International (AVI). The bullying was alleged to have taken place while he was engaged as a volunteer to perform work as a Sanitation Engineer in The Ministry of Public Works and Utilities (The Ministry) in South Tarawa, Kiribati. The applicant did not dispute that he performed work for The Ministry; however, he claimed that AVI also assumed an employer role and acted as the main employer 'sub-contracting' volunteers to the host organisation.

Outcome

The Commission found that, as a volunteer with the Australian Volunteers for International Development Program, the applicant was placed with a host organisation, The Ministry, for which the applicant worked.

The Ministry was not a constitutionally-covered business and accordingly, the application fell outside the Commission's jurisdiction to deal with bullying at work.

Furthermore, the applicant would have been outside the geographic application of the Fair Work Act. The applicant was not an Australian-based employee within the meaning of s.35 of the Fair Work Act, as his primary place of work was not in Australia and his attendance at pre-departure briefings in Australia was an insubstantial part of his duties.

Relevance

Where workers are located outside of Australia, it may be necessary to consider the geographical limits on the application of the Fair Work Act in deciding whether the worker is covered by Fair Work Act provisions.

Case example: **Employer company formed in New Zealand but applicant worked in Australia (unfair dismissal application)**[67]

Gardner v Milka-Ware International Ltd [2010] FWA 1589 (Gooley C, 25 February 2010).

Facts

The applicant alleged the termination of his employment was harsh, unjust or unreasonable. The respondent raised a jurisdictional objection as it was a New Zealand registered, directed and owned company; traded in New Zealand only; employed the applicant in New Zealand and paid the applicant in New Zealand dollars into a New Zealand bank account. The applicant however worked in both New Zealand and Australia.

Outcome

The Commission determined that the respondent was a constitutional corporation (a foreign corporation within the meaning of s.51(xx) of the Australian Constitution) and a national system employer for the purposes of the unfair dismissals jurisdiction.

The respondent was covered by the Commission's jurisdiction in relation to its employees working in Australia. This included the applicant whose primary place of work at the time of his dismissal was Australia.

Relevance

The Commission found that it has jurisdiction to deal with applications against foreign corporations in relation to employees employed to work in Australia.

[67] See, however, Fair Work Ombudsman v Valuair Limited (No 2) [2014] FCA 759 (24 July 2014) per Buchanan J, in relation to the work performed on domestic flights by 8 foreign-based cabin crew who were employed by foreign corporations. There, the crew members' employment contracts were made outside Australia and were regulated by overseas laws; their wages and liabilities were paid outside Australia; and the crew spent a small and transient proportion of overall working time in Australia.

What is a 'person conducting a business or undertaking' (PCBU)?

The sexual harassment laws in Part 3-5A apply to 'a person conducting a business or undertaking'.

For the purposes of s.527D(1) of the Fair Work Act, a 'person conducting a business or undertaking' has the same meaning as in the WHS Act.[68]

The term ***person conducting a business or undertaking*** or PCBU refers to the legal entity running the business or undertaking, and includes incorporated entities, sole traders, partners of a partnership and certain senior 'officers' of an unincorporated association. It also refers to the Commonwealth including its departments, as well as local governments and other government businesses and undertakings.

Public and private sector employers (including the self-employed) are the largest category of PCBU, but the term is broader and also includes principals that use contractors or subcontractors as well as franchisors and bailors.

A person (including a corporate entity)[69] may conduct a business or undertaking alone or with others.[70] It is irrelevant whether the business or undertaking is conducted for profit or gain.[71] A business or undertaking conducted by a person includes a business or undertaking conducted by a partnership or an unincorporated association.[72]

Exclusions

The following are examples of persons or bodies that are not conducting a business or undertaking under the sexual harassment laws:

a person whose only relationship to the business or undertaking is that of an employee[73]

an elected member of a local authority (acting in that capacity),[74] or

a wholly 'volunteer association' that does not employ anyone (whether incorporated or not).[75]

Volunteer associations

[68] Fair Work Act, s.527D(4).
[69] See *Acts Interpretation Act 1901* (Cth) s.2C. Note: This Act as in force on 25 June 2009 applies to the Fair Work Act (see Fair Work Act s.40A).
[70] WHS Act s.5(1)(a).
[71] WHS Act s.5(1)(b).
[72] WHS Act, s.5(2).
[73] WHS Act, s.5(4).
[74] WHS Act s.5(5). It is however possible that an elected member could be an individual whose conduct could be relied upon as sexual harassment under Fair Work Act s.527D(1).
[75] WHS Act s.5(7).

Volunteer associations (whether incorporated or not) that do not employ anyone, do not conduct a business or undertaking[76]. The Commission does not have power to deal with workplace sexual harassment claims made by persons who may be at work in a volunteer association.

A ***volunteer association*** is a group of volunteers acting together for one or more community purposes where none of the volunteers, either alone or jointly with any other volunteers, employs any person to carry out work for the volunteer association.[77]

'Acting together for one or more community purposes' includes 'philanthropic or benevolent purposes, including the promotion of art, culture, science, religion, education, medicine or charity' and 'sporting or recreational purposes, including the benefiting of sporting or recreational clubs or associations'.[78]

If a person is employed to carry out work,[79] the volunteer association may be considered a business or undertaking.

[76] WHS Act s.5(7).
[77] WHS Act s.5(8).
[78] Explanatory Memorandum, Work Health and Safety Bill 2011 at para. 26.
[79] For a discussion on the difference between employees and contractors, see the cases referenced at footnote 26.

Vicarious liability of employers and principals

The sexual harassment laws in Part 3-5A apply to:

- persons who are alleged to have engaged in sexual harassment (respondents), and
- employers and principals – that is, businesses and undertakings that employ or otherwise engage an aggrieved person or a respondent.

Under s.527E of Part 3-5A, a principal (including an employer) may be liable for the act(s) of unlawful sexual harassment of its employees or agents, if the sexual harassment was done 'in connection with' their employment or their duties as agent. Liability applies 'as if the principal had also done the act'. This is known as vicarious liability. [80] The Commonwealth may also be vicariously liable for unlawful sexual harassment perpetrated by a defence member (within the meaning of the *Defence Force Discipline Act 1982*), in contravention of s.527D(1), if the contravention was done in connection with the person's service as a defence member.[81]

Section 527E is modelled on s.106 of the Sex Discrimination Act.[82] In *Von Schoeler v Allen Taylor and Company Ltd Trading as Boral Timber (No 2) (Von Schoeler v Boral Timber)*,[83] a Full Court of the Federal Court articulated the test in s.106 as:

> 'For s 106(1) to apply it is first necessary for the person alleging an act of unlawful … harassment to prove that it was done. It is then necessary to prove that the person who did the unlawful act is the employee of the employer or an agent of the principal. It is also necessary to prove that the unlawful act was done in connection with the employment of the employee or with the duties of the agent as an agent: see generally *South Pacific Resort Hotels Pty Ltd v Trainor* (2005) 144 FCR 402 at [41]–[42], [61]–[70].[84]

The Revised Explanatory Memorandum states that the effect of s.527E is that an aggrieved person can seek a remedy against an employer or principal in addition to, or instead of, the perpetrator of the sexual harassment.[85]

However, a principal (including an employer) is **not** vicariously liable if they prove that they took all reasonable steps to prevent the employee or agent from doing acts that contravene the prohibition on sexual harassment in connection with work.[86] The onus is on the principal to prove that it took all reasonable steps to prevent the sexual harassment.

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[80] See Fair Work Act, s.527E. The accessorial liability / body corporate liability provisions also apply to Part 3-5A (see ss.550 and 793).

[81] Fair Work Act, s. 527E(2A).

[82] Revised Explanatory Memorandum, [148].

[83] *Von Schoeler v Boral Timber* [2020] FCAFC 13.

[84] Ibid at [59].

[85] Revised Explanatory Memorandum at para. 454.

[86] Fair Work Act, ss.527E(2) and 527E(2B) (in respect of defence members). See also s.106(2) of the Sex Discrimination Act.

The Federal Court has described the test in s.106(2) as 'a difficult one to satisfy. It may be inferred that Parliament intended that to be so.'[87]

In *Von Schoeler v Boral Timber* the Full Court of the Federal Court held:

> '60. The effect of s 106(2) of the SDA is that an employer or principal to whom s 106(1) applies will not be liable for the act of unlawful discrimination or sexual harassment if the employer or principal establishes that it took "all reasonable steps" to prevent its employee or agent from doing the relevant act. The word "all" is significant. It is not enough for the employer to demonstrate that it took some of the reasonable steps available to prevent the employee from doing the unlawful act.
>
> 61. However, it is unnecessary for the employer to take all steps necessary to prevent the employee or agent from doing the relevant act. What must be taken is all steps that are reasonable to take. What steps are reasonable will depend upon the whole of the circumstances, including the size of the organisation, the nature of its workforce, the conditions under which the work is carried out and any history of unlawful discrimination or sexual harassment.
>
> 62. The reasonable steps taken must be "to prevent" the employee or agent from engaging in the unlawful discrimination or sexual harassment. The focus is upon preventative steps taken before any relevant act occurs. However, in some circumstances, the way a complaint is dealt with after the act may have relevance to the question of whether all reasonable preventative steps were taken. For example, a failure by an employer to comply with policies for investigating and dealing with complaints may be reflective of a workplace culture that tolerates unlawful discrimination or sexual harassment.
>
> 63. Further, the focus must be on what steps would or might prevent an employee from doing the relevant unlawful act ...
>
> 64. Section 106(2) requires the taking of all reasonable steps to prevent "the employee or agent" who did the unlawful act from doing acts of that kind. The employer must demonstrate that the steps it relies upon were adequately communicated to the particular employee who did the unlawful act. Where the employer relies upon workplace policies, it may be necessary to demonstrate not only that the policies were communicated to the relevant employee, but that they were periodically reinforced.'[88]

[87] *Richardson v Oracle Corporation Australia Pty Limited* [2013] FCA 102 (20 February 2013) at para. 152.
[88] *Von Schoeler v Boral Timber* [2020] FCAFC 13 at [60]-[64].

Case example: **Sexual harassment ¬ vicarious liability – all reasonable steps to**

Von Schoeler v Allen Taylor and Company Ltd Trading as Boral Timber (No 2) [2020] FCAFC 13 (20 February 2020)

Facts

Ms Von Schoeler alleged that she was sexually harassed by another employee of Allen Taylor and Company Ltd Trading as Boral Timber (Boral) on 28 August 2009, when the employee (John Urquhart) groped her buttocks. Ms Von Schoeler alleged that she was then victimised and discriminated against by Mr Urquhart and other Boral employees because she made a complaint of sexual harassment, and Boral was vicariously liable for the conduct of its employees.

Mr Urquhart did not participate in the proceeding at first instance and Boral admitted that he had touched Ms Von Schoeler near the area of her buttocks.

The primary judge upheld Ms Von Schoeler's allegation of sexual harassment against Mr Urquhart but dismissed her claim of vicarious liability, holding that Boral was not liable under s.106(1) of the Sex Discrimination Act as it had taken all reasonable steps to prevent Mr Urquhart from engaging in sexual harassment. The primary judge's finding was based on Boral's implementation of a 'Working With Respect' policy and a training program in relation to that policy (which Mr Urquhart had attended 4 days before the sexual harassment).

Outcome

On appeal, the Full Court of the Federal Court (the Full Court) upheld the appeal and declared Boral vicariously liable for Mr Urquhart's sexual harassment against Ms Von Schoeler. The matter was remitted to the Federal Circuit Court of Australia for reconsideration.

The Full Court was critical of the evidence of the steps Boral had taken and observed that there was a paucity of evidence as to the content of the information and training provided to Mr Urquhart prior to 28 August 2009. In particular, there was no evidence that the training included any statement to the effect that sexual harassment is against the law; that Boral would take sexual harassment seriously because it could also be liable for sexual harassment by an employee, or that disciplinary action would be taken in cases where sexual harassment was proven and what that disciplinary action would be. The evidence also did not demonstrate Mr Urquhart was aware that Boral had a zero tolerance attitude towards harassment in the workplace or precisely what that meant.

The Full Court found that in the absence of provision of such information, the training lacked any substantial deterrent effect. The Full Court held that 'the paucity of evidence as to the steps actually taken to convey the seriousness and consequences of sexual harassment to employees, including Mr Urquhart, leads to the conclusion that Boral failed to establish that it took all reasonable steps to prevent Mr Urquhart from engaging in the sexual harassment.'

Relevance

The Full Court observed that it is common for employers to seek to establish that they took all reasonable steps to prevent an employee from doing the unlawful act by relying upon policies

published and training provided in the workplace. In such a case, the content of the policies and training informs the question of whether all reasonable steps were taken for the purposes of s.106(2) of the Sex Discrimination Act and ss.527E(2) and (2B) of the Fair Work Act.

Part 5 – When is a worker sexually harassed in connection with work?

- See Fair Work Act s.527D

The following information only applies in relation to the alleged sexual harassment of a worker in connection with work that occurred or commenced **on or after 6 March 2023**.

For information about sexual harassment at work that is said to have occurred or commenced before 6 March 2023, see the Orders to stop sexual harassment: Transitional arrangements Benchbook.

A person (the first person) must not **sexually harass** another person (the second person) who is:

- a worker in a business or undertaking; or
- seeking to become a worker in a particular business or undertaking; or
- a person conducting a business or undertaking;

if the harassment occurs in connection with the second person being a worker, person seeking to become a worker in a particular business or undertaking, or a person conducting a business or undertaking.[89]

'Sexually harass' has the same meaning given by s.28A of the Sex Discrimination Act.[90] Section 28A provides that a person sexually harasses another person if:

- they make an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
- they engage in other unwelcome conduct of a sexual nature in relation to the person harassed;

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

The legal test for sexual harassment requires that the conduct must be:

1. either a sexual advance or a request for sexual favours to the person harassed or other conduct of a sexual nature in relation to the person harassed
2. unwelcome

[89] Fair Work Act, s.527D.
[90] Fair Work Act s.12.

3. such that a reasonable person, having regard to all the circumstances, would anticipate the possibility that the person who was harassed would be offended, humiliated and/or intimidated.

Each of these elements will be examined further below.

The person who engages in sexual harassment need not be a worker and could (for example) be a customer or client of the employer or principal, a supplier of the employer or business or a visitor to the place of work of the worker.

A sexual advance, a request for sexual favours or conduct of a sexual nature

Whether there has been a sexual advance, a request for sexual favours directed to the person harassed or other conduct of a sexual nature in relation to the person harassed is a question of fact.[91]

'Conduct of a sexual nature' in s.28A of the Sex Discrimination Act has been interpreted broadly. It includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.[92]

It is clear that the concept 'other conduct of a sexual nature *in relation to the person harassed*' is wider than conduct specifically directed at the applicant, given it includes making a statement of a sexual nature *in the presence of* a person. However, this expression is not so broad as to encompass all unwelcome conduct of a sexual nature in relation to persons other than the applicant. The conduct must be shown to be, in some way, connected to the applicant. The question of whether particular conduct of a sexual nature is in relation to an applicant will depend on the circumstances, which may include whether a hostile or demeaning atmosphere has become a feature of the workplace environment.[93] In other contexts, conduct has been held to be 'in relation to' a person if there is a real connection to the person, rather than one that is insignificant, or remote and merely incidental.[94]

Examples of conduct of which may constitute a sexual advance, a request for sexual favours or other conduct of a sexual nature include:

- sexually suggestive comments or jokes;
- intrusive questions about private life or physical appearance;

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[91] *Hughes trading as Beesley and Hughes Lawyers v Hill* [2020] FCAFC 126 (24 July 2020) at para. 22.
[92] Sex Discrimination Act s.28A(2).
[93] See, for example, *G v R & Dept of Health, Housing & Community Services* [1993] HREOCA 20 (17 September 1993); *Noble v Baldwin & Anor* [2011] FMCA 283 28 April 2011; *Carter v Linuki Pty Ltd t/as Aussie Hire & Anor* [2004] NSWADT 287; *Carter v Linuki Pty Ltd trading as Aussie Hire & Fitzgerald (EOD)* [2005] NSWADTAP 40; *Treglown v Eliam Pty Limited and anor* [2010] NSWADT 196; *Zanella -v- Carroll's Auto Repairs Pty Ltd & anor* [2001] NSWADT 220; *Green v State of Queensland, Brooker and Keating* [2017] QCAT 8.
[94] *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356; *Maritime Union of Australia, The v Maersk Crewing Australia Pty Ltd* [2016] FWCFB 1894.

- unwanted invitations to go on dates, or requests or pressure for sex;
- unwanted written declarations of love;
- sending sexually explicit or suggestive pictures or gifts to a worker, or displaying sexually explicit or suggestive pictures, posters, screensavers or objects in the work environment;
- intimidating or threatening behaviours such as inappropriate staring or leering, sexual gestures, or following, watching or loitering;
- inappropriate physical contact, such as deliberately brushing up against a person, or unwelcome touching, hugging, cornering or kissing;
- behaviours that may be offences under criminal laws, such as actual or attempted rape or sexual assault, indecent exposure or stalking;
- sexually explicit or suggestive emails, SMS or social media (including the use of emojis with sexual connotations), indecent phone calls, circulating pornography or other sexually graphic imagery, unwelcome sexual advances online, or sharing or threatening to share intimate images or film without consent.[95]

The intention of the alleged harasser is not relevant.[96] An advance, request or other conduct may be sexual in nature even if the person engaging in the conduct has no sexual interest in the person towards whom it is directed,[97] or is not aware that they are acting in a sexual way.[98] Sexual harassment is unlawful regardless of the sex, sexual orientation or gender identity of the parties.[99]

Some conduct, which may not amount to sexual harassment on its own, may fall within the definition if it forms part of a broader pattern of inappropriate sexual conduct. For example, the flicking of elastic bands at a person has been found to be conduct of a sexual nature in the context of a broader pattern of sexual conduct.[100]

Unwelcome conduct

The advance, request or other conduct must be both of a sexual nature and unwelcome to be sexual harassment.

[95] See, eg AHRC, *Respect@Work* report, pp 17-18. Note also, in respect of unwelcomed sexual intercourse, *Aldridge v Booth* [1988] FCA 170 at paras. 63, 72 and 73; *Ewin v Vergara (No 3)* [2013] FCA 1311 at paras. 25, 444 and 465 (not disturbed on appeal: *Vergara v Ewin* [2014] FCAFC 100).

[96] *Hughes trading as Beesley and Hughes Lawyers v Hill* [2020] FCAFC 126 (24 July 2020) at paras. 30 and 31.

[97] *Ford v Inghams Enterprises Pty Ltd (No 3)* [2020] FCA 1784 at para. 708.

[98] *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91 at para. 24.

[99] *Ford v Inghams Enterprises Pty Ltd (No 3)* [2020] FCA 1784 at para. 708.

[100] *Shiels v James* [2000] FMCA 2 at para. 72.

The question of whether an identified form of conduct is unwelcome is a subjective one. It turns only on the attitude of the recipient of that conduct.[101] The intention of the person responsible for the conduct is not relevant.

Unwelcome conduct has been described as being:

- conduct that is not solicited or invited, which the recipient regards as undesirable or offensive;[102]
- conduct that is disagreeable to the person to whom it is directed.[103]

To find that conduct is unwelcome, it is not necessary for the person experiencing sexual harassment to have explicitly addressed the behaviour or informed their harasser that their conduct is unwelcome.[104] There are many reasons why a person who has been sexually harassed may not tell their harasser that the conduct is unwelcome. These reasons include a power imbalance, youth and inexperience and fear of reprisals.

Reasonable person test

The final element of the test for sexual harassment is that a reasonable person in the circumstances, having regard to those circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

The 'reasonable person' is assumed to have some knowledge of the personal qualities of the person harassed.[105] Section 28A(1A) of the Sex Discrimination Act requires that the circumstances to be taken into account include:

- the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;
- the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;
- any disability of the person harassed;
- any other relevant circumstance.

The reasonable person test is an objective test.[106] It is not concerned with the motives or reasons of the person who engaged in the sexual harassment, or what they actually anticipated. Excuses such

[101] *Hughes trading as Beesley and Hughes Lawyers v Hill* [2020] FCAFC 126 (24 July 2020) at para. 23.
[102] *Aldridge v Booth* [1988] FCA 170 (30 May 1988) at para. 4.
[103] *Ewin v Vergara (No 3)* [2013] FCA 1311 at para. 27 (not disturbed on appeal: *Vergara v Ewin* [2014] FCAFC 100).
[104] *San v Dirluck Pty Ltd* [2005] FMCA 750 at para. 23.
[105] *Hughes trading as Beesley and Hughes Lawyers v Hill* [2020] FCAFC 126 (24 July 2020) at para. 26.
[106] *Hughes trading as Beesley and Hughes Lawyers v Hill* [2020] FCAFC 126 (24 July 2020) at para. 25.

as 'it was joke', 'I didn't mean anything by it', 'it was harmless fun', or 'it was done while under the influence of alcohol', are misplaced.[107]

Single incidents

A single incident can constitute sexual harassment.[108] This is different to the Commission's jurisdiction to make orders to stop bullying at work, which can only be accessed where the bullying behaviour is repeated.[109]

Whether a single incident will constitute sexual harassment depends on the 'nature or quality of the action or statement.'[110]

Sexual harassment – Case examples

Note: Sexual harassment can take many forms, including allegations against a number of parties; serious criminal offences; and complaints of both sexual harassment and other bullying behaviours.

The following examples include cases about sexual harassment in other legal contexts; primarily under state and federal discrimination laws.

WHS regulators can also assess and investigate complaints of workplace sexual harassment in accordance with their individual compliance and prosecution policies, which may take into account issues such as the immediate risk to health and safety, possible breaches of WHS legislation, evidence, likelihood of success and whether prosecution would be in the public interest. Jurisdictions that use alternative dispute resolution practices may not keep or publish records of the outcomes in these matters.

It is not necessary for a worker to establish a risk to health and safety when seeking an order to stop sexual harassment, as sexual harassment is a known and accepted WHS risk.[111] Sexual harassment at work can cause various physical illnesses and psychological harm, such as stress, depression, anxiety and post-traumatic stress disorder.[112]

[107] Kate Eastman, Sophie Callan and Aditi Rao, 'Crossing the Line: Behaviour that Gets Barristers into Trouble' [2017] (Summer) *Bar News: Journal of the New South Wales Bar Association* 38, 39; Prue Bindon, '*The Weinstein Factor: Where does the legal profession stand?*' (2018) 247 *Ethos: Law Society of the ACT Journal* 26, 26.

[108] *Hall v A & A Sheiban* [1989] 20 FCR 217 at pp. 231, 247 and 279.

[109] Fair Work Act s. 789FD(1).

[110] *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91 at para. 25.

[111] Explanatory Memorandum, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, at para. 38.

[112] Safe Work Australia, 'Workplace Sexual Harassment'.

Case example: **Sexual harassment ¬ conduct of a sexual nature – unwelcome conduct – reasonable person**

Hill v Hughes trading as Beesley and Hughes Lawyers [2019] FCCA 1267 (24 May 2019); ***Hughes trading as Beesley and Hughes Lawyers v Hill*** [2020] FCAFC 126 (24 July 2020).

Facts

Ms Beesley worked as a paralegal in a small law firm run by Mr Hughes, a solicitor. Shortly after Ms Beesley commenced work at the law firm, Mr Hughes began a course of conduct including:

- sending Ms Beesley persistent, amorous emails;
- during a trip for work, attending Ms Beesley's bedroom uninvited and inappropriately clothed, refusing to leave until she gave him a hug; and
- on a number of occasions, preventing Ms Beesley from leaving her office until she gave Mr Hughes a hug.

Ms Beesley rejected each of these advances and asked Mr Hughes to stop. When the conduct continued, Ms Beesley resigned.

At trial, Mr Hughes argued that his conduct was not sexual harassment because he was attempting to pursue a romantic relationship. The trial judge found that such a distinction 'reflects a social myopia' that is not reflected in the Sex Discrimination Act. The trial judge found that Mr Hughes' conduct was 'outrageous' and constituted sexual harassment and ordered him to pay Ms Beesley $120,000 in general damages and $50,000 in aggravated damages. This decision was appealed.

Outcome

An appeal from Mr Hughes was dismissed.

The Full Court of the Federal Court (the Full Court) found that Mr Hughes' conduct was reprehensible and held that the trial judge was correct to conclude that an award of aggravated damages was appropriate given the psychological damage caused by the sexual harassment and the Appellant's subsequent conduct at trial.

The Full Court held that the question of whether there has been any of the 3 identified forms of conduct – a sexual advance, a request for sexual favours or other conduct of a sexual nature – is a question for the Court, and it is a question of fact.

It held that the test of whether conduct is 'unwelcome' is subjective and turns solely on the attitude of the person alleging the harassment.

By contrast, the reasonable person test is an objective one, to be assessed against the broadly defined circumstances in s.28A(1A) of the Sex Discrimination Act. In this case, the profound power imbalance between Mr Hughes and Ms Beesley was important, as was Mr Hughes' awareness of Ms Beesley's anxiety disorder.

Relevance

Whether an advance, request or conduct is sexual in nature is a question of fact.

Whether an advance, request or conduct is 'unwelcome' is assessed subjectively, and turns on the attitude of the person experiencing the conduct only.

Whether a reasonable person would anticipate the possibility that the recipient of the advance, request or conduct would be offended, humiliated or intimidated is assessed objectively.

Case example: **Sexual harassment ¬ conduct of a sexual nature – reasonable person**

Vitality Works Australia Pty Ltd v Yelda (No 2) **[2021] NSWCA 147** (19 July 2021)

Yelda v Sydney Water Corporation; Yelda v Vitality Works Australia Pty Ltd [2021] NSWCATAD 107 (30 April 2021)

Facts

The New South Wales Civil and Administrative Tribunal (the Tribunal) determined that both Sydney Water Corporation (Sydney Water) and Vitality Works Australia Pty Ltd (Vitality Works) had engaged in sexual harassment by displaying a poster at the Sydney Water Ryde depot.[113]

Sydney Water is a male-dominated workplace and the poster was placed just outside the men's toilet and the lunchroom. The poster showed a photograph of a female Sydney Water employee under the caption 'Feel great – lubricate!' The employee had agreed to have her photograph taken for a WHS campaign but had not been informed that those words would be used above her image.

The Tribunal found that the poster conveyed the sexual connotation that the employee 'with her smiling face, feels great because she applies lubricant to her body, including her sexual organs which gives her sexual pleasure' and that she 'advocates that others should do the same'.

The Tribunal calculated Ms Yelda's loss and damages at $318,280.08, but due to the statutory monetary limits which can be awarded by the Tribunal, ordered Vitality Works and Sydney Water to each pay Ms Yelda $100,000.

Outcome

On appeal, the NSW Court of Appeal (the Court) held that whether conduct is 'conduct of a sexual nature' is a question of fact. The phrase 'conduct of a sexual nature' has a broad meaning and includes sexually suggestive 'jokes' and comments as well as innuendo, insinuation, implication, overtone, undertone, horseplay, a hint, a wink or a nod - all of these are capable of being deployed to sexualise conduct. The subjective intention of the alleged perpetrator to engage (or not engage) in 'conduct of a sexual nature' is not an element of sexual harassment.

The Court held that conduct of a sexual nature is not confined to conduct that is sexually explicit. This would overlook the statutory language and the infinite subtlety of human interaction and the historical forces that have shaped the subordinate place of women in the workplace for centuries. The scope of the phrase 'conduct of a sexual nature' is properly construed with an understanding of those matters.

The Court found that design, publication, display and distribution of the poster was plainly conduct of a sexual nature, which held up the employee to sexual ridicule in her workplace. The fact that other clients of Vitality Works had not made adverse comments about the slogan 'Feel great –

[113] In contravention of s.22B of the *Anti-Discrimination Act 1977* (NSW). Section 22A of that Act defines 'sexual harassment' in similar terms to s.28A the Sex Discrimination Act. The key difference is the additional underlined words in s.28A '… in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated …'

lubricate' in the past was not relevant to its determination that a reasonable person would have anticipated that the employee would be offended, humiliated or intimidated by the conduct, which is an objective test.

The Court upheld the Tribunal's decision that the poster constituted sexual harassment in contravention of ss.22A and 22B of the *Anti-Discrimination Act 1977* (NSW) and dismissed the application to overturn the award of damages against Vitality Works and Sydney Water.

Relevance

The phrase 'conduct of a sexual nature' is of broad import, and should not be narrowly construed. It is clear that a single act or single incident may constitute sexual harassment.

Conduct which is not intended to be sexual harassment may amount to sexual harassment – there is no legal requirement that the perpetrator of sexual harassment intend to sexually harass the victim.

Case example: **Sexual harassment ¬ conduct of a sexual nature**

Richardson v Oracle Corporation Australia Pty Limited **[2013] FCA 102** (20 February 2013);
Richardson v Oracle Corporation Australia Pty Ltd and Another **[2014] FCAFC 82** (15 July 2014)
Richardson v Oracle Corporation Australia Pty Ltd (No 2) **[2014] FCAFC 139** (27 October 2014)

Facts

Ms Richardson was employed in the Sydney office of Oracle Corporation Australia Pty Ltd (Oracle). Mr Tucker was employed at Oracle's Melbourne office. Ms Richardson and Mr Tucker were part of a team putting together a bid for work.

Ms Richardson alleged that she was sexually harassed by Mr Tucker in the period from late April 2008 until 12 November 2008 during their work together as part of the bid team. The conduct included inappropriate sexual advances and subjecting Ms Richardson to a humiliating series of comments such as: 'Gosh, Rebecca, you and I fight so much, I think we must have been married in our last life', and 'So, Rebecca, how do you think our marriage was? I bet the sex was hot'.

Ms Richardson complained to her manager, who referred the matter to HR. An investigation was conducted. In the meantime, Ms Richardson was required to continue working with Mr Tucker and had regular contact with him via conference calls and emails. The HR investigation supported much of Ms Richardson's complaint. Mr Tucker was given a first and final warning and retained his role. Ms Richardson resigned in March 2009.

Mr Tucker denied some of the alleged conduct and explained the rest as trying to diffuse a tense situation with jokes, making innocuous or commonplace comments or engaging in 'blue banter' that fell short of sexual harassment when seen in context.

Outcome

The Federal Court rejected 'Mr Tucker's denials and attempts to defend his conduct as unintended, misunderstood or innocuous.' The Court found that Mr Tucker had embarked on a systematic course of conduct that was fairly described as sexual harassment within its statutory meaning. Some of the individual remarks and suggestions constituted sexual harassment in their own right. Overall, the whole course of conduct constituted sexual harassment.

Oracle was found vicariously liable for Mr Tucker's conduct. Oracle did not make out its defence under s.106(2) of the Sex Discrimination Act that it had taken all reasonable steps to prevent the sexual harassment, as the Federal Court found its global online training package deficient: it failed to make clear that sexual harassment is against the law (and identify the source of this legal standard), or state that sexual harassment is against company policy and that an employer might also be liable for sexual harassment by an employee.

In its decision, the Federal Court noted that Ms Richardson was very distressed by Mr Tucker's conduct, which manifested in her suffering forms of physical and mental impairment, including an adjustment disorder. The Federal Court ordered Oracle to pay Ms Richardson $18,000 as general damages.

On appeal, a Full Court of the Federal Court set aside the damages order of $18,000 as 'manifestly inadequate'. The award of damages was subsequently increased to $161,572.24, having regard to the nature and extent of Ms Richardson's injuries and prevailing community standards.

Relevance

Jokes or 'banter' may constitute conduct of a sexual nature.

A perpetrator's intentions are irrelevant to the assessment of whether conduct is of a sexual nature.

The finder of fact may look to a course of conduct as a whole, which may include instances of sexual conduct as well as other conduct, in order to determine whether the conduct complained of constituted sexual harassment.

Case example: **Sexual harassment ¬ conduct of a sexual nature – unwelcome conduct**

Collins v Smith (Human Rights) **[2015] VCAT 1029** (10 July 2015)
Collins v Smith (Human Rights) **[2015] VCAT 1992 (23 December 2015)**

Facts

Ms Collins commenced working at a local post office in May 2011. Mr Smith was the owner and manager of the post office, in partnership with his wife. Up until 5 January 2013, Ms Collins said she enjoyed her job and got along well with Mr Smith, whom she regarded as 'like a father figure'.

However, after that time, Ms Collins detailed persistent and unwelcome conduct of a sexual nature by Mr Smith in the course of her employment, from January to April 2013. Mr Smith either denied that the conduct occurred or, where it was admitted, denied that it was unwelcome.

Outcome

The Victorian Civil and Administrative Tribunal (the Tribunal) upheld Ms Collins' complaints of sexual harassment.[114] As there were no other witnesses to the events and only limited corroborative evidence, the Tribunal's assessment of the credibility of each party's account was crucial to its findings.

The Tribunal accepted Ms Collins' evidence of the numerous incidents of sexual harassment, which included physical contact (such as attempting to kiss Ms Collins and touching her on her bottom and breasts); verbal comments, including propositioning for sex and threatening comments, and written communications including a St Valentine card, notes and text messages.

The Tribunal rejected Mr Smith's evidence depicting Ms Collins as the principal protagonist who welcomed his continuing flattery and jocular behaviour. It preferred Ms Collins' evidence that she consistently rejected Mr Smiths' advances and reiterated to him her desire to maintain a friendly but professional relationship. The Tribunal accepted that Ms Collins was attempting to effectively 'manage' Mr Smith in view of her desire to maintain her employment, and Mr Smith's behaviour created an intolerable situation for her in which to perform her work. The medical evidence showed a clear nexus between the sexual harassment and Ms Collins' consequent psychological trauma, comprising chronic post-traumatic stress disorder and a depressive disorder.

At a later hearing to assess compensation, Mr Smith was ordered to pay Ms Collins a total amount of $332,280 plus costs comprising:

- general damages of $180,000
- aggravated damages of $20,000
- past loss of net earnings and superannuation of $60,000
- future loss of net earnings and superannuation of $60,000, and

[114] Within the meaning of s.92 of the *Equal Opportunity Act 2010* (Vic). Section 92 of that Act defines 'sexual harassment' in similar terms to s.28A the Sex Discrimination Act. The key difference is the additional underlined words in s.28A '… in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated …'

- out of pocket expenses, incurred or to be incurred, of $12,280.

Relevance

A finding of sexual harassment may be based on the fact finder's assessment of the relative credibility of each party's accounts, particularly in circumstances where there is limited corroborating evidence.

A worker does not welcome conduct simply by enduring it and taking steps to placate the harasser in order to maintain employment.

Case example: **Sexual harassment ¬ conduct of a sexual nature – unwelcome conduct - reasonable person**

Kordas v Ruba & Jo Pty Ltd t/a Aztec Hair & Beauty [2017] NSWCATAD 156 (25 May 2017)

Facts

Mr Kordas was employed as an apprentice hairdresser by Aztec Hair and Beauty for about 3 months. He alleged that he was sexually harassed during his employment by his manager, Mr Rony, and his colleague and trainer, Mr Eaton. The alleged sexual harassment included Mr Rony stroking Mr Kordas' palm when he gave him money to make a purchase, and the following conduct by Mr Eaton:

- unwelcome touching (such as requiring Mr Kordas to hold his hand unnecessarily when he was showing him how to blow dry hair; putting his hands around Mr Kordas' waist; unnecessarily brushing against Mr Kordas, and slapping Mr Kordas' bottom with a ruler), and
- unwelcome verbal comments (such as referring to Mr Kordas' as 'his bitch' and saying that he and Mr Kordas were like a gay married couple).

Outcome

The New South Wales Civil and Administrative Tribunal (the Tribunal) determined that both Mr Rony and Mr Eaton had engaged in sexual harassment,[115] and Aztec Hair and Beauty was vicariously liable.

The Tribunal noted that whether conduct is of a sexual nature may depend on the context. The Tribunal accepted that the conduct was of a sexual nature in the context of a workplace in which Mr Kordas was the most junior employee, who had no prior relationship with his manager or trainer.

The Tribunal was also satisfied that the conduct had been unwelcome. It was not necessary for Mr Kordas to establish that the perpetrators knew that their conduct was unwelcome.

The Tribunal considered the circumstances of the conduct, including that Mr Kordas' position as an apprentice meant that he had little, if any, power in relation to his manager and trainer. The Tribunal concluded that a reasonable person, having regard to these circumstances, would have anticipated that the conduct would be likely to humiliate or intimidate Mr Kordas.

The Tribunal ordered Aztec Hair and Beauty to pay $30,000 to Mr Kordas as general damages comprised of:

- $5,000 in respect of the sexual harassment by Mr Rony
- $10,000 in respect of the sexual harassment by Mr Eaton, and
- $15,000 in respect of victimisation.

[115] In contravention of s.22B of the *Anti-Discrimination Act 1977* (NSW). Section 22A of that Act defines 'sexual harassment' in similar terms to s.28A the Sex Discrimination Act. The key difference is the additional underlined words in s.28A '… in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated ...'

Relevance

Sexual harassment is unlawful regardless of the sex or sexual orientation of the parties. A perpetrator need not know that their conduct is unwelcomed.

The circumstances of the conduct may impact the assessment of whether the conduct is of a sexual nature, as well as whether a reasonable person would consider it offensive, humiliating or intimidating.

Case example: **Sexual harassment ¬ conduct of a sexual nature**

Kerkofs v Abdallah (Human Rights) **[2019] VCAT 259** (25 February 2019)

Facts

Ms Kerkofs worked at Parker Manufactured Products Pty Ltd (PMP) from 4 to 16 May 2016. Ms Kerkofs claimed that during that time she was sexually harassed by Mr Abdallah, a colleague.

Ms Kerkofs alleged that at her workplace, an office within the PMP factory, she was subjected to various instances of unwelcome conduct of a sexual nature by Mr Abdallah including him: using nicknames such as 'sexy' and 'honey'; commenting on her body and making sexual comments; physically touching her, and discussing and rating her appearance and that of other women.

Ms Kerkofs also alleged that she was sexually assaulted by Mr Abdallah at home after he drove her home from work (at the direction of his supervisor) because she was unwell. Ms Kerkofs did not willingly participate in or solicit the behaviour, which happened while she was resting on her bed. She succumbed to it because she was too ill to resist.

Ms Kerkofs reported the sexual assault to her manager 3 days after the incident. She subsequently developed a post-traumatic stress disorder.

Outcome

The Victorian Civil and Administrative Tribunal (the Tribunal) found that Mr Abdallah had engaged in sexual harassment,[116] and that PMP was vicariously liable for his actions. Mr Abdallah did not dispute that the alleged conduct was properly characterised as sexual harassment but denied he had engaged in any of the conduct alleged.

The Tribunal preferred the evidence of Ms Kerkofs. While Mr Abdallah was evasive in answering questions and sought to interfere with other evidence given to the Tribunal, Ms Kerkofs was a credible witness and her account was largely consistent with accounts she had given to other people. The Tribunal rejected the suggestion that the fact that Ms Kerkofs did not pursue a complaint to the police reflected on her credibility, observing that many people who are victims of sexual assault are not prepared to go through the trauma of giving evidence in a criminal trial.

The Tribunal also did not consider that inconsistencies in Ms Kerkofs' evidence reflected adversely, to any great extent, on her credibility, observing that inconsistencies in an account of sexual activity are to be expected, and one should not expect an identical account on each occasion a traumatic sexual experience is recounted.

The Tribunal found that it was more probable than not that Mr Abdallah had engaged in each of the alleged acts of sexual harassment, and they were unwelcome. The Tribunal accepted that a

[116] Within the meaning of s.92 of the *Equal Opportunity Act 2010* (Vic). Section 92 of that Act defines 'sexual harassment' in similar terms to s.28A the Sex Discrimination Act. The key difference is the additional underlined words in s.28A '… in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated …'

reasonable person, having regard to all the circumstances, would have anticipated that Ms Kerkofs would be offended, humiliated or intimidated by that conduct.

The Tribunal ordered Mr Abdallah and PMP to jointly pay the sum of $130,000 to Ms Kerkofs by way of pain and suffering damages for the harassment, and ordered PMP to pay an additional sum of $20,000 for aggravated damages.

Relevance

Inconsistencies in accounts of sexual harassment are to be expected and do not necessarily impact adversely on a complainant's credibility, particularly given the fact that a complainant may be recalling traumatic events. Similarly, the credibility of a complaint of sexual harassment that constitutes sexual assault is not undermined simply by reason of the fact that a complainant chooses not to report the conduct to the police. Many people who are victims of sexual assault do not report the conduct, including to the police.

Case example: **Sexual harassment ¬ unwelcome conduct**

Aldridge v Booth **[1988] FCA 170** (30 May 1988)

Facts

Miss Aldridge, aged 19, was employed in a cake shop through a government employment scheme, after having been unemployed for a year. This was her first full-time job. She alleged that, during the year of her employment, Mr Booth, who was a proprietor of the business, made repeated unwelcome sexual advances towards and contact with Miss Aldridge. Mr Booth and Miss Aldridge were often the only 2 people working in the shop. The alleged advances included physically touching Miss Aldridge, kissing her, pulling her hair, requesting sexual intercourse, threatening to terminate her employment when she resisted and engaging in unwanted acts of sexual intercourse with her at the cake shop. Miss Aldridge ultimately resigned.

Mr Booth accepted that there was one act of intercourse, which he described as 'reasonably spontaneous'. He otherwise claimed there was only accidental or unintended touching because of the confines of the shop, and horseplay from time to time.

Outcome

The Federal Court preferred the account of Miss Aldridge and was satisfied that there was a course of conduct engaged in by Mr. Booth that constituted sexual harassment which was, in the main, unwelcome. The Court accepted Miss Aldridge's evidence that she believed that if she rejected the advances, she would lose her job. The Court held that the sexual harassment 'continued for as long as it did, and went as far as it did, because of the fear of Miss Aldridge of losing her job.' The Court awarded damages of $7,000.00 by way of compensation to the applicant for the loss and damage suffered by her by reason of his conduct.

Relevance

The Court characterised Miss Aldridge as being both young and vulnerable when compared to Mr Booth, who was the proprietor of the shop in which she worked. The power imbalance between them, and Miss Aldridge's fear that she would lose her job, were relevant to the Court's conclusion the conduct was unwelcome.

Case example: **Sexual harassment ¬ unwelcome conduct – reasonable person**

Horman v Distribution Group Ltd **[2001] FMCA 52** (19 December 2001)

Facts

Ms Horman worked as a spare parts interpreter for Distribution Group Ltd (Distribution Group), at a branch of its Repco Auto Parts business. Ms Horman alleged that during the course of her employment she was sexually harassed by her co-workers, which included inappropriate suggestions and comments; texta writing on her body; her bra straps being pulled, and her buttocks being touched. Distribution Group argued that, far from being offended by any incident of 'tomfoolery' in the workplace, Ms Horman was an enthusiastic participant and instigator.

Outcome

The Federal Magistrates Court (the Court) found some, but not all, of the alleged conduct took place, and then moved to the question of whether or not that conduct was unwelcome. Ms Horman's evidence included a letter that she had written towards the end of her employment outlining the harassing behaviour, which concluded: 'Please, do something, it's not fair for people to get away with such behaviour.' The Court accepted that the sexual conduct towards Ms Horman was unwelcome by reference to this letter, which was written contemporaneously and was found to represent Ms Horman's state of mind at the time.

Next the Court considered whether a reasonable person would anticipate the possibility that Ms Horman would be offended, humiliated or intimidated by the conduct. The Court accepted that Ms Horman used crude and vulgar language in the workplace; engaged in physical contact with other employees; exhibited explicit sexual photographs of herself; made disclosures about personal matters such as the shaving of her pubic hair and participated in tomfoolery and arguments. The Court did not accept that it followed that a person in the position of Ms Horman would still not be offended, humiliated or intimidated by some of the actions and remarks directed at her. The Court found that 'everyone is entitled to draw a line somewhere, and those activities crossed that line'. The Court held:

> '"Giving as good as you get" is often the only way in which a person feels he or she can resist unpleasant language and would not to my mind indicate to a reasonable person the type of acceptance of the language which would relieve a respondent of liability under section 28A of the Sex Discrimination Act.'

Having considered the medical evidence and the type of incident to which Ms Horman was subjected, the respondent was ordered to pay $12,500 to Ms Horman as damages, including any special damages for the cost of Ms Horman's medication.

Relevance

While the behaviour of a complainant, including inappropriate behaviour, may be relevant in assessing whether or not the conduct was 'unwelcome', or whether a reasonable person in the circumstances would have anticipated the possibility that the complainant would be offended, humiliated or intimidated, it will not disqualify a complainant from claiming sexual harassment in relation to other conduct.

Case example: **Sexual harassment ¬ reasonable person**

Smith v Hehir and Financial Advisors Aust Pty Ltd **[2001] QADT 11** (26 June 2001)

Facts

Ms Smith was employed by Hehir and Financial Advisors Aust Pty Ltd as a telemarketer. She alleged that Mr Hehir sexually harassed her on a number of occasions, including by unnecessarily and inappropriately touching her (such as massaging her shoulders and hugging her when she was distressed about a personal matter), and making suggestions with sexual connotations to her.

Outcome

The Queensland Anti-Discrimination Tribunal (the Tribunal) found that each of the incidents constituted sexual harassment.[117] In considering whether a reasonable person would have anticipated the possibility of offence in relation to the hugging incident, the Tribunal considered that it did not matter what Mr Hehir thought, as men's and women's perceptions of behaviour which can be characterised as sexual harassment may differ. Nor did the Tribunal consider it necessarily mattered what Ms Smith thought or felt. The Tribunal held:

> 'I do not consider that Mr Hehir intended to sexually harass Ms Smith on this occasion. However, the issue becomes whether a reasonable person taking all the circumstances into account (including the unwelcome rubbing on or after 8 February) would have anticipated the possibility that Ms Smith would be offended, humiliated or intimidated by this action … Using another person's distress as an excuse to touch them for purposes which are less than altruistic should never be encouraged or condoned. As reasonable members of society, however, we must equally be on our guard not to discourage genuine and compassionate actions of comfort from one person to another, particularly if there is obvious distress. Whether an action is compassionate or reprehensible will depend on the overall context in every case. The context here is that the action was not one between friends of long standing: it was an action by a middle-aged male employer to a young female employee who had only worked in the office for 2 weeks. It occurred not long after another incident when distress due to a phone call had been used as an excuse to massage the complainant. The action was more than just a touch, such as placing a comforting hand on the distressed person's arm or shoulder: it was more in the form of a cuddle. In my opinion, in this instance in the overall context, a reasonable person should have anticipated that there was the possibility that Ms Smith would have found this action offensive, humiliating or intimidating …'

The respondents were jointly ordered to pay Ms Smith $17,000 as compensation for loss or damage caused by the contravention comprised of:

- $5,000 for special damages
- $9,000 for general damages, and
- $3,000 for aggravated damages.

[117] Contravening s.118 of the *Anti-Discrimination Act 1991* (Qld). Section 119 of that Act defines 'sexual harassment' in comparable (but more extensive) terms to s.28A the Sex Discrimination Act.

Relevance

The 'reasonable person' test does not turn on the intentions of the perpetrator, or the reaction of the person experiencing sexual harassment. It is an objective test, determined by the specific context of the conduct.

A reasonable person may anticipate the possibility certain conduct would offend, humiliate or intimidate a person in one context, but not in another.

What does 'in connection with work' mean?

Part 3-5A of the Fair Work Act applies to sexual harassment 'in connection with work' ie where the sexual harassment occurs 'in connection with' the aggrieved person being a worker, a prospective worker or a person conducting a business or undertaking.

The phrase 'in connection with work' is not defined in the legislation.

When considering whether the sexual harassment of a person is 'in connection with work', the focal point of the inquiry is the worker (the aggrieved person).

The individuals engaging in the sexual harassment do not need to be workers – for example, they could be customers of a business. There is no requirement that these individuals must also work with the aggrieved person or be at work at the time they engage in the alleged sexual harassment. For example, a worker will be protected from sexual harassment under Part 3-5A where the worker is sexually harassed by another worker or by another person when working (such as by a client of the employer or principal, a supplier of the employer or business, or a visitor to the worker's workplace).

In the context of earlier provisions in the *Sex Discrimination Act 1984* (describing when sexual harassment was prohibited in employment and employment-like settings), the Federal Court has observed:

- The phrase 'in connection with' is a phrase of wide import[118]
- 'The words require a mere relation between one thing and another and do not necessarily require a causal relationship between the two things …',[119] and
- The words 'in connection with' indicate that the relationship between the 2 things 'need not be express nor direct'.[120]

Whether the necessary connection is present depends on the particular facts and circumstances of the case.

Related information

- Definition of 'Worker'

[118] *Ewin v Vergara (No 3)* [2013] FCA 1311 [230] (per Bromberg J).

[119] *Ewin v Vergara (No 3)* [2013] FCA 1311 [230] (per Bromberg J), citing *Our Town FM Pty Ltd v Australian Broadcasting Tribunal* [1987] FCA 301; (1987) 16 FCR 465 at 479 (Wilcox J).

[120] See *Vergara v Ewin (includes Corrigendum dated 14 November 2014)* [2014] FCAFC 100 [83] (per White J in dissent, but not in relation to this observation).

Case example: **Sexual harassment ¬ Sex Discrimination Act - 'in connection with'**

Vergara v Ewin [2014] FCAFC 100

Facts

The Full Court of the Federal Court of Australia upheld a decision by the primary judge that in 4 separate incidents in May 2009, Mr Claudio Vergara (the appellant) contravened s.28B(6) of the Sex Discrimination Act by sexually harassing Ms Ewin (the respondent). These incidents comprised:

- on 13 May 2009, at the end of the working day, the appellant turned off the lights in the office which he shared with the respondent (the LLA office), walked behind her, and tried in the dark to touch her hand so as to turn her computer off, stating that she should finish work. He told the respondent that he would turn the light back on only if she agreed to come to talk to him, as he wished to tell her something. The respondent agreed and they went to the nearby Waterside Hotel. At the hotel, the appellant sexually propositioned the respondent in very explicit and crude terms and proposed that they have an affair. The respondent refused. Outside the hotel and on the way to Southern Cross Train Station via King Street, the appellant tried to kiss the respondent
- on 14 May 2009, at work at another office, the appellant again sexually propositioned the respondent and made other statements of a sexual kind
- on 15 May 2009, at the LLA office, the appellant asked the respondent 'what are you doing to keep Claudio happy?', and
- in the late evening of 15 May 2009, at the LLA office, the appellant engaged in sexual intercourse with the respondent and touched and stroked her naked body. (The primary judge made a finding that the respondent had no memory of this incident due to heavy intoxication.)

At the time, the Sex Discrimination Act made it unlawful for a workplace participant to sexually harass another workplace participant at a place that was a workplace of both of those persons: see s.28B(6).

'Workplace' was defined as 'a place at which a workplace participant works or otherwise carries out functions in connection with being a workplace participant' (s.28B(7), emphasis added), and 'workplace participant' as meaning an employer or employee; a commission agent or contract worker, or a partner in a partnership (s.28B(7)).

It was common ground that Mr Vergara (a contract worker) and Ms Ewin (an employee) were both workplace participants.

The primary judge was satisfied that the Waterside Hotel and the place in King Street at which the appellant attempted to kiss the respondent were workplaces within the statutory definition; reasoning (in relation to the Waterside Hotel) as follows:

> '[227] The third incident on 13 May … undoubtedly involved the making of unwelcome sexual advances, unwelcome requests for sexual favours and other unwelcome conduct of a sexual nature. A reasonable person would have anticipated that Ms Ewin would be offended, humiliated or intimidated, as indeed she was.

> [228] The conduct occurred at the Waterside Hotel across the road from the LLA office and immediately followed the sexual harassment which I have found occurred at the office. The conduct was part of the same course of sexual harassment which began in the office. The movement from the office to the Waterside Hotel was initiated by Mr Vergara as part of his sexual harassment of Ms Ewin in the office and was acceded to by Ms Ewin in reaction to that harassment at the office, in an endeavour to move to a safer place.
>
> [229] In that respect at least, the purpose of the attendance and thus the function there carried out was to deal with the sexual harassment which began at the workplace. It makes no difference to the existence of that function that Mr Vergara's purpose was to enlarge the sexual harassment while Ms Ewin's purpose was to diminish it.
>
> [230] For a place at which sexual harassment occurs to satisfy the statutory definition of "workplace", the function carried out at that place needed to be "in connection with" Mr Vergara and Ms Ewin being workplace participants. The phrase "in connection with" used in the s 28B(7) definition of "workplace" is a phrase of wide import. The words require a mere relation between one thing and another and do not necessarily require a causal relationship between the two things: *Our Town FM Pty Ltd v Australian Broadcasting Tribunal* (1987) 16 FCR 465 at 479 (Wilcox J).
>
> [231] The relation between what Mr Vergara and Ms Ewin were doing at the Waterside Hotel and each being a workplace participant is established by the fact that the sexual harassment at the LLA office was workplace based harassment and that Ms Ewin and Mr Vergara moved to the Waterside Hotel to deal with that incident of harassment. Those matters establish a sufficient connection to the workplace to render the Waterside Hotel a "workplace" for the purposes of s 28B(6) during the course of Mr Vergara's and Ms Ewin's attendance at that place.'
>
> [232] The fourth incident which occurred on 13 May … involving Mr Vergara trying to kiss Ms Ewin in King Street after they left the Waterside Hotel also involved the making of an unwelcome sexual advance or other unwelcome conduct of a sexual nature. That conduct also formed part of the same course of conduct which began with the sexual harassment at the LLA office earlier that same evening. Having regard, in particular, to Ms Ewin's prior rejection of Mr Vergara's sexual advances, a reasonable person having regard to the circumstances would have anticipated that Ms Ewin would be offended, humiliated or intimidated. In my view, the place at which the conduct occurred had a sufficient workplace nexus and satisfied the statutory definition of "workplace" for the same reasons as those that pertain to the finding I have made in relation to the Waterside Hotel.'

The primary judge assessed the compensation to which the respondent was entitled at $476,163 together with interest but, after making allowance for other recoveries by the respondent, entered judgment for $210,563 inclusive of interest. This included compensation for loss of past earning capacity, loss of future earning capacity, general damages, past expenses and future expenses.

While the Full Court confirmed the decision of the primary judge, White J (in dissent) disagreed that the incidents at the Waterside Hotel and on a nearby street could be characterised as incidents 'in

connection with the workplace', because neither the appellant nor the respondent were carrying out any functions in connection with their being workplace participants at those times.

Relevance

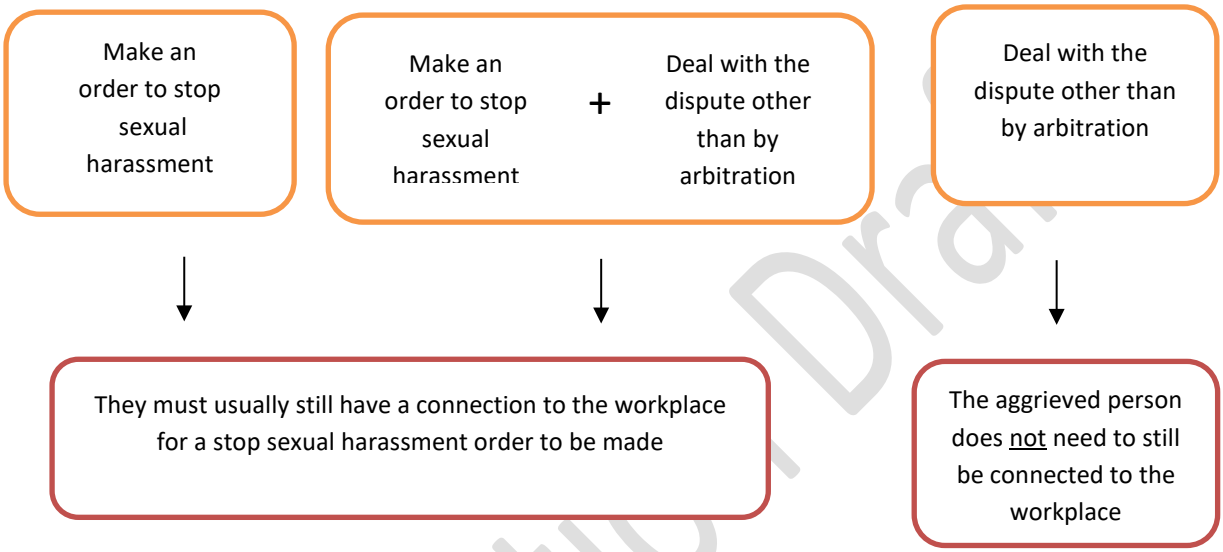
This decision considered when certain activities may have a relevant connection to the workplace.

The Court (in decisions at first instance and on appeal) observed that there did not necessarily have to be an express, direct or causal relationship between the sexual harassment and the workplace. In this case, the fact that the parties had moved to the Waterside Hotel to deal with the earlier incident of workplace-based sexual harassment was sufficient to render the Waterside Hotel a 'workplace' for the purposes of s.28B(6) of the Sex Discrimination Act (as in force at May 2009).

Note, however, that the legal test considered in this case was whether alleged sexual harassment had occurred at a shared 'workplace' (s.28B(6) of the Sex Discrimination Act). This is a different and narrower legal test to that which applies under the Fair Work Act. The prohibition in s.527D of the Fair Work Act is **not** limited to sexual harassment that occurs at a workplace. It also includes sexual harassment where this occurs 'in connection with' the person harassed (the aggrieved person) being a worker, a prospective worker or a person conducting a business or undertaking.

Does the aggrieved person still need to have a connection to work?

Whether an aggrieved person still needs to be a worker in the business or undertaking where the sexual harassment occurred may depend on the outcome they are seeking. If the aggrieved person is asking the Commission to:



Part 6 – Applications to stop sexual harassment – risk of continued sexual harassment

See Fair Work Act s.527J(1)(b)(ii)

The following information is **only** relevant to an application asking the Commission to make a stop sexual harassment order.

If an application asks the Commission to deal with a sexual harassment dispute (other than by a stop sexual harassment order or by arbitration), it is **not** necessary to show that there is a risk the aggrieved person will continue to be sexually harassed by the respondents.

Under Part 3-5A of the Fair Work Act, for the Commission to be able to make a stop sexual harassment order, it must be satisfied that an aggrieved person has been sexually harassed in connection with work by an individual or individuals (the respondents named in the application) **and** that there is a risk that the aggrieved person will continue to be sexually harassed at work by that individual or those individuals.

Applying a dictionary definition, 'risk' means exposure to the hazard or chance of continued sexual harassment. Relevant considerations may include whether the worker is still in contact with the individual or individuals at work, and any action that may have been taken to deal with the behaviour.

In the context of the Commission's stop bullying jurisdiction in Part 6-4B of the Fair Work Act, it has not been considered sufficient to satisfy the second condition (in s.789FF(1)(b)(ii)) to demonstrate that there is a risk of the applicant being bullied at work by individuals other than those who have been found to have engaged in the bullying behaviour.[121]

Absence of future risk of sexual harassment

If there is no risk of the aggrieved person being sexually harassed in connection with the same work in future, it may not be possible for an applicant to demonstrate that the Commission can make orders to stop sexual harassment.

[121] See *Mekuria v MECCA Brands Pty Ltd t/a Mecca Cosmetica and Others* [2019] FWCFB 2771 (Hatcher VP, Sams DP, Hampton C, 26 April 2019) at para. 29.

The circumstances in which this might arise have been considered in the context of applications to stop bullying at work. They include the person who harassed the worker no longer working at the workplace,[122] the worker making an application after having ceased working in a workplace,[123] or the worker being dismissed or ceasing work in a workplace after making an application but before the matter is dealt with by the Commission.[124]

If there is no risk that the applicant will continue to be sexually harassed in connection with work, the Commission has no power to make an order to stop sexual harassment under s.527J of Part 3-5A. In these circumstances, if the application is only asking the Commission to make a stop sexual harassment order (and does not ask the Commission to otherwise deal with the dispute (other than by arbitration)), the Commission may find that the application has no reasonable prospect of success and may exercise its discretion to dismiss the application.[125]

The Commission has held that it will not always be appropriate to dismiss an application for an order to stop bullying at work where a worker has been terminated from their employment. The decision to dismiss an application on this basis requires a consideration of the particular circumstances of the parties, including whether or not an individual may return to a workplace in some capacity as a worker. The Commission may decide to consider the application or adjourn it until any related dismissal proceeding - where there is a prospect of reinstatement - is determined. This is a matter of judgement in the particular circumstances of each case.[126]

If an application is dismissed (or withdrawn) because the person has left the workplace and they are later re-engaged by the same employer/principal, the person could make a new application for orders to stop sexual harassment in connection with work if they remain concerned about the risk of sexual harassment.[127] Allegations of the past sexual harassment could be relied upon in support of any such application.[128] Depending on when the past sexual harassment occurred, this may affect the type of application for orders to stop sexual harassment that a person can make.

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[122] Explanatory Memorandum, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, at para. 47 states: 'Orders would not be available in cases where there is no risk of harassment occurring again, for example when the person who harassed the worker is no longer employed at the workplace.'

[123] *Shaw v Australia and New Zealand Banking Group Limited t/a ANZ Bank* [2014] FWC 3408 (Gostencnik DP, 26 May 2014) at para. 16, in the context of a stop bullying application.

[124] *Re Mr M T* [2014] FWC 3852 (Johns C, 23 June 2014) at paras 20 and 22–23 and *Re Ms Brenton* [2014] FWC 4166 (Cloghan C, 24 June 2014) at paras 9–10, in the context of stop bullying applications.

[125] Fair Work Act s.587. See also Part 10 of this Benchbook.

[126] *Atkinson v Killarney Properties Pty Ltd T/A Perm-A-Pleat Schoolwear and Adrian Palm* [2015] FWCFB 6503 (Acton SDP, Gooley DP, Roe C, 14 October 2015) at para. 35 and *Dr Ng* [2019] FWC 3055 (Hampton C, 11 June 2019) at paras 32–33, in the context of a stop bullying applications.

[127] Note, if the alleged sexual harassment is part of a course of conduct that commenced before 6 March 2023, an application could be made under preserved s.789FC of Part 6-4B of the Fair Work Act, provided the jurisdictional facts could be established in relation to the application.

[128] *Dr Ravi v Baker IDI Heart and Diabetes Institute Holdings Limited T/A Baker IDI Heart and Diabetes Institute and Another* [2014] FWC 7507 (Gostencnik DP, 28 October 2014) at para. 14, in the context of a stop bullying application.

Workplace Advice Service

The Workplace Advice Service is a free legal assistance program facilitated by the Commission for eligible employees and employers who have a concern or enquiry regarding dismissal, general protections or workplace bullying or sexual harassment.

The Commission's role is to connect eligible persons with lawyers who may be able to help them. These lawyers work at law firms and other legal organisations that are completely independent of the Commission. The eligibility quiz on the Commission's website helps employers and employees to find out if they are eligible for the service.

Other legal help

You can find a community legal centre in your area by searching the Community Legal Centres website. The 'where to find legal help' page of Commission's website includes contact details for some of the main community legal centres in each state and territory who may be able to assist with free legal advice or other advisory services.

The law institutes or law societies in each state or territory may be able to refer a party to a private solicitor who specialises in workplace law.

Unions and employer organisations may also be able to provide advice and assistance.

The following case example is a Commission decision dealing with an application to stop bullying at work:

Case example: Application for orders to stop bullying – no longer employed – Application dismissed

Application by Vanessa Stewart [2020] FWC 4562 (Simpson C, 28 August 2020)

Facts

The application for orders to stop bullying was lodged on 17 June 2020. On 3 August 2020, the applicant wrote to the Commission and confirmed that she had resigned from her employment. The respondent requested that the Commission dismiss the matter under s.587 of the Fair Work Act.

Outcome

As there was no evidence to suggest there was a risk that the applicant would continue to be bullied at work, the application was dismissed on the grounds it had no reasonable prospects of success.

Relevance

It was clear from the circumstances of the matter that there was presently no risk the applicant would be bullied at work by the group of individuals against whom she made her application, given she was no longer employed by the employer and no longer attended the workplace. In those circumstances, the Commission exercised its discretion to dismiss the application.

Change in circumstances

Changes that are made in the workplace to specifically address the issues around alleged sexual harassment may reduce or eliminate the risk that an aggrieved person will continue to be sexually harassed in connection with work. The Commission may take this into consideration when deciding whether or not to make a stop sexual harassment order.[129]

Changes that might be made include:

- the relocation or dismissal of the individual or individuals alleged to have sexually harassed the aggrieved person;
- the introduction of a workplace sexual harassment policy;
- the delivery of sexual harassment or other appropriate training;
- changes to rosters; or
- changes to reporting requirements.

Other options for aggrieved persons who are no longer working for the employer/principal

An aggrieved person who is no longer connected to the work where the alleged sexual harassment occurred may be able to make another type of application to the Commission or bring a claim in other federal or state jurisdictions. In particular, they may be able to apply to the Commission under Part 3-5A to deal with the sexual harassment dispute in another way (other than by arbitration). Other types of applications that might be available include:

If a person has been dismissed they may be eligible to make an unfair dismissal application or a general protections application to the Commission. They may also be eligible to make a claim in other federal or state jurisdictions.

WHS regulators, as well as the AHRC and anti-discrimination bodies in the states and territories, can also deal with complaints about sexual harassment (depending on matters including where the conduct occurred).

See also – Other avenues for dealing with sexual harassment

[129] *Re Ms LP* [2016] FWC 763 (Hampton C, 12 February 2016) at para. 32, in the context of a stop bullying application.

Other Commission Benchbooks

You can access the **Unfair Dismissals** Benchbook at:
www.fwc.gov.au/benchbook/unfair-dismissals-benchbook

You can access the **General Protections** Benchbook at:
www.fwc.gov.au/resources/benchbooks/general-protections-benchbook

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The Workplace Advice Service is a free legal assistance program facilitated by the Commission for eligible employees and employers who have a concern or enquiry regarding dismissal, general protections or workplace bullying or sexual harassment.

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The law institutes or law societies in each state or territory may be able to refer a party to a private solicitor who specialises in workplace law.

Unions and employer organisations may also be able to provide advice and assistance.

Part 7 – Making and responding to an application

Making an application

See Fair Work Act s.527F

The following information only applies in relation to the alleged sexual harassment of a worker in connection with work that occurred, or was part of a course of conduct that commenced, **on or after 6 March 2023**.

For information about sexual harassment at work that is said to have occurred or commenced before 6 March 2023, see the Orders to stop sexual harassment Benchbook.

An application under s.527F for the Commission to deal with a sexual harassment dispute may be made by a person who:

- is a worker, or seeking to become a worker, in a business or undertaking, or a person who is conducting a business or undertaking, and
- believes they have been sexually harassed in connection with work on or after 6 March 2023, and
- wants the Commission to deal with a sexual harassment dispute by making a stop sexual harassment order, or by dealing with the dispute in another way, or both.

A person must apply to the Commission to deal with a sexual harassment dispute using a Form F75 application form. This is also known as a 'sexual harassment FWC application'.[130]

Currently, no application fee applies to applications made under s.527F.[131]

Applications under s.527F for the Commission to deal with a sexual harassment dispute must usually be made within 24 months after the alleged sexual harassment in connection with work occurred, or last occurred. The Commission may decide not to deal with a sexual harassment dispute

[130] Fair Work Act, s.723A(3).

[131] Section 527H provides that an application for the Commission to deal with a sexual harassment dispute must be accompanied by payment of the fee prescribed in regulations. As at 6 March 2023, no application fee has been prescribed. The Explanatory Memorandum for the FWOLA Regulations states that a purpose of the FWOLA Regulations is to introduce fee arrangements for applications brought in the Federal Courts under the sexual harassment prohibition in the Fair Work Act, and that 'Applicants will not be required to pay a fee for applications made to the Fair Work Commission under the same jurisdiction' (at p.2).

if it is made after this time. If the Commission decides not to deal with the sexual harassment dispute, the application will be dismissed.[132]

Link to form

- Form F75 - Application for the Fair Work Commission to deal with a sexual harassment dispute

All forms are available on the Forms page of the Commission's website.

Making an application under s.527F for the Commission to deal with a sexual harassment dispute is a workplace right protected under the general protections provisions of the Fair Work Act. Further information about the general protections provisions is available in the General protections benchbook.

If a person has been dismissed they may be eligible to make an unfair dismissal application or a general protections application to the Commission. They may also be eligible to make a claim in other Federal or State jurisdictions.

Amending an application

Section 586 of the Fair Work Act allows the Commission to correct or amend an application or waive an irregularity in the form or manner in which an application is made.[133]

An applicant can apply to the Commission to amend an application if they have made a mistake on the form such as misspelling a name or not providing the full name of an employer/principal. In certain circumstances, this power may also be used to substitute the name of the employer.[134] The power cannot be used to fundamentally change the nature of a claim (for example, from one type of claim to another).[135]

[132] Fair Work Act, s.527G.

[133] Fair Work Act s.586; see *Narayan v MW Engineers Pty Ltd* [2013] FWCFB 2530 (Ross J, Sams DP, Bull C, 29 April 2013) at para. 6, [(2013) 231 IR 89].

[134] See for e.g. *Djula v Centurion Transport Co. Pty Ltd* [2015] FWCFB 2371 (Catanzariti VP, Harrison SDP, Bull C, 12 May 2015) at para. 28, where the Full Bench observed that had the amendment sought by the applicant been granted, it would not have had the effect of creating a new application – while it would have substituted the name of the respondent, the application would have remained the same.

[135] *Ioannou v Northern Belting Services Pty Ltd* [2014] FWCFB 6660 (Boulton J, Gostencnik DP, Johns C, 2 October 2014) at para. 17.

Case example: **Application to amend stop bullying application refused – New application can be made**

Mekuria v MECCA Brands Pty Ltd t/a Mecca Cosmetica and Others [2019] FWCFB 2771 (Hatcher VP, Sams DP, Hampton C, 26 April 2019).

Decision at first instance [2018] FWC 6486 (Lee C, 20 November 2018).

Facts

The proceedings in this matter went forward entirely on the basis of bullying allegations against a clearly identified group of individuals, and Mecca responded to the case on this basis. On the day of the hearing, Ms Mekuria raised a series of new allegations against other individuals. One of the letters sent to the Commission on the morning of the hearing sought some new orders against her 'supervisor and manager'.

Outcome

The Full Bench refused to allow the application to be amended to name new individuals because it would not have been procedurally fair to Mecca.

Relevance

The Full Bench held that Mecca was in no position to respond to new allegations. The Full Bench confirmed that Ms Mekuria's new allegations could be addressed via a fresh and separate application to stop bullying if she wished to pursue them.

Responding to an application

Individual respondent – person(s) who have allegedly engaged in sexual harassment

A person (individual) who is named in a Form F75 as having engaged in sexual harassment must lodge a response to the application with the Commission within **7 calendar days** after the day on which the person was served the application.

A response giving the respondent's side of the case (including any objections to the application) must be made by using a Form F76.

Link to response form

Form F76 - Individual Respondent's response to an application to deal with a sexual harassment dispute

All forms are available on the Forms page of the Commission's website.

Employer/principal

A person named as an employer/principal or prospective employer/principal in a Form F75 can lodge a response with the Commission where:

- the Form F75 application seeks a stop sexual harassment order and a response is required from the employer/principal or prospective employer/principal of the aggrieved person, or
- the Form F75 application asks the Commission to otherwise deal with the dispute, and a response is required from the employer/principal of an individual respondent to the dispute.

An employer/principal or prospective employer/principal that is required to respond to a Form F75 application must do so within **7 calendar days** using the Form F77. The response can give the employer/principal's side of the case (including any objections to the application).

Link to response form

Form F77 - Response from employer/principal to an application to deal with a sexual harassment dispute

All forms are available on the Forms page of the Commission's website.

Related information

- For calculating 7 calendar days - What is a day?

Service

The Commission must serve an application for the Commission to deal with a sexual harassment dispute on each person named as having allegedly engaged in the sexual harassment (individual respondent) and each employer/principal. Where an individual respondent has a different employer/principal to the aggrieved person, the Commission will also serve the respondent's employer/principal if their details are included in the application.

The Commission can decide to vary or dispense with the service rules in appropriate cases.[136]

A response to an application for the Commission to deal with a sexual harassment dispute and any attachments will be sent to the following people named in the Form F75:

- the person or industrial association that made the application
- any other aggrieved person
- any other (individual) respondent to the application
- each employer/principal named in the application, and
- each person's nominated representative (if they have one).

The response must be lodged within **7 calendar days** after receiving the application for the Commission to deal with a sexual harassment dispute. The Commission will then serve the response on the other people involved in the case.

Related information

- Confidentiality – sending documents to the other parties

[136] *Fair Work Commission Rules 2013* rr.6(1) and (2).

Part 8 – Commission processes for dealing with sexual harassment disputes

Overview - how the Commission can deal with a dispute

An application under s.527F can ask the Commission to deal with a sexual harassment dispute by:

- making an order to stop sexual harassment in connection with work, or
- dealing with the dispute (other than by arbitration), or
- both making an order to stop sexual harassment **and** otherwise dealing with the dispute.

The Commission will assess the application and any responses or objections to decide next steps.

The Commission will try to resolve cases in a way that is fair, just and quick.[137]

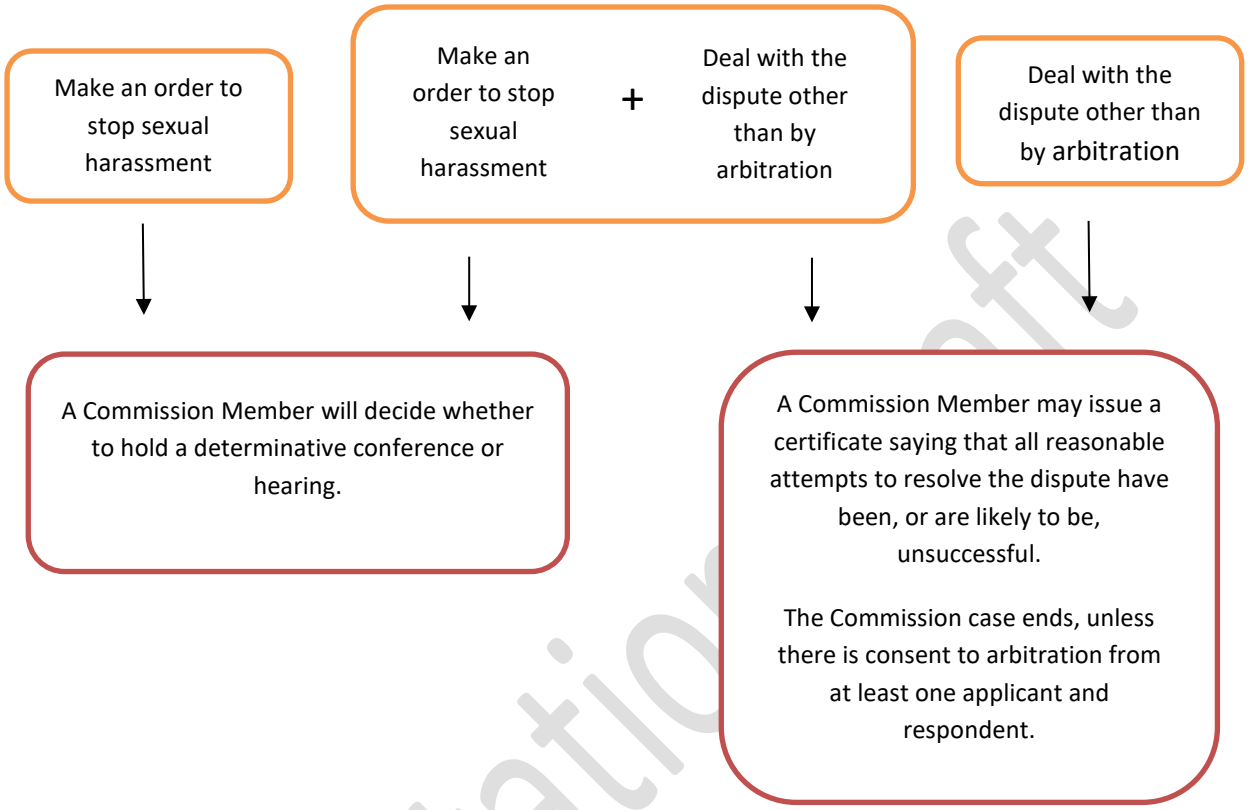
Not all cases follow the same process. However, in most cases, the Commission will first deal with a dispute by holding a Member conference to see if the matter can be resolved. This may involve the Member conciliating, making a recommendation or expressing an opinion in relation to the case.

Part 3-5A requires the Commission to start to deal with an application that includes an application for a stop sexual harassment order, within 14 days after it is made.[138] This early intervention is intended to help resolve matters quickly and inexpensively, with the ultimate aim of restoring safe working relationships.[139] Making an application will not of itself stop any actions taking place at a workplace. This includes investigations to deal with alleged sexual harassment as well as the implementation of any investigation outcome.

The Fair Work Act provides the Commission with flexibility to inform itself as it considers appropriate in relation to an application for the Commission to deal with a sexual harassment dispute.[140]

[137] See Fair Work Act, s.577.
[138] Fair Work Act s.527J(2).
[139] See Statement of Compatibility with Human Rights, Explanatory Memorandum for the *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* at paras. 31 and 38.
[140] Fair Work Act s.590.

If a Member conference does not resolve the case, the next steps will depend on the type of application. If the aggrieved person (or their industrial association) is asking the Commission to:



Hearings and conferences

See Fair Work Act ss.592–593 and s.527R

What is a Member conference?

This is a conference before a Commission Member where the Member will try to assist the parties to resolve the sexual harassment dispute. Member conferences are informal.

Member conferences **must** be conducted in private if the application is not only for a stop sexual harassment order,[141] and must also be conducted in private unless the Member specifically directs otherwise. [142]

[141] Fair Work Act, s.527R(2).
[142] Fair Work Act s.592(3).

In private means that members of the public are excluded. Persons who are necessary for the Commission to perform its functions are permitted to be present.[143] Usually, parties can bring a support person with them to a conference, such as a partner, parent or close friend. While support persons are not representatives, they can provide emotional support and act as a 'sounding board' during private sessions.

A Member conference is an opportunity for the parties to hear each other's perspectives and to identify and discuss issues in dispute, where there is common ground and what steps might be taken to resolve the dispute. A Commission Member will manage the process and will help the people involved in the dispute try to resolve the issues together. The Member is independent.

The Commission Member will review the documents filed in the case and may make procedural decisions about the conduct of the case, such as who can participate in the conference, where and when the conference will be, and what is needed to help the people involved feel safe and supported (such as having separate in-person or online meeting rooms).

During a Member conference, the Commission Member will try to resolve the dispute, including through conciliation, mediation, making a recommendation to the parties or expressing an opinion. The Member will not usually decide the case in a Member conference.

What is a determinative conference or hearing?

Determinative conferences and hearings generally involve the Commission making a binding decision.

If a Member holds a determinative conference or hearing in relation to an application for stop sexual harassment orders or in a consent arbitration, the Member will consider the evidence and objectively assess whether they are satisfied that sexual harassment has occurred in connection with work in relation to the aggrieved person.[144] This requires the Commission to reach a conclusion about each of the relevant elements of the conduct complained of.[145] This may include considering matters such as whether:

- the applicant was eligible to apply to the Commission,
- the aggrieved person has been sexually harassed in connection with work, and
- (if the application is for a stop sexual harassment order) whether there is a risk that the aggrieved person will continue to be sexually harassed in connection with work.

Determinative conferences are less formal than hearings but still involve the Commission Member considering evidence submitted by each of the parties and making a decision.

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[143] *SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 49 (5 October 2006) at para. 25, [(2006) 230 CLR 486].

[144] See *Appellant v Respondent* [2015] FWCFB 1972 (Harrison SDP, Lawrence DP, Cambridge C, 22 April 2015) at para. 30.

[145] *Mayson v Mylan Health P/L and Ors* [2020] FWC 1404 (Colman DP, 17 March 2020) at para. 19 (in the context of an application for orders to stop bullying at work).

Determinative conferences are usually held in private and are limited to the parties involved in the dispute. Representatives and support persons may also be permitted to attend a determinative conference. A determinative conference is different to an informal Member conference. Even though it is generally held in private, a determinative conference is recorded and transcript may be produced.

A hearing is a more formal process than a determinative conference. It involves the Commission Member hearing evidence from the people involved in the case, including witnesses, and making a decision. The Commission may inform itself in relation to a matter before it as it sees fit.

The Commission will only conduct a hearing if it considers it appropriate to do so. A hearing is usually open to the public and anyone can attend, unless a confidentiality order has been made. This includes media and any other member of the public with an interest in the dispute.

After a hearing, a Member will make a decision. It usually takes between 5 and 12 weeks for the Commission to decide a case. If a party needs an urgent decision, they can ask the Commission for a quick or "expedited" hearing.

Following a determinative conference or hearing, the Commission will publish the Member's reasons for decision on its website, including the names of the parties, details of the allegations made against individuals and relevant witness evidence. Publication of decisions is required unless a confidentiality order has been made.

For further information about Commission conferences and hearings refer to the Fair Hearings Practice Note.

Refer to the Commission's website for information on preparing for hearings and conferences.

Procedural issues

Confidentiality – sending documents to the other parties

The service rules in relation to applications under s.527F for the Commission to deal with a sexual harassment dispute, and responses to these applications, are discussed earlier in this Benchbook. As noted there, the Commission can decide to vary or dispense with the service rules in appropriate cases.[146]

Applying to the Commission starts a legal process. Information given to the Commission is usually a matter of public record and may become accessible to other people, including those who are not involved in the case.

[146] *Fair Work Commission Rules 2013* rr.6(1) and (2).

Generally, a party to a matter must also send a copy of any correspondence or documents sent to the Commission to the other parties (or their representatives). If they do not do so, the Commission may forward a copy to the other parties (or their representatives).

If a party has any concerns about correspondence or a document being forwarded by the Commission to the other parties or their representatives (for example, because the document contains personal medical details or other sensitive information) they should contact the Commission to discuss their options before sending the document to the Commission.

The Commission's powers and practice in relation to making confidentiality orders is discussed below.

Confidentiality orders – De-identification of parties

 See Fair Work Act ss.593–594

The Commission is generally required to perform its functions and exercise its powers in a manner that is open and transparent,[147] and must usually publish its written decisions and orders in (following a determinative conference or a hearing) on its website.[148]

While Member conferences and determinative conferences are almost always held in private, Commission hearings are usually held in public because of the public interest in open justice. The Commission usually publishes the date and time of hearings on its website, as well as the name or initials of the person making the application.

Some matters, including some sexual harassment cases, may involve sensitive personal information (such as medical information) that is not appropriate for publication. The Commission has the power to make orders to keep information confidential if it is satisfied that it is desirable to do so because of the confidential nature of the evidence or for any other reason. This might include orders:

- that all or part of a hearing be held in private,
- restricting the persons who may be present at a hearing,
- prohibiting or restricting the publication of the names and addresses of persons appearing at, or involved in, the hearing, and
- prohibiting or restricting the publication or disclosure of evidence, documents, or some or all of the Commission's decision or reasons in relation to a matter.[149]

Considerations of open justice and the administration of justice are clearly relevant to the exercise of discretion to make a confidentiality order under s.594(1) of the Fair Work Act. However, these considerations are not to be applied in a vacuum and need to be considered in the context of the

[147] Fair Work Act s.577(c).
[148] Fair Work Act s.601(4).
[149] Fair Work Act ss.593–594.

express power to prohibit or restrict publication of certain material having regard to its confidential nature or for any other reason and the circumstances of a particular case.[150]

Part 3-5A of the Fair Work Act is directed to protecting Australian workers from the risk to health and safety caused by sexual harassment in connection with work. This may be defeated if the public disclosure of sensitive information during the course of proceedings under Part 3-5A would be likely to make the person's continuing engagement at their workplace unviable.

However, in accordance with the open justice principle, the Commission has held in relation to an application to stop bullying at work that a non-disclosure order cannot be made merely because allegations have been made that are embarrassing, distressing or potentially damaging to reputations.[151] Something more is required.

If a party applies for confidentiality orders on the basis that disclosure of sensitive information is likely to endanger the viability of a continuing working engagement, the party will need to positively satisfy the Commission that this is the case. A mere assertion is not enough.[152]

[150] *Bowker and Others v DP World Melbourne Limited T/A DP World and Others* [2015] FWC 4542 (Gostencnik DP, 6 July 2015) at para. 15.
[151] *Amie Mac v Bank of Queensland Limited and Others* [2015] FWC 774 (Hatcher VP, 13 February 2015) at para. 9.
[152] ibid. at para. 10.

Case example: **Application for de-identification of parties approved**[153]

Application by Worker A, Worker B, Worker C, Worker D and Worker E *(interim orders dealing with behaviour at workplace)* PR584404 (Gostencnik DP, 18 August 2016).

Application by Worker A, Worker B, Worker C, Worker D and Worker E *(interim orders dealing with confidentiality)* PR584235 (Gostencnik DP, 15 August 2016).

Application by Worker A, Worker B, Worker C, Worker D and Worker E *(reasons for confidentiality order)* [2016] FWC 6524 (Gostencnik DP, 7 October 2016).

Facts

An application for an interim confidentiality order was made in the context of protected industrial action by a group of workers at the Carlton and United Breweries (CUB) site in Abbotsford, Victoria. The workers alleged that they were experiencing unreasonable behaviour as a result of the industrial action.

The applicants submitted that the publication of their names in connection with the applications would likely result in an escalation of the behaviour they were experiencing at the workplace.

The applicants had previously sought, and been granted, an interim order which prohibited the persons named from engaging in certain behaviour towards them, including filming the applicants attending work and calling them various inappropriate names.

Outcome

The Deputy President issued the orders sought on the basis that the concerns were genuinely held and the risk that the behaviour would escalate was not merely theoretical. Further, the interests of open justice were found to 'give way to the desirability to mitigate the risk of escalating inappropriate conduct directed towards the applicants'.

Relevance

The capacity of a person to effectively participate in a proceeding before the Commission may be affected, for example, by a well-founded or reasonable concern that the disclosure and publication of their name or address might result in some form of retribution, harassment or intimidation.

[153] See also *H v Centre and Others* [2014] FWC 6128 (Wilson C, 4 September 2014) and *Re G.C.* [2014] FWC 6988 (Hampton C, 9 December 2014).

Case example: **Application for de-identification of parties NOT approved**[154]

Amie Mac v Bank of Queensland Limited and Others [2015] FWC 774 (Hatcher VP, 13 February 2015).

Facts

Amie Mac filed an application for orders to stop bullying at work. The application alleged that bullying occurred in the course of Ms Mac's employment as a lawyer with the Bank of Queensland Limited (BOQ), and identified 5 persons employed by BOQ as the perpetrators of that bullying (jointly, the respondents).

The respondents applied for an order prohibiting the publication of their names and the name of the applicant. The respondents submitted that de-identification was appropriate because it would:

- minimise the negative impact that any open proceedings may have on Ms Mac, particularly in relation to her ability to return to work
- minimise the negative impact that any open proceedings may have on the health of Ms Mac
- minimise the adverse impact on the individual respondents of untested allegations, including allegations to the effect that they (being lawyers) have breached the Australian Solicitors' Conduct Rules, and
- minimise unnecessary knowledge of the proceedings amongst BOQ employees, thereby minimising the potential to adversely affect any return to work by Ms Mac.

Outcome

The Commission found nothing in the evidence, including the medical evidence, which could form a proper basis for the conclusion that the identification of the names of the relevant individuals would be likely to prevent Ms Mac from returning to work at an appropriate time. Ms Mac herself, who had access to competent legal and medical advice, expressed no concerns on this score and was opposed to the making of de-identification orders. There was also no issue of 'untested' allegations, because the allegations had been tested at the hearing and were the subject of findings in the decision.

The Commission did not consider there to be any proper basis for the making of the de-identification orders sought by the respondents and rejected their application.

Relevance

The principle of open justice will usually be the paramount consideration in determining whether a confidentiality order should be made. It is not sufficient to justify the making of a non-disclosure order merely on the basis that allegations have been made which are embarrassing, distressing or potentially damaging to reputations.

[154] See also *Re Justin Corfield* [2014] FWC 4887 (Bissett C, 21 July 2014) and *Bowker and Others v DP World Melbourne Limited T/A DP World and Others* [2014] FWC 7381 (Gostencnik DP, 21 October 2014).

Interim Orders

See Fair Work Act ss.589 and 789FF

Sometimes, parties to an application under s.527F may seek to have certain preliminary issues dealt with prior to the application being determined.

The Commission does not have power to make interim orders in relation to an application that seeks a stop sexual harassment order unless it is satisfied that the aggrieved person has been sexually harassed in connection with work and there is continuing risk of sexual harassment.

Case example: **Application for an interim order – Interim order refused**

Ms Virginia Wills v Grant, Marley & The Government of New South Wales, Sydney Trains and Another [2020] FWCFB 4514 (Ross J, Hatcher VP and Gostencnik DP, 28 August 2020)

Facts

The applicant filed an application for interim orders to restrain the respondents from taking any further step in relation to its investigation of the applicant, imposing any disciplinary sanction on the applicant and/or terminating the applicant's employment. The application for interlocutory relief was dismissed and that decision was appealed.

Outcome

The appeal was dismissed as the Full Bench was not satisfied that the worker had been bullied at work or that there was a risk that the bullying would continue.

Relevance

The Commission has power to make an interim order dealing with an application made under s.789FC. However, an interim stop bullying order cannot be issued based only on a prima facie case, or serious question to be determined, and the balance of convenience favouring the interim relief sought.

Section 789FF allows the Commission to make stop bullying order, including an interim order, only if it is satisfied that a worker has been bullied at work and that there is a risk that the bullying will continue. For example, the Commission might be satisfied that a worker has been bullied at work and that there is a risk of continued bullying but require further submissions from the parties as to the final orders; an interim order might be made 'in the interim' on the material before the Commission at that time.

The Full Bench noted that it should not usually be necessary for applicants for stop bullying orders to seek interim orders given the Commission triages stop bullying applications in order to ensure that applications that are brought in circumstances of urgency are dealt with on an expedited basis.

Case example: **Application for interim orders – Interim orders refused**

Mayson v Mylan Health P/L and Ors [2020] FWC 1404 (Colman DP, 17 March 2020)

Facts

The applicant sought interim orders to stop her employer and 4 named individuals from taking further disciplinary action against her or terminating her employment until the final hearing and determination of her workplace bullying application.

Outcome

The application for interim orders was dismissed.

The Commission rejected the applicant's argument that s.589(2) of the Fair Work Act is a discrete source of power for the Commission to make interim orders in workplace bullying cases.

An application under s.789FC alleging that a worker has been bullied at work seeks an order under s.789FF to prevent the worker from being bullied by those individuals. Any order made in relation to a s.789FC application is an order under s.789FF and needs to meet its requirements.

It was not enough for the Commission to be persuaded that the applicant had a prima facie case and that the balance of convenience was in her favour in order to make the interim orders. As the Commission was not yet satisfied that the worker had been bullied at work or that there was a risk that the bullying would continue, the Commission did not have power to make orders to stop the behaviour and dismissed the application for interim orders.

Relevance

An interim order to stop bullying cannot be issued based only on a prima facie case, or serious question to be determined, and the balance of convenience favouring the grant of the interim order. The Commission can only make an order to stop bullying, including an interim order, if it is satisfied that a worker has been bullied at work and there is a risk that the bullying will continue.

The Commission rejected the applicant's argument that an interim order should be granted because it was necessary for her employment to continue so that the Commission could determine her workplace bullying application. The purpose of making orders to stop workplace bullying is to prevent a worker from being bullied at work, not to prevent the termination of their employment.

Consent Orders

Some parties, during the process of dealing with an application under s.527F for the Commission to deal with a sexual harassment dispute, may come to an agreement about how to resolve their dispute. Providing the parties also agree that the circumstances required by the Fair Work Act for making such an order have been met, an order giving effect to this agreement may be made by the Commission, called a consent order. The Commission would still need to be satisfied that the conditions for making an order were met.

Representation by lawyers and paid agents

See Fair Work Act ss.12 and 596, *Fair Work Commission Rules 2013* rr.11–12A

Related information

- Notification of 'acting for' a person
- What is representation?
- Exception – Conference by staff conciliator
- Representation – Not in a conference or hearing
- When will permission be granted?

Definitions

A ***lawyer*** is a person who is admitted to the legal profession by a Supreme Court of a state or territory.[155]

A ***paid agent*** is an agent (other than a bargaining representative) who charges or receives a fee to represent a person in the matter before the Commission.[156]

Seeking permission

A person must seek the Commission's permission to be represented by a lawyer or paid agent participating in a conference or hearing in relation to an application to stop sexual harassment (subject to the exception below). Permission is not usually required for a lawyer or paid agent to make an application or submissions on a person's behalf.[157]

Only a Commission Member can give or refuse permission for a lawyer or paid agent to represent a party, unless a Commission employee (such as a staff conciliator) has been delegated this power or function.[158]

Notification of 'acting for' a person

If a person wants to advise the Commission that a lawyer or paid agent acts for them in relation to a matter before the Commission, they must lodge a notice with the Commission.[159] The notice must be served on all parties to the matter.[160]

[155] Fair Work Act s.12.
[156] Fair Work Act s.12.
[157] Fair Work Act s.596(1) and *Fair Work Commission Rules 2013* rr.12(1)(b) and 12(3). See also s.596(4) as to when a person is taken not to be represented by a lawyer or paid agent.
[158] *Department of Education and Early Childhood Development v A Whole New Approach Pty Ltd* [2011] FWA 8040 (Gooley C, 29 November 2011) at para. 67.
[159] *Fair Work Commission Rules 2013* r.11(1).
[160] *Fair Work Commission Rules 2013* Schedule 1.

There are 2 ways in which a person (or a lawyer or paid agent acting for the person) can give notice that a lawyer or paid agent acts for them in relation to a matter before the Commission:

- they can give notice by identifying the lawyer or paid agent as the person's representative in an application or other approved Commission form that they lodge in the matter, or
- they can give notice by lodging a Form F53.[161]

The notice may serve to inform the Commission and other parties that the lawyer or paid agent needs to be copied into correspondence and documents lodged in the matter. It also puts the other parties on notice that costs are being incurred for which the other parties (or their lawyers or paid agents) could become liable if a costs order is made by the Commission.[162]

Meaning of 'act for' a person

In broad terms, a lawyer or paid agent **acts for** a person in relation to a matter before the Commission if they provide their professional services to the person in relation to the matter – for example:

- appearing as an advocate in a conference or hearing conducted by a Member of the Commission (or in a conciliation conference before a member of the staff of the Commission)
- preparing to appear as an advocate
- negotiating a settlement or compromise of the matter
- giving legal or other advice
- preparing or advising on documents (including applications, forms, affidavits, statutory declarations, witness statements, written submissions and appeal books) for use at a conference or hearing
- lodging documents with the Commission
- sending letters or emails to the Commission, another party or another lawyer or paid agent, or
- carrying out work incidental to any of the above.[163]

Link to form

Form F53 - Notice that a person: (a) has a lawyer or paid agent; or (b) will seek permission for lawyer or paid agent to participate in a conference or hearing.

[161] Fair Work Commission Practice Note, Lawyers and paid agents, 1 May 2020 at para. 19.
[162] Fair Work Commission Practice Note, Lawyers and paid agents, 1 May 2020 at para. 16.
[163] Fair Work Commission Practice Note, Lawyers and paid agents, 1 May 2020 at para. 13.

All forms are available on the Forms page of the Commission's website.

Ceasing to 'act for' a person

If a person has previously lodged a notice informing the Commission that a lawyer or paid agent is acting for them in relation to a matter before the Commission and the lawyer or paid agent ceases to act for them, the person must give the Commission notice of this.[164] The notice must also be served on all of the other parties to the matter.[165]

Link to form

- Form F54 - Notice that lawyer or paid agent has ceased to act for a person

All forms are available on the Forms page of the Commission's website.

In-house counsel, union representatives and employer association representatives

A person **does not need to seek permission** to be represented by a lawyer or paid agent if the lawyer or paid agent is:

- an employee (or officer) of the person, or
- an employee (or officer) of any of the following, which is representing the person:
  - a union or employer association that is registered under the *Fair Work (Registered Organisations) Act 2009* (Cth), or
  - an association of employers that is not registered under the *Fair Work (Registered Organisations) Act 2009* (Cth), or
  - a peak council, or
  - a bargaining representative, or
- a bargaining representative.[166]

In these circumstances, the person is **taken not to be represented** by a lawyer or paid agent.[167]

Other support persons

Where a person wants to be represented by a person or organisation that is **not** a lawyer or paid agent as defined in the Fair Work Act, the Commission's permission is not required.[168]

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[164] *Fair Work Commission Rules 2013* r.11(2).
[165] *Fair Work Commission Rules 2013* Schedule 1.
[166] Fair Work Act s.596(4).
[167] Fair Work Act s.596(4).
[168] *Cooper v Brisbane Bus Lines Pty Ltd* [2011] FWA 1400 (Simpson C, 3 March 2011) at para. 13.

What is representation?

The term '**representation**' is concerned with more than just advocacy at a hearing. A lawyer can be said to **represent** their client when they engage in a wide range of activities connected with litigation, not just advocacy.[169]

Barristers' conduct rules describe the work of a barrister in the following way: [170]

> 'Barristers' work consists of:
>
> (a) appearing as an advocate;
>
> (b) preparing to appear as an advocate;
>
> (c) negotiating for a client with an opponent to compromise a case;
>
> (d) representing a client in a mediation or arbitration or other method of alternative dispute resolution;
>
> (e) giving legal advice;
>
> (f) preparing or advising on documents to be used by a client or by others in relation to the client's case or other affairs;
>
> (g) carrying out work properly incidental to the kinds of work referred to in (a)-(f); and
>
> (h) such other work as is from time to time commonly carried out by barristers.'

This work is no different with respect to a solicitor.

Outside of the context of legal representation, a paid agent involved in proceedings before the Commission will typically engage in non-legal equivalents of most of the above categories of work and would be regarded as 'representing' their client in doing so.[171]

Meaning of 'representing' a person and 'participating' in a conference or hearing

Sections 596(1) and (2) of the Fair Work Act refer to a person being represented 'in a matter' before the Commission. The word 'matter' describes more than just a hearing; in a legal context it usually describes the whole situation that is brought before a court or tribunal.[172]

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[169] *Fitzgerald v Woolworths Limited* [2017] FWCFB 2797 (Hatcher VP, Dean DP, Wilson C, 17 October 2017) at para. 34.
[170] Australian Bar Association's Barristers' Conduct Rules cited in *Fitzgerald v Woolworths Limited* [2017] FWCFB 2797 (Hatcher VP, Dean DP, Wilson C, 17 October 2017) at para. 34. See also r.11 of the *Legal Profession Uniform Conduct (Barristers) Rules* 2015, which is in the same terms.
[171] *Fitzgerald v Woolworths Limited* [2017] FWCFB 2797 (Hatcher VP, Dean DP, Wilson C, 17 October 2017) at para. 34.
[172] ibid. at para. 36.

Section 596(1) also expressly provides that representation in a matter includes 'making an application or submission to the FWC on behalf of the person'.[173]

The meaning of **represent** in s.596 of the Fair Work Act and the *Fair Work Commission Rules 2013* is narrower than the meaning of **act for** a person. **Representing** a person generally means that the activity will involve some interaction with the Commission itself – for example:

- appearing as an advocate in a conference or hearing conducted by a Member of the Commission (or in a conciliation conference before a member of the staff of the Commission)
- participating in a conference or hearing other than as an advocate
- negotiating a settlement or compromise of the matter in a conciliation conference
- lodging written applications, responses, submissions and other documents with the Commission, or
- sending letters or emails to both the Commission and another party or lawyer or paid agent.[174]

Participating in a conference or hearing **includes:**

- appearing as an advocate of a person in the conference or hearing (or otherwise speaking on behalf of a person in the conference or hearing), and
- attending the conference or hearing and assisting a person to present their case without speaking on behalf of the person (such as by taking notes, providing documents or cataloguing exhibits for an advocate, or making suggestions to an advocate as how best to conduct the case).[175]

Representation – In a conference or hearing

A person must not be represented by a lawyer or paid agent participating in a conference or hearing relating to an application to stop sexual harassment without the permission of the Commission.[176]

[173] ibid. at para. 37.

[174] Fair Work Commission Practice Note, Lawyers and paid agents, 1 May 2020 at para. 23. For Commission decisions that consider the nature of representation, see for example *Fitzgerald v Woolworths Limited* [2017] FWCFB 2797 (Hatcher VP, Dean DP, Wilson C, 17 October 2017) at paras. 34-35 and 52-53; *Kolobius v Uniting Church in Australia Property Trust (Q)* [2018] FWCFB 1057 (Hatcher VP, Spencer C, Hunt C, 16 February 2018) at para. 36; *Rodl v Qantas Airways Limited* [2018] FWCFB 6693 (Gostencnik DP, Bull DP, Bissett C, 30 October 2018) at para. 65.

[175] Fair Work Commission Practice Note, Lawyers and paid agents, 1 May 2020 at para. 24. See *Fitzgerald v Woolworths Limited* [2017] FWCFB 2797 (Hatcher VP, Dean DP, Wilson C, 17 October 2017) and *Kolobius v Uniting Church in Australia Property Trust (Q)* [2018] FWCFB 1057 (Hatcher VP, Spencer C, Hunt C, 16 February 2018).

[176] *Fair Work Commission Rules 2013* r.12(1).

This requirement for permission does not apply to lawyers and paid agents who are covered by s.596(4) of the Fair Work Act[177] or to the exception below, unless the Commission directs otherwise.

If a person proposes to be represented by a lawyer or paid agent participating in a conference or hearing in relation to an application to stop sexual harassment before the Commission and requires permission to be represented, the person must lodge a notice with the Commission informing the Commission that the person will seek the Commission's permission for a lawyer or paid agent to participate in the conference or hearing. [178]

Link to form

Form F53 - Notice that a person: (a) has a lawyer or paid agent; or (b) will seek permission for lawyer or paid agent to participate in a conference or hearing

All forms are available on the Forms page of the Commission's website.

Exception – Conciliation conference by staff conciliator

In some circumstances, a person may, without the permission of the Commission, be represented in a matter by a lawyer or paid agent participating in a **conciliation conference conducted by a member of the staff of the Commission** (whether or not under delegation).[179]

However, a person **cannot be represented** by a lawyer or paid agent in **a conference before a Commission Member** in relation to an application to deal with a sexual harassment dispute, without the permission of the Commission.[180]

Despite this exception (in relation to staff conciliation conferences), the Commission may direct that a person is not to be represented in a matter by a lawyer or paid agent except with the permission of the Commission.[181]

Representation – Not in a conference or hearing

A person may be represented by a lawyer or paid agent **other than** by them participating in a conference or hearing **without** the permission of the Commission.[182]

Under rule 12(1)(b) and s.596 of the Fair Work Act, apart from participating in a conference or hearing, a person's lawyer or paid agent can act for and represent the person without permission, unless the Commission directs otherwise.

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[177] *Fair Work Commission Rules 2013*, Note to r.12(1).

[178] *Fair Work Commission Rules 2013* r.12A(1). Rule 12A(2) provides that the Commission may permit a person to be represented by a lawyer or paid agent in a matter before the Commission even if the person fails to comply with r.12A(1).

[179] See, *Fair Work Commission Rules 2013* r.12(2)(b). Note, as at March 2023 applications for orders to stop sexual harassment are only assigned to Members of the Commission, however in the longer-term matters may be allocated to staff conciliators.

[180] *Fair Work Commission Rules 2013* r.12(1).

[181] *Fair Work Commission Rules 2013* r.12(3).

For example, unless the Commission directs otherwise, the lawyer or paid agent can:

- prepare and lodge written applications, responses, submissions and other documents with the Commission, and
- correspond with the Commission and other parties.[183]

When will permission be granted?

The Commission can only give permission for a person to be represented by a lawyer or paid agent in a matter before the Commission if:

- it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter (complexity)[184]
- it would be unfair not to allow the person to be represented because the person is unable to represent himself, herself or itself effectively (effectiveness),[185] or
- it would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter (fairness).[186]

Each of these are separate reasons why the Commission might be satisfied that permission should be granted for a person to be represented. If the Commission is satisfied that permission should be granted for one of these reasons, it is not necessary to also consider the other reasons given for seeking permission. Granting permission is discretionary and even if one of the reasons applies, permission may not be granted.[187]

Assessing whether permission should be granted under s.596 involves a 2-step process:

1. Assess whether one or more of the criteria in s.596(2) is satisfied. This involves making of an evaluative judgment akin to the exercise of a discretion.
2. If the first step is satisfied, consider whether in all of the circumstances, the discretion should be exercised in favour of the party seeking permission.[188]

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[183] Fair Work Commission Rules 2013 r.12(1)(b) and Fair Work Commission Practice Note 2/2019, Lawyers and paid agents, 1 May 2020 at para. 27.
[184] Fair Work Act s.596(2)(a).
[185] Fair Work Act s.596(2)(b).
[186] Fair Work Act s.596(2)(c).
[187] *Kaur v Hartley Lifecare Incorporated* [2020] FWCFB 6434 (Hatcher VP, Mansini DP, McKinnon C, 1 December 2020) at para. 21.
[188] *Warrell v Fair Work Australia* [2013] FCA 291, 233 IR 335 (4 April 2013) at para. 24; *Asciano Services Pty Ltd v Hadfield* [2015] FWCFB 2618 (Hatcher VP, Sams DO, Lawrence DP, 21 April 2015) at para. 19; *Calleri v Swinburne University of Technology* [2017] FWCFB 4187 (Ross J, Colman DP, Cirkovic C, 28 August 2017) at para. 36, *Kaur v Hartley Lifecare Incorporated* [2020] FWCFB 6434 (Hatcher VP, Mansini DP, McKinnon C, 1 December 2020) at para. 21.

In granting permission, the Commission will have regard to considerations of efficiency and fairness rather than merely the convenience and preference of the parties.[189]

The discretion afforded to the Commission will be exercised on the facts and circumstances of the particular case.[190]

The Commission is obliged to perform its functions and exercise its powers in a manner that is 'fair and just'.[191] In some cases it may not be fair and just for one party to be represented by a lawyer or paid agent when the other is not.[192]

A party might be required to represent themselves if the Commission is not satisfied permission should be granted for a lawyer or paid agent to appear for them.[193]

Where permission is required, the Commission must decide whether to grant permission before a party can be represented by a lawyer or paid agent, even if the other party has not objected to representation.[194]

Partial representation may be permitted during examination-in-chief and cross-examination of the party seeking representation[195] or during argument about jurisdictional issues.[196]

Complexity

The complexity of a matter is relevant to whether a matter could be dealt with more efficiently if permission is granted for a person to be represented, but it is not determinative. While s.596(2)(a) of the Fair Work Act requires the complexity of the matter to be taken into account in deciding whether or not to grant permission to be represented, the issue to decide is whether the grant of permission would enable the matter to be dealt with more efficiently. [197]

A significant number of documents and wide-ranging issues does not necessarily mean a matter is complex.[198]

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[189] Explanatory Memorandum to Fair Work Bill 2008 at para. 2296. Also see *Lekos v Zoological Parks and Gardens Board T/A Zoos Victoria* [2011] FWA 1520 (Lewin C, 18 March 2011) at para. 41.

[190] *Rodgers v Hunter Valley Earthmoving Company Pty Ltd* [2009] FWA 572 (Harrison C, 9 October 2009) at para. 12.

[191] Fair Work Act s.577(a).

[192] *Warrell v Fair Work Australia* [2013] FCA 291 (4 April 2013) at para. 27.

[193] *Azzopardi v Serco Sodexo Defence Services Pty Limited* [2013] FWC 3405 (Cambridge C, 29 May 2013).

[194] *Viavattene v Health Care Australia* [2012] FWA 7407 (Booth C, 9 October 2012) at para. 4.

[195] *Blair v Kim Bainbridge Legal Service Pty Ltd T/A Garden & Green* [2011] FWA 2720 (Gooley C, 10 May 2011) at para. 6.

[196] *O'Grady v Royal Flying Doctor Service of Australia (South Eastern Section)* [2010] FWA 1143 (Leary DP, 17 February 2010) at para. 31.

[197] See *Singh v Metro Trains Melbourne* [2015] FWCFB 3502 (Hatcher VP, Kovacic DP, Johns C, 5 June 2015) at para. 16 (point 2); *Vassallo v Easitag P/L* [2021] FWCFB 3974 (Dean DP, Colman DP, Platt C, 26 July 2021) at para. 19.

[198] *King v Patrick Projects Pty Ltd* [2015] FWCFB 2679 (Catanzariti VP, Drake SDP, Riordan C, 4 May 2015) at para. 17.

Jurisdictional issues are often complex and may require expertise in case law. However, even if there is a jurisdictional issue which needs to be determined, permission may be refused or limited to specific parts of a hearing.[199]

Effectiveness

Where a person would be unable to effectively represent themselves, permission for representation may be granted.[200] The test is not whether a person would be more effectively represented if permission was granted. The criterion to be satisfied is that 'it would be unfair not to allow the person to be represented because the person is unable to represent … itself effectively.' In considering whether the criterion is satisfied context is important, and the Commission will adhere to the language of s.596 rather than placing any unnecessary and unhelpful gloss on the words used.[201]

Examples

A circumstance where a person may be given permission to be represented is where the person is from a non-English speaking background or has difficulty reading or writing.[202]

Other circumstances where a person may be given permission to be represented are where the person:

- *is a minor*
- *has a disability which affects their capacity to effectively represent themselves*
- *is in a vulnerable setting, or*
- *is located overseas.*

Whether or not permission is granted will depend on the context of the matter before the Commission.

Fairness

Permission may be granted if it would be unfair to refuse permission taking into account the fairness between the parties to the matter.[203]

[199] See for e.g. *Blair v Kim Bainbridge Legal Service Pty Ltd T/A Garden & Green* [2011] FWA 2720 (Gooley C, 10 May 2011) at paras 5–6.
[200] Fair Work Act s.596(2)(b).
[201] *Wellparks Holdings Pty Ltd t/as ERGT Australia v Govender* [2021] FWCFB 268 (Ross J, Masson DP, Wilson C, 20 January 2021) at paras. 66 and 67; *Grabovsky v United Protestant Association of NSW Ltd T/A UPA* [2018] FWCFB 4362 (Ross J, Asbury DP, Hampton C, 31 July 2018) at para. 54.
[202] Fair Work Act, Note (a) to s.596(2).
[203] Fair Work Act s.596(2)(c).

Example

A person may be given permission to be represented where one party to the matter is a small business with no human resources staff and the other is represented by a union.[204]

Case example: **Permission granted for representation – Complexity**[205]

Aly v Commonwealth Bank of Australia; Michelle Gentile; Russell Hayman [2015] FWC 3604 (Bissett C, 27 May 2015).

Facts

The employer submitted that it should be granted permission to be represented in part on the basis that it had a jurisdictional objection to the application. Specifically, the employer objected to the stop bullying application on the basis that it had engaged in reasonable management action carried out in a reasonable manner.

Outcome

The Commission was satisfied that there was a level of complexity given the range of issues raised by the applicant would 'require a level of unpacking of a number of incidents and assimilation of asserted facts and supporting evidence'. The Commission granted the employer permission to be represented (but noted that this was not a jurisdictional objection in the strict sense).

Relevance

The Commission was satisfied that the matter had a level of complexity, and that the matter would be dealt with more efficiently given this complexity if the employer had representation.

[204] Fair Work Act, Note (b) to s.596(2).

[205] See also *Pedler v The Commonwealth of Australia, represented by Centrelink* [2011] FWAFB 4909 (Watson VP, Ives DP, Bissett C, 1 August 2011) and *O'Grady v Royal Flying Doctor Service of Australia (South Eastern Section)* [2010] FWA 1143 (Leary DP, 17 February 2010).

Case example: **Permission granted for representation – Complexity – Fairness**[206]

Rollason v Austar Coal Mine Pty Limited [2010] FWA 4863 (Stanton C, 1 July 2010)

Facts

The employee was dismissed for alleged sexual harassment. The employee contended his dismissal was, in part, related to an application made to the Commission concerning a workplace right. The employee, who was represented by a union, objected to the employer being legally represented.

The employer submitted that it did not have specialist human resources or other staff equipped with legal, industrial relations or advocacy skills to effectively represent itself in the proceedings, and its Human Resources Coordinator was on maternity leave and in any event had no advocacy training or experience before courts or tribunals.

Outcome

The Commission held that the relevant factual matrix was sufficiently complex that legal representation would assist in its effective and efficient resolution. The union's advocate, although not legally qualified, was highly experienced. Permission for the employer to be legally represented was granted.

Relevance

The union advocate had over 20 years' experience across a wide range of industrial issues, including unfair dismissal proceedings within the coal industry. The Commission found it would not have been fair for the employer to be unrepresented given the complexity of the matter and the experience of the employee's representative.

[206] See also *Wesslink v Walker Australia Pty Ltd T/as Tenneco* [2011] FWA 2267 (Hampton C, 21 April 2011) (complexity and fairness) and *Rahman v Storm International Pty Ltd T/A Storm International Property Maintenance* [2011] FWA 7583 (Cambridge C, 4 November 2011) (fairness).

Case example: **Permission granted for representation – Complexity – Fairness**

Singh v Metro Trains Melbourne [2015] FWCFB 3502 (Hatcher VP, Kovacic DP, Johns C, 5 June 2015)

Facts

Ms Singh's unfair dismissal application was listed for determinative conference and the respondent was granted permission to be legally represented at the conference. Ms Singh appealed this decision.

Outcome

The Full Bench refused permission to appeal. The Full Bench held that the appellant's argument that the case was not complex did not address whether the granting of permission would enable matter to be dealt with more efficiently.

The Bench also held that no manifest injustice or unfairness arose from the decision to grant the respondent permission to be legally represented. Having seen and heard Ms Singh during the appeal hearing, the Full Bench was satisfied that she was a person capable of articulating her case, and the greater procedural informality of a determinative conference (compared to a Commission hearing) would significantly reduce any disadvantage perceived by Ms Singh. If Ms Singh had any difficulty in understanding any legal question which arose, the Commission could intervene as appropriate.

Relevance

While s.596(2)(a) of the Fair Work Act requires the complexity of the matter to be taken into account in deciding whether or not to grant permission to be represented, the real issue under s.596(2)(a) is whether the grant of permission would enable the matter to be dealt with more efficiently.

There will be circumstances where permission for legal representation may enable a matter to be dealt with more efficiently even though it is not particularly complex; for example, an appeal may be dealt with more efficiently by granting permission to allow the legal representatives who appeared in the matter at first instance to also appear in the appeal.

Case example: **Permission granted for representation – Complexity – Efficiency**

Vassallo v Easitag P/L [2021] FWCFB 3974 (Dean DP, Colman DP, Platt C, 26 July 2021)

Facts

Mr Vassallo initially filed a claim with the Commission that he had been misclassified under the applicable modern award, which was rejected in November 2017. Mr Vassallo was refused permission to appeal that decision (First Appeal) and then filed an underpayment claim in the Federal Court which was dismissed. Subsequent applications to the Commission were dismissed, including an application under s.603 of the Fair Work Act to have the Commission's 2017 decision varied or revoked.

In March 2021, a Full Bench refused Mr Vassallo permission to appeal the dismissal of his s.603 application (Second Appeal). Easitag P/L (Easitag) made an application for an order that Mr Vassallo pay its costs in relation to the unsuccessful Second Appeal.

Outcome

In deciding to grant Easitag's application for indemnity costs in relation to the Second Appeal, the Full Bench noted that Easitag had successfully applied under s.596(2)(a) for permission to be represented in the Second Appeal, despite the fact that it was not legally complex.

The Full Bench held that there is no contradiction in this – s.596(2)(a) is engaged if granting permission for representation would enable the matter to be dealt with more efficiently, *taking into account* the complexity of the matter.

Relevance

The presence of complexity is not required in order for s.596(2)(a) of the Fair Work Act to be engaged. In a case with a long history involving serial applications, granting representation to a respondent to be represented by a lawyer or paid agent may offer the Commission various benefits tending to promote the efficient conduct of the proceeding, irrespective of the absence of complexity. These benefits, including perspective, brevity, and concision in the presentation of facts and argument, may be such as to warrant the grant of permission under s.596(2)(a). In some cases, it may also be patently unfair to deny representation to a party that is a respondent to serial unmeritorious claims (see s.596(2)(c)).

Case example: **Permission granted for representation – Efficiency**

Venn v The Salvation Army T/A Barrington Lodge [2010] FWA 912 (Leary DP, 9 February 2010).

Facts

The employee opposed permission for the employer to be legally represented because the employee was unrepresented and the employer could be represented by its Human Resources Officer. However, the employee had obtained a restraining order against the Human Resources Officer, who was going to be a witness in the matter. The employer had no-one else capable of presenting its case.

The employee was represented by a very experienced HR professional experienced in advocacy who had represented the employee in other matters.

Outcome

Permission for legal representation was granted to both parties. The Commission was satisfied that the employer did not have a person able to present its case, and even if the Human Resources Officer was capable, it would be difficult for her to be both advocate and witness.

Relevance

In this matter, the employee did not wish to participate in a conciliation conference and wished to proceed directly to hearing, accordingly the hearing would be the first time any issues related to the substantive claim would be addressed. Legal representation would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter.

Case example: **Permission NOT granted for representation – Employer of a considerable size with adequate HR support**[207]

Application by EK [2017] FWC 3448 (Simpson C, 4 July 2017).

Facts

This matter involved an application to stop bullying against 2 persons named who were alleged to have bullied the applicant at work. Both the applicant and the 2 persons named were employed by the same employer. The employer advised that it was representing itself and the 2 persons named in the matter.

After the Commission dismissed an application by the employer to dismiss the stop bullying application, the employer advised it was intending to seek leave to be legally represented.

The applicant submitted that she was relying on the support of her daughter, who, like herself, did not have any legal, human resources, industrial relations or university qualifications. She submitted she would be at a significant disadvantage if legal representation was granted for the employer and the 2 persons named.

Outcome

The employer appeared in the matter and relied on its internal human resources staff, using their expertise to support the 2 persons named in refuting the applicant's allegations. The Commission concluded that it would not be unfair to refuse the application by the employer and the 2 persons named to be represented, taking into account fairness between the parties. The application for legal representation was refused.

Relevance

The persons named in this matter received the support of the employer's human resources staff and as a result were at somewhat of an advantage over the applicant. To grant the employer and the persons named legal representation would lead to a further imbalance between the parties.

[207] See also *King v Patrick Projects Pty Ltd* [2015] FWCFB 2679 (Catanzariti VP, Drake SDP, Riordan C, 4 May 2015) (complexity), *Bowley v Trimatic Management Services Pty Ltd T/A TSA Telco Group* [2013] FWC 1320 (Steel C, 1 March 2013) (complexity), *Hamilton v Carter Holt Harvey Wood Products Australia Pty Ltd* [2012] FWA 5219 (Bartel DP, 19 June 2012) (complexity) and *Rodgers v Hunter Valley Earthmoving Company Pty Ltd* [2009] FWA 572 (Harrison C, 9 October 2009) (complexity); *Lekos v Zoological Parks and Gardens Board T/A Zoos Victoria* [2011] FWA 1520 (Lewin C, 18 March 2011) (complexity and fairness).

Rescheduling or adjourning matters

Parties to matters before the Commission may apply to have the matter adjourned.

Parties should not assume that an adjournment will be granted.[208] The principles in relation to adjourning (or staying) proceedings are as follows:

- a party to a matter before the Commission has a right to expect that the matter will be determined quickly
- serious consideration needs to be given before any action interferes with this right
- the party who applies for the adjournment must demonstrate that it is necessary to the satisfaction of the Commission
- a party is not automatically entitled to an adjournment because they are involved in a criminal hearing, and
- an application for an adjournment must be determined on its own merits.[209]

The Commission's task is a 'balancing of justice between the parties' taking all relevant factors into account.[210]

The consideration of an application for adjournment of a matter requires the exercise of a discretion. The overarching objective must always be the just resolution of the real issues in dispute with minimum delay and expense. Regard must be given to ensuring that the applicant for the adjournment is afforded a fair and reasonable opportunity to advance their case, and that any adjournment does not cause undue prejudice to the other party.[211]

However, the interests of the parties are not the only considerations. The Commission is an institution which is required to deal with a very large number of matters, and s.577 of the Fair Work Act provides that the Commission must perform its functions and exercise its powers fairly, justly and quickly.[212]

Specific provisions of the Fair Work Act require the Commission to start dealing with particular types of matters in defined timeframes (for example, in relation to applications for orders to stop sexual harassment, s.527J(2)). Therefore, the grant of adjournments and the associated loss of valuable

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[208] *Sanford v Austin Clothing Company Pty Ltd trading as Gaz Man* Print S8287 (AIRC, Watson SDP, 19 July 2000) at para. 26.
[209] *Sanford v Austin Clothing Company Pty Ltd trading as Gaz Man* Print S8287 (AIRC, Watson SDP, 19 July 2000) at para. 31; summarising the relevant principles from *McMahon v Gould* (1982) 7 ACLR 202 (19 February 1982), applied in *Mr Kevin Boyce v Scott Corporation Limited T/A Bulktrans* [2016] FWC 594 (Saunders C, 12 February 2016) at para. 10.
[210] *Sanford v Austin Clothing Company Pty Ltd trading as Gaz Man* Print S8287 (AIRC, Watson SDP, 19 July 2000) at para. 28; citing *McMahon v Gould* (1982) 7 ACLR 202 (19 February 1982).
[211] *Mekuria v MECCA Brands Pty Ltd t/a Mecca Cosmetica and Others* [2019] FWCFB 1093 (Hatcher VP, Sams DP, Hampton C, 19 February 2019) at para. 18.
[212] ibid.

hearing days may prejudice the Commission's capacity to promptly deal with matters. For this reason, when a matter has been programmed for hearing in a way which affords parties a proper opportunity to advance their cases within reasonable timeframes, an adjournment would not readily be granted.[213]

Examples of where a request for an adjournment may be granted include:

- where illness of the applicant or respondent, a significant person in the employer/principal's business, or a witness would prevent them from attending a proceeding – a medical certificate or other relevant evidence may be required of the requesting party to substantiate the request
- unavailability of a representative for reasons beyond their control
- a significant life event affecting a conference or hearing participant, or
- where the applicant, a respondent, a significant person in the employer/principal's business, a witness or a representative will be unavailable due to pre-planned travel booked before the application was listed for hearing – the Commission may ask for proof that the booking was made prior to the matter being listed for hearing.

The other party (or parties) will usually be asked to comment on an adjournment request before a decision is made by the Commission. This may mean that documents providing in support of an adjournment request are shared with other people involved in the matter. Concerns about the disclosure of personal or private information should be brought to the attention of the Commission before this happens so that they can be dealt with before the information is shared.

Uncontested applications

The Commission will attempt to make regular contact with parties to an application under s.527F for the Commission to deal with a sexual harassment dispute. If a party does not respond to the Commission's notices or directions the application may still be dealt with, including by holding a hearing and making a decision where the application includes asking the Commission to make a stop sexual harassment order. Any orders made by the Commission in an uncontested application are legally binding and enforceable.[214]

[213] ibid. See generally *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27 (5 August 2009).

[214] See, for example, *Antonarakis v Logan City Electrical Service Division Pty Ltd* [2017] FWC 3801 (Simpson C, 21 July 2017) and *Amanpreet Kaur v The Trustee for Mehtaab Family Trust T/A Paint Splash* [2021] FWC 3343 (Lee C, 23 June 2021).

Bias

A Commission Member should not hear a case if there are reasonable grounds for apprehending that they are, or will be seen to be, biased.[215]

The test for reasonable apprehension of bias is that a fair-minded lay observer might reasonably apprehend that the Member might not bring an impartial and unprejudiced mind to resolution of the question they are required to decide

The question of a reasonable apprehension of bias is a difficult one involving matters 'of degree and particular circumstances [which] may strike different minds in different ways'.[216]

A reasonable apprehension of bias involves deciding whether a 'fair-minded lay observer' would reasonably apprehend that the decision-maker would not decide a case impartially and without prejudice.[217] Bias does not mean simply that a decision-maker considers one party's case not to be strong, or decides a case adversely to one party.[218]

Reasonable apprehension of bias may arise in the following 4 (sometimes overlapping) ways:

- if a Commission Member has some direct or indirect interest in the case, financial or otherwise
- if a Commission Member has published statements or acted in a way that gives rise to a reasonable apprehension of prejudice
- if the Commission Member has some direct or indirect relationship, experience or contact with anyone involved in the case, and
- if the Commission Member has some knowledge of extraneous information, which cannot be used in the case, however would be seen as detrimental.[219]

While it is important that justice must be seen to be done, it is of equal importance that Commission Members discharge their duty to hear and decide matters and do not, by agreeing too readily to suggestions of appearance of bias, encourage parties to believe that by seeking their disqualification

[215] *R v Watson; Ex parte Armstrong* [1976] HCA 39 (3 August 1976), [(1976) 136 CLR 248; (1976) 9 ALR 551, 561–565]; cited in *Livesey v New South Wales Bar Association* [1983] HCA 17 (20 May 1983) at para. 7, [(1983) 151 CLR 288, 293–294].

[216] *Livesey v New South Wales Bar Association* [1983] HCA 17 (20 May 1983) at para. 8, [(1983) 151 CLR 288]; citing *R v Shaw; Ex parte Shaw* (1980) 55 ALJR 12 (14 November 1980) at p. 16 (Aickin J).

[217] *Dain v Bradley & Grant* [2012] FWA 9029 (Booth DP, 29 October 2012) at para. 14; citing *British American Tobacco Australia Services Limited v Laurie* [2011] HCA 2 (9 February 2011) at para. 104.

[218] *Re J.R.L. Ex parte C.J.L.* [1986] HCA 39 (30 July 1986), [(1986) 161 CLR 342, 352].

[219] *Webb v The Queen* [1994] HCA 30 (30 June 1994), [(1994) 181 CLR 41, 74]; see also *Construction, Forestry, Maritime, Mining and Energy Union v Watpac Construction Pty Ltd T/A Watpac Construction* [2019] FWCFB 3855 (Hamberger SDP, Gostencnik DP, Saunders DP, 4 June 2019).

they will have their case heard by someone thought to be more likely to decide the case in their favour.[220]

Expression of a view or prejudgment

In deciding whether a Commission Member should be disqualified for the appearance of bias, the Member (or a Full Bench on appeal) will consider whether a reasonable and fair-minded person might anticipate that the Commission member might approach the matter with a partial or prejudiced mind.[221]

The question is not whether the decision-maker's mind was blank, but whether their mind was open to persuasion.[222]

The expression of a provisional view on a particular issue, or warning parties of the outcome of a provisional view, is usually entirely consistent with procedural fairness.[223]

Prior relationship

Generally, a Commission Member will not be disqualified in circumstances where it is found that the Member, before being appointed as a Member, gave legal advice or represented a person who now appears before them as a party in their capacity as a Member.[224] However, the Member should not hear a matter if the Member:

- is determining the correctness of advice they gave to a party in their role as a legal representative
- recommended a course of conduct to a party in their role as a legal representative and the legality, reasonableness or wisdom of that conduct is to be determined, or
- is determining the quality of the advice they gave while they were the legal representative of one of the parties.[225]

[220] *Re J.R.L. Ex parte C.J.L.* [1986] HCA 39 (30 July 1986), per Mason J [(1986) 161 CLR 342, at p. 352].
[221] *Johnson v Johnson* [2000] HCA 48 (7 September 2000) at para. 11, [(2000) 201 CLR 488].
[222] *The Minister for Immigration and Multicultural Affairs v Jia* [2001] HCA 17 (29 March 2001) at para. 71, [(2001) 205 CLR 507].
[223] *Oram v Derby Gem Pty Ltd* PR946375 (AIRCFB, Lawler VP, Kaufman SDP, Blair C, 22 July 2004) at para. 110, [(2004) 134 IR 379]. See also *Bienstein v Bienstein* (2003) 195 ALR 225 at 232, where the High Court held: 'This court held in *Re Keely; Ex parte Ansett Transport Industries* [(1990) 94 ALR 1] that the expression by a judge of tentative views during the course of argument as to matters on which the parties are permitted to address full argument manifests no partiality or bias. This approach has been confirmed and applied in many cases.' (endnotes omitted)
[224] *Re Polites; Ex parte Hoyts Corporation Pty Ltd* [1991] HCA 25 (20 June 1991) at para. 10, [(1991) 173 CLR 78].
[225] ibid.

Extraneous information

Commission Members can draw upon the specialist expertise they bring to the Commission or their general knowledge as members of the community in dealing with Commission matters. However, a Commission Member should disclose any independent knowledge of factual matters that affect or may affect the decision to be made.[226]

A central element of the justice system is that a judge (or Commission Member) should determine the case based on the evidence and arguments presented.[227] A judge (or Commission Member) should not take into account, or indeed receive, secret or private representations from a party or from a stranger about the case they are to decide.[228]

[226] *Re Media, Entertainment and Arts Alliance and Theatre Managers' Association; Ex parte Hoyts Corporation Pty Ltd (No 2)* [1994] HCA 66 (9 February 1994) at para. 12, [(1994) 119 ALR 206].
[227] *Re J.R.L. Ex parte C.J.L.* [1986] HCA 39 (30 July 1986), [(1986) 161 CLR 342, 350].
[228] *Regional Express Holdings Ltd, Png Yeow Tat, Mark Burgess and Maree Penglis v Stephen Hanson* [2021] FWCFB 2755 (Hatcher VP, Gostencnik DP, Bissett C, 14 May 2021) at para. 51.

Case example: **Apprehension of bias – Expression of a view or prejudgment**

Gaynor King [2018] FWC 3300 (Bissett C, 8 June 2018).

Facts

Three applicants made applications to the Commission for an order to stop bullying, naming Ms King as the person who had engaged in the conduct. Following 2 conciliation conferences before the Commission, the applicants discontinued their applications. Ms King made an application for costs against the applicants. Commissioner Bissett made a decision in relation to that application, dismissing the application for costs.

At the same time as the costs application, Ms King also made an application to the Commission for orders to stop bullying. She named the 3 initial applicants as those who had engaged in bullying conduct directed towards her, which included making the initial applications for orders to stop bullying.

Ms King's application for orders to stop bullying was subject to conciliation before Commissioner Bissett, where it did not settle. Directions were then issued for filing submissions and evidence in the matter. United Voice, representing the initial applicants (now respondents) requested that Commissioner Bissett recuse herself from further dealing with the application because of comments made by the Commissioner in the costs decision.

Outcome

Commissioner Bissett considered the passages from the costs decision issued by her in relation to the applications of the initial applicants. In that decision, the Commissioner made findings with respect to the motivations of the 3 in making their applications for orders to stop bullying. The Commissioner found that the applications harassed and embarrassed Ms King, were made vexatiously, sought to intimidate and had far-reaching consequences.

The Commissioner was satisfied that she expressed views in that decision that may lead a lay observer to apprehend that she may not bring an impartial mind to the determination of the application by Ms King. Accordingly, Commissioner Bissett recused herself from hearing Ms King's application for orders to stop bullying.

Relevance

Any person making application to the Commission is entitled to a fair hearing and to have their case determined on its merits. The application by Ms King was inextricably tied up with the earlier applications for orders to stop bullying and the costs application. In order to ensure that everyone, including Ms King, was fairly heard, the Commissioner was satisfied that she should recuse herself.

Part 9 – Evidence

See Fair Work Act ss.590 and 591

Section 590 of the Fair Work Act outlines the ways in which the Commission may inform itself including by:

- requiring a person to attend the Commission
- requiring written and oral submissions
- requiring a person to provide copies of documents
- taking evidence under oath or affirmation
- conducting inquiries or undertaking research, or
- holding a conference or a hearing.

Section 591 of the Fair Work Act states that the Commission is not bound by the rules of evidence and procedure (whether or not the Commission holds a hearing).

Instead, the rules of evidence 'provide general guidance as to the manner in which the Commission chooses to inform itself'.[229]

Commission Members are expected to act judicially and in accordance with 'notions of procedural fairness and impartiality'.[230]

Commission Members are ultimately expected to get to the heart of the matter as quickly and effectively as possible, without unnecessary technicality or formality.[231]

[229] *Australasian Meat Industry Employees' Union, The v Dardanup Butchering Company Pty Ltd* [2011] FWAFB 3847 (Lawler VP, Hamberger SDP, Gay C, 17 June 2011) at para. 28, [(2011) 209 IR 1]; citing *Hail Creek Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* PR948938 (AIRCFB, Ross VP, Duncan SDP, Bacon C, 12 July 2004) at paras 47–50, [(2004) 143 IR 354].
[230] *Coal & Allied Mining Services Pty Ltd v Lawler* [2011] FCAFC 54 (19 April 2011) at para. 25, [(2011) 192 FCR 78]; Fair Work Commission, 'Member Code of Conduct' (2 July 2021), at pp. 4 and 8.
[231] ibid.

Case example: **Following rules of evidence – Employer used illegally obtained evidence for allegation of theft**

Walker v Mittagong Sands Pty Ltd T/A Cowra Quartz [2010] FWA 9440 (Thatcher C, 8 December 2010).

Facts

The employee was accused of stealing oil from the employer. After becoming suspicious that the theft had occurred, the employer searched for and took samples of oil from the employee's vehicle, without the employee's authority, in order to have it tested. Mr Walker made an unfair dismissal claim, in which he submitted that he had not stolen the oil, and that the evidence of the oil sample should not be admitted.

Outcome

While s.591 of the Fair Work Act provides that the Commission is not bound by the rules of evidence it does not mean that such rules are irrelevant.

The Commission was guided by s.138 of the *Evidence Act 1995* (Cth) in deciding whether to exclude the evidence. Having found that the evidence was unlawfully obtained or in consequence of evidence that was unlawfully obtained, the Commission considered whether the desirability of admitting the evidence outweighed the undesirability of admitting such evidence.

The Commission exercised its discretion to exclude the evidence.

Relevance

After taking all of the circumstances into consideration, including giving appropriate weight to the factors in s.138(3), the Commission held that the undesirability of admitting the evidence outweighed the desirability of admitting the evidence.

While the power to admit or exclude challenged evidence is discretionary, that discretion must be exercised judicially in the interests of justice. The interests of justice are not confined to the interests of the parties but extend to include the broader public interest in the proper administration of justice.

Privilege against self-incrimination

Witnesses have a right not to produce documents, or answer questions they are asked during a Commission proceeding, on the grounds of self-incrimination. The test is whether there is a real and appreciable danger of the person being convicted of an offence if they answer the question. If the test is met, the person can choose not to answer the question.

This is important because a person can be required by the Commission to attend before the Commission and answer a question or produce specific documents. Ordinarily, if a person refuses or fails to answer the question or produce the documents, they commit an offence with a penalty of imprisonment.[232]However, if a person has a reasonable excuse not to answer the question or provide the document, they are not required to do so.[233]

The privilege against self-incrimination could provide a reasonable excuse for not answering a question or producing a document. If the privilege applies, because the person believes on reasonable grounds that their evidence will tend to prove that they have committed an offence, they are not required to answer that question where there is a 'real and appreciable danger of conviction'.[234]

The privilege against self-incrimination is a substantive common law right and is available in both judicial and non-judicial proceedings, including in proceedings before the Commission.[235]

The *Evidence Act 1995* (Cth) specifies how a federal court must deal with potential self-incrimination. Under s.128 of that Act, a witness in court proceedings may object to giving evidence on the grounds that the evidence may tend to prove that the witness has either committed an offence under an Australian or foreign law or is liable to a civil penalty. If the court determines that there are reasonable grounds for the objection, the court must inform the witness that:

a) the witness need not give evidence unless required; and
b) the court will give the witness a certificate if the witness willingly gives the evidence, or if the witness gives the evidence after being required to do so by the court.

The certificate prevents the evidence, and any evidence obtained as a direct or indirect consequence, from being used against the witness in any proceedings in an Australian court.

The protection extends only to evidence given under compulsion. The Federal Court has held that when a witness who is a party to the proceedings is being asked questions by their own legal

[232] Fair Work Act s.677(3).

[233] Fair Work Act s.677(4).

[234] *Sorby v Commonwealth* [1983] HCA 10 (18 March 1983) at para. 11, [(1983) 152 CLR 281].

[235] ibid at 309; *Reid v Howard* [1995] HCA 40 (6 December 1995), [(1995) 184 CLR 1] See also *SZHWY v Minister for Immigration and Citizenship* [2007] FCAFC 64 (9 May 2007), para.77.

representative (whether in evidence in chief or re-examination) the witness is not under any compulsion to give the evidence and therefore cannot 'object' under s.128.[236]

The Commission is not bound by the rules of evidence or the *Evidence Act 1995*, but these provide general guidance as to the manner in which the Commission informs itself.

Where a person relies on the privilege against self-incrimination, the Commission cannot draw an adverse inference from failure to give the particular evidence. This means the Commission cannot assume the witness did not provide the evidence or the document only because it would have harmed their case before the Commission.

The Commission still needs to determine the application based upon the evidence that is before it. The decision will be made without the evidence the witness might otherwise have given if they had not relied on the privilege against self-incrimination.

Whether a matter before the Commission will be adjourned or otherwise delayed because one or more witnesses may assert a privilege against self-incrimination was considered by a Full Bench of the Commission in *Visy Board Pty Ltd T/A Visy Board v Rustemovski and Ahmadyar*.[237] The Full Bench confirmed that *McMahon v Gould*[238] sets down non-exhaustive guidelines and that it is necessary for the Commission to determine what justice requires in the circumstances.[239]

A corporate entity does not have a privilege against self-incrimination.[240]

[236] *Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner* [2018] FCAFC 4 (30 January 2018).
[237] *Visy Board Pty Ltd T/A Visy Board v Rustemovski and Ahmadyar* [2018] FWCFB 1255 (Ross J, Binet DP, Platt C, 5 March 2018).
[238] *McMahon v Gould* (1982) 7 ACLR 202 (19 February 1982).
[239] *Visy Board Pty Ltd T/A Visy Board v Rustemovski and Ahmadyar* [2018] FWCFB 1255 (Ross J, Binet DP, Platt C, 5 March 2018) at para. 49.
[240] *Environment Protection Authority v Caltex Refining Co Pty Ltd* [1993] HCA 74 (24 December 1993), [(1993). 178 CLR 477]. While companies are not entitled to claim the privilege against self-incrimination, company directors can claim the privilege where a disclosure would tend to make them personally liable.

Part 10 – What are the outcomes?

Conciliated outcomes

Many matters in the Commission are resolved through conciliation by the parties voluntarily agreeing to an outcome to settle the matter.

Where an application to deal with a sexual harassment dispute is settled at a Member conference, the Member can assist the parties to record the agreed outcomes. The people involved might prefer to prepare their own agreement based on the agreed outcomes. They can also ask the Member to help.

When a dispute is settled, the people involved may want to keep some or all of their agreement confidential.

Guidelines on the use of confidentiality clauses in the resolution of workplace sexual harassment complaints are available on the Respect@Work website. The guidelines are relevant to aggrieved persons and industrial associations, as well as employers, respondents, employer organisations, legal practitioners and anyone else involved in the process of resolving a workplace sexual harassment dispute.

The Guidelines recommend that if confidentiality clauses are to be included in terms of settlement, they should be:

- clear, fair, in plain English and translated or interpreted where necessary
- considered on a case-by-case basis (both about whether they should be included and what they should say), and
- limited in scope and duration to only what is necessary in the circumstances.

Where an application seeks a stop sexual harassment order, outcomes negotiated at a Member conference will depend on the interests of the parties and can include things like:

- changes in work arrangements, including in lines of reporting
- an apology
- a reference or statement of service (if the employment relationship has ended)
- commitments by the employer or principal to:
  - investigate a complaint or engage an external investigator
  - provide training for staff on sexual harassment, discrimination and other relevant matters
  - review and update its policies and procedures
  - be more transparent in reporting complaints about sexual harassment
  - conduct a safety risk assessment for the workplace
- sharing information
- the applicant withdrawing the complaint.

Where an application asks for the Commission to deal with the dispute in other ways (other than by arbitration), outcomes negotiated at a Member conference can be whatever the parties agree to and will depend on the interests of the parties. These might include things like those set out above (in relation to stop sexual harassment orders). They might also include payment of compensation for past harm or payment of lost remuneration.

Application for stop sexual harassment orders in connection with work

 See Fair Work Act s.527J

If an aggrieved person (or their industrial association) has made an application under s.527F that includes an application for stop sexual harassment orders and the Commission is satisfied that the person has been sexually harassed in connection with work by one or more individuals and there is a risk that this will continue, then the Commission may make a stop sexual harassment order.[241]

The Commission will make a decision about whether or not to make a stop sexual harassment order based on the evidence and facts of the case.

The Commission will only issue a stop sexual harassment order if it considers that unlawful sexual harassment has occurred in connection with work and there is a risk of continued sexual harassment. For example, there might be no risk because:

- the aggrieved person has not been sexually harassed, or is no longer connected to the same work where the alleged sexual harassment occurred[242]
- the people involved are not likely to come into contact with each other again
- appropriate action has already been taken to stop or prevent sexual harassment and further measures are not required.

Where a finding of sexual harassment is made and there is some future risk, orders to stop the sexual harassment would usually follow. Such orders would, in appropriate cases, aim to establish a suitable basis for a future mutually safe and constructive working relationship.[243]

A stop sexual harassment order is intended to prevent future harassment. The role of the Commission and the orders it can make are preventative – orders are not directed at punishing bad behaviour (although they may have a deterrent effect) or compensating the victims of such

[241] Fair Work Act s.527J(1).
[242] See Explanatory Statement, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 at para 47.
[243] See *Re Ms LP* [2016] FWC 763 (Hampton C, 12 February 2016) at para. 50.

behaviour. Their primary aim is to protect persons from future harm, and the focus is on resolving the matter and enabling normal working relationships to resume.[244]

If the Commission is satisfied that a stop order should be made, it can make any order it considers appropriate in the circumstances (**other than** an order requiring payment of money) to prevent the aggrieved person from being sexually harassed in connection with work.[245] When deciding what orders to make, the Commission must take into account certain matters, including the outcomes of any investigation conducted by another person or body into the matter (of which the Commission is aware).[246]

Related information

- Part 6 – Applications to stop sexual harassment - risk of continued sexual harassment

Who can an order be made against?

Section 527J of the Fair Work Act does not limit the persons against whom orders can be made. The Commission may make orders directed to the behaviour of individuals found to have engaged in sexual harassment as well as their respective employer(s)/principal(s). As noted in the Explanatory Statement for the *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021*:

> The existing jurisprudence, which will continue to be relevant in relation to the modified jurisdiction, provides that orders can apply to a broad range of persons, most obviously co-workers but also employers and visitors to the workplace where appropriate.[247]

Where the parties agree that orders should be made and the Commission is satisfied that the aggrieved person has been sexually harassed in connection with work and there is a risk of further sexual harassment, consent orders may be issued by the Commission.

[244] See Revised Explanatory Memorandum, Fair Work Amendment Bill 2013 at para. 120 regarding proposed clause 789FF – FWC may make orders to stop bullying; Explanatory Statement, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 at para 50, and see *Re Ms McInnes* [2014] FWCFB 1440 (Ross J, Hatcher VP, Hampton C, 6 March 2014) at para. 9.

[245] Fair Work Act ss.527J(1).

[246] Fair Work Act, s.527J(3).

[247] Explanatory Statement, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 at para. 48.

What can be ordered

Under Part 3-5A, the Commission has wide powers to make stop sexual harassment orders, other than payment of a 'pecuniary amount' (money).[248]

While the Commission cannot order the payment of money, this does not prevent the Commission from making an order that would require some financial expenditure on the part of the employer/ principal to give effect to the order.[249] For example, an order which has the effect of requiring a person to continue paying normal wages to another person for work performed in the context of a continuing employment relationship does not fall within the exclusion in s.527J(1) of the Fair Work Act.[250]

The Commission can include any terms in an order that it considers appropriate to prevent the aggrieved person from being sexually harassed in connection with work.[251]

The Commission's powers must be informed by, but are not necessarily limited to, the sexual harassment found to have occurred. Orders must be directed towards preventing the person from being sexually harassed in connection with work in the future, be based upon appropriate findings, and have regard to the considerations established by s.527(3) of the Fair Work Act.[252]

The range of orders that the Commission may make includes orders requiring:

- that a person is to stop the sexual harassment and apologise
- someone to develop, comply with, or review a workplace policy or practice about sexual harassment
- workers to be given more information, support and/or training about sexual harassment.[253]

[248] Fair Work Act s.527J(1) and Revised Explanatory Memorandum, Fair Work Amendment Bill 2013 at para. 120, in relation to the Commission's workplace bullying jurisdiction. See also *Application by Chopra* [2020] FWC 3491 (Clancy DP, 2 July 2020) at para. 69(i).

[249] See *South Eastern Sydney Local Health District v Lal* [2019] FWCFB 1475 (Hatcher VP, Sams DP, Hampton C, 7 March 2019) at para. 27.

[250] ibid.

[251] Explanatory Statement, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 at para 48.

[252] *Churches and Others v Jackson and Woods* [2016] FWCFB 2367 (O'Callaghan SDP, Clancy DP, Hampton C, 14 April 2016) at para 32.

[253] See also the Revised Explanatory Memorandum for the *Fair Work Amendment Bill 2013* at para. 121, which gives the following as examples of the types of stop bullying orders the Commission may make: changes in working arrangements; one or more individuals to stop specified behaviour; regular monitoring of behaviours by an employer; compliance with an employer's policy; the provision of information and additional support and training to workers; conduct a safety risk assessment for the workplace, and a review of the employer's workplace policies.

The orders that are made depend on the facts and circumstances of the case. The Commission may also make orders that go to the broader conduct within, and culture of, a workplace. These could include the establishment and implementation of appropriate policies, procedures and training.[254]

Examples of orders the Commission has made in response to applications for orders to stop bullying (which provide insight into the type of orders that the Commission might make to stop sexual harassment in connection with work) include:

1. orders that individual parties:

- not make contact with each other
- only make contact via email during specific times
- not attend certain premises
- not denigrate or humiliate one another
- behave in a way that is reasonable and professional
- not deliberately or unreasonably delay the performance of work, and
- refrain from making written and/or oral statements to each other or others that are abusive, offensive, or disparaging

2. orders for businesses:

- to provide all staff with additional training on appropriate workplace behaviour
- to ensure they have in place updated 'anti-bullying' policies and complaints handling procedures
- to commission specific training for management personnel who will be investigating complaints about workplace bullying
- to implement, and actively monitor, the effectiveness of control measures identified in risk assessments
- to arrange for a Work Safe inspector to attend meetings with parties[255]

The Commission has also observed, in the context of an application to stop bullying at work, that physical and/or functional separation in the workplace of a person who has alleged that they have

[254] *Re Ms LP* [2015] FWC 6602 (Hampton C, 4 November 2015) at para. 194; see also *CF and NW* [2015] FWC 5272 (Hampton C, 5 August 2015) at paras 31–34.
[255] For examples see *Applicant v Company A Pty Ltd; Company B Pty Ltd; and Third Respondent* PR555521 (Williams C, 15 September 2014); *CF and NW* PR569997 (Hampton C, 30 July 2015); *Roberts v VIEW Launceston Pty Ltd as trustee for the VIEW Launceston Unit Trust T/A View Launceston and Others* PR573139 (Wells DP, 23 October 2015); *Bowker and Others v DP World Melbourne Limited T/A DP World and Others* PR574247 (Gostencnik DP, 26 November 2015).

been bullied, and those said to have engaged in bullying conduct is one way of preventing future bullying, although it may be a last resort where other practical measures will not be effective.[256]

If an aggrieved person is suffering from a medical condition that prevents their return to their workplace without some appropriate modifications, the Commission may consider such measures in an order.[257]

Considerations the Commission must take into account

When considering the terms of an order to prevent further sexual harassment in connection with work, the Commission must, to the extent that it is aware, take into account:

- any final or interim outcomes arising out of an investigation into the matter that is being or has been undertaken by another person or body
- any procedures available to the aggrieved person to resolve grievances or disputes
- any final or interim outcomes arising out of any procedures available to the worker for resolving grievances or disputes, and
- any matters that the Commission considers relevant.[258]

By taking into account these factors, the Commission can frame the order in a way that has regard to compliance action being taken by the employer or a health and safety regulator or another body, to ensure consistency with those actions.[259]

Outcomes arising from investigations by another person or body

An aggrieved person who has applied to the Commission for a stop sexual harassment order can also seek intervention by a WHS regulator under the WHS Act or the corresponding state or territory WHS laws.[260] WHS regulators may respond to complaints in a number of ways consistent with their own internal policies. Regulators may send inspectors to workplaces to investigate incidents, issuing prohibition or improvement notices, seeking enforceable undertakings or prosecuting alleged offences against WHS laws.

Workplace sexual harassment which involves criminal behaviour may separately be the subject of a complaint to, and investigation by the police.

Any outcomes arising from an investigation by such a person or body, that the Commission is aware of, must be taken into account by the Commission when making orders.[261]

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[256] *South Eastern Sydney Local Health District v Lal* [2019] FWCFB 1475 (Hatcher VP, Sams DP, Hampton C, 7 March 2019) at para. 24.
[257] *Re G.C.* [2014] FWC 6988 (Hampton C, 9 December 2014) at para. 168.
[258] Fair Work Act s.527J(3).
[259] See Revised Explanatory Memorandum for the *Fair Work Amendment Bill 2013* at para. 123.
[260] Fair Work Act s.527L.
[261] Fair Work Act s.527J((3)(a).

The AHRC and anti-discrimination bodies in the states and territories can also deal with complaints about sexual harassment (depending on matters including where the conduct occurred). Information about each of those bodies is available on their websites.[262]

[262] Australian Human Rights Commission (humanrights.gov.au); ACT Human Rights Commission (hrc.act.gov.au); Anti-Discrimination Board of NSW (antidiscrimination.justice.nsw.gov.au); Equal Opportunity Commission South Australia (eoc.sa.gov.au); Equal Opportunity Tasmania (equalopportunity.tas.gov.au); Equal Opportunity Commission Western Australia (eoc.wa.gov.au), Northern Territory Anti-Discrimination Commission (https://adc.nt.gov.au/); Queensland Human Rights Commission (qhrc.qld.gov.au) and Victorian Equal Opportunity and Human Rights Commission (www.humanrights.vic.gov.au).

Case example: **Outcome arising from an investigation by another person or body considered**

Re Ms SB [2014] FWC 2104 (Hampton C, 12 May 2014).

Facts

The applicant managed a team of employees. It was alleged that 2 employees who reported to the applicant started behaving unreasonably towards the applicant by harassing her on a daily basis and spreading rumours about her in the workplace.

One of those employees made bullying allegations against the applicant immediately prior to the applicant lodging this application. The employer arranged for an investigation to be conducted by a legal firm, which found that the allegations against the applicant were justified in part, whereas the complaints by the applicant were not substantiated.

The applicant did not rely upon the legal firm's investigation as evidence of bullying conduct in its own right (by the employer), but as support for her proposition that there was a risk of ongoing bullying conduct against her, principally because no action was being proposed in relation to the other employee.

Outcome

The Commission noted that, although the results of the investigation were provided to the applicant and the Commission, the full report and evidence about how the investigation was conducted were not. As a result, the Commission placed no weight upon the outcomes of the investigation so far as it might have cast light on the applicant's and other employee's conduct and relied upon its findings from the direct evidence provided. Accordingly, it was not necessary for the Commission to consider the employer's claim of legal professional privilege in relation to the investigation and/or whether this had been waived.

The Commission found that some of the behaviour towards the applicant was bordering upon unreasonable but not such as to fall within the scope of bullying behaviour as defined by the Fair Work Act. As a result the Commission was not satisfied that the applicant had been bullied at work.

Relevance

The Commission found that the engagement of an external person to investigate both competing allegations was not unreasonable. There was also nothing unreasonable about the apparent general approach to the investigation adopted by the legal firm.

Procedures available to resolve grievances or disputes

This refers to any internal complaint mechanisms that may be available to an aggrieved person to resolve their grievance at the workplace level without the Commission's involvement, such as pursuant to a WHS law or an enterprise agreement or award.

Some workplaces will have policies which contain specific provisions on workplace sexual harassment, such as how it is to be prevented and what action should be taken if it occurs. These may be contained within an enterprise agreement, code of conduct or policy manual.

The availability of alternative procedures does not mean that an application for orders to stop sexual harassment cannot proceed. An individual may still apply to the Commission to help resolve the matter quickly and inexpensively if they have been sexually harassed in connection with work.[263]

Any matters the Commission considers relevant

In considering the terms of an order, the Commission must also take into account any other matters that the Commission considers to be relevant to an application for a stop sexual harassment order.

Without limiting the matters that might be considered in this context, the circumstances of the parties, the history and nature of the work and work relationships) and the utility of any orders that might be made would be relevant considerations.[264] This might include:

- the aggrieved person being on leave from the workplace
- that the individual(s) involved in the behaviour are no longer in the workplace
- changes in the work environment
- initiatives put in place by the employer/principal such as policies and procedures to reduce the risk of sexual harassment
- any other developments in the workplace.[265]

[263] See Revised Explanatory Memorandum for the *Fair Work Amendment Bill 2013* at para. 88 and Statement of Compatibility with Human Rights, Explanatory Memorandum, *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* at para.31.
[264] *Re Ms LP* [2016] FWC 763 (Hampton C, 12 February 2016) at para.39.
[265] Ibid. at para. 4; citing *Re Ms LP* [2015] FWC 6602 (Hampton C, 4 November 2015) at para. 195.

Case example: **Orders NOT made – Positive steps by employer**

Re Ms LP [2015] FWC 6602 (Hampton C, 4 November 2015);
Re Ms LP [2016] FWC 763 (Hampton C, 12 February 2016).

Facts

The applicant was a Food and Beverage Attendant at a family-owned restaurant. She sought orders to stop certain alleged conduct by a group of individuals, including orders for the employer to conduct management courses to be completed by the supervisors at the restaurant, and for all staff to attend training on bullying conduct.

The employer contended that the alleged conduct was not bullying but rather was reasonable management action carried out in a reasonable manner. The employer further contended that the Commission had no jurisdiction to consider the conduct of the former Head Chef and former Supervisor as they had ceased working for the employer and there was no risk that the applicant would continue to be bullied by those individuals at work.

The employer submitted that, since some of the incidents had occurred, it had worked to develop a comprehensive set of policies about workplace bullying and appropriate workplace behaviour and provided training in relation to those matters.

Outcome

The Commission was satisfied, on fine balance, that there was sufficient relevant unreasonable behaviour towards the applicant and/or the group of workers to which she belonged whilst at work to constitute bullying. However, much of that behaviour occurred in a particular context that had since changed, and this had an impact upon the appropriateness of any orders that might be considered.

The Commission was not persuaded that it could, or should, make orders in this matter, and sought further submissions on this issue. In a subsequent decision, the Commission determined that given the history of the matter, the extent of positive measures that the employer subsequently put into place as a result of the applications, and an understanding of the workplace and the relationships that had developed from hearing the matter, the Commission did not consider that the making of orders at that time would be conducive to the constructive resumption of working relationships. No orders were made.

Relevance

Where a finding of bullying conduct is made and there is some future risk, preventative orders would be expected to follow. Such orders would establish the appropriate basis for future mutually safe and constructive relationships.

Here, the Commission decided that making orders would not be conducive to the parties resuming constructive working relationships given the history of the matter and the extent of positive measures the employer had put in place as a result of the applications.

Case example: **Orders NOT made – bullying finding an adequate deterrent**

Lacey and Kandelaars v Murrays Australia Pty Limited; Cullen [2017] FWC 3136 (Roe C, 8 June 2017).

Facts

The 2 applicants were employed as bus drivers. They alleged bullying by their manager Mr Cullen and their employer. Mr Cullen and Murrays Australia provided a joint defence to the applications and accepted that whilst Mr Cullen engaged in some inappropriate behaviour, they denied that the behaviour amounted to bullying.

Mr Cullen's duties were altered so that he was no longer responsible for supervision of drivers, investigating incidents, assessing drivers or disciplining drivers and therefore there was no longer any risk that the applicants would be bullied at work. He remained responsible for training drivers and recording breathalyser results from time to time.

The Commission was satisfied that Mr Cullen's behaviour was unreasonable and that it was not reasonable management action carried out in a reasonable manner. The Commission was satisfied that Mr Cullen bullied both applicants.

Outcome

The Commission accepted that the change in Mr Cullen's role in itself was not sufficient and considered that an essential further step was to recognise that bullying had occurred because:

- it sent a strong message to Mr Cullen and should reduce the likelihood for further unreasonable action
- it should assist the drivers affected to regain some confidence and dignity, and
- it should assist management in taking the necessary steps to be more supportive of the drivers and to regain their confidence.

The Commission also accepted that there was a serious risk that bullying conduct would continue. Ultimately, the Commission held that bullying had occurred but an order was not necessary or appropriate in this case.

Relevance

The Commission accepted that the risk of bullying conduct continuing was substantially reduced by the change in Mr Cullen's role, and that it was not possible to avoid contact between the applicants and Mr Cullen. The Commission did not consider that an order requiring complete separation between Mr Cullen and other drivers, and the applicants in particular, or requiring another person to always be present, would be a practical or balanced response.

Applications for the Commission to deal with the dispute in another way

When the Commission will issue a certificate and next steps

Following a Member conference, if the Member is satisfied that all reasonable attempts to resolve the sexual harassment dispute (other than by arbitration) have been, or are likely to be, unsuccessful, the Member must issue a certificate to this effect.[266]

The Member must also advise the parties if the Commission considers that arbitration of the dispute or proceeding to court would not have a reasonable prospect of success.[267]

After the Commission issues the certificate, the aggrieved person, or an industrial association entitled to represent their industrial interests, can:

- jointly agree with at least one respondent for the Commission to arbitrate the dispute between those parties (the notifying parties)
- proceed to court (against any respondent that is not a notifying party).

An aggrieved person may also elect not to proceed further with the sexual harassment dispute.

The Commission's role in relation to the dispute will end with the issue of the certificate, unless at least 2 notifying parties have agreed to consent arbitration by the Commission.

Consent arbitration

The Commission may deal with a sexual harassment dispute by arbitration if the following requirements are met:

- the Commission has issued a certificate in relation to the dispute,
- 2 or more of the parties, including at least 1 applicant and 1 respondent(the **notifying parties**), have jointly notified the Commission that they agree to the Commission arbitrating the dispute, and
- the notification is given within 60 days of the certificate being issued, unless the Commission grants an extension.[268]

The notifying parties must notify the Commission of their consent to arbitration by lodging a Form F78.

[266] Fair Work Act, s.527R(3)(a).

[267] Fair Work Act, s.527R(3)(b).

[268] Fair Work Act, ss.527S(1) and (3). The notification must also comply with any requirements prescribed by the procedural rules.

Link to form

Form F78 - Notice of agreement to consent arbitration of a sexual harassment dispute

All forms are available on the Forms page of the Commission's website.

The Commission can arbitrate a sexual harassment dispute even if all the people involved in the case don't agree. However, consent arbitration is **only** available if at least 1 applicant (an aggrieved person or industrial association entitled to represent them) and 1 respondent to the dispute have agreed to consent arbitration and have jointly notified the Commission of this.[269] The Revised Explanatory Memorandum states that '[t]his ensures the FWC can meaningfully arbitrate the dispute between the notifying parties.'[270]

The Form F78 should be lodged with the Commission within 60 days or such further period as the Commission allows (on application made before or after those 60 days).[271] The 60-day time limit allows discussions to occur between aggrieved persons, industrial associations and respondents about whether to proceed to arbitration.

If only some of the people involved in the case consent to arbitration, the Commission will remove the other people (those who are not a notifying party) from the dispute and will inform them of their removal.[272] People removed from the case will not be involved in the consent arbitration as a party and any decision and orders made will not be binding on them.

Consent arbitration will be conducted by a Commission Member as a determinative conference or hearing. In dealing with a dispute, the Commission may exercise its general powers, including its powers under s.590 to inform itself as it sees fit.

The case will end if the matter settles or when the Member makes a binding decision based on the evidence before them, which may include making an order or expressing an opinion (see below).

An aggrieved person who consents to arbitration cannot later take the case to court against a respondent who was a notifying party. However, an aggrieved person or their industrial association may bring a sexual harassment court application against a respondent who did not consent to arbitration.[273]

Related information

- Part 12 – Role of the Court

[269] Fair Work Act, ss.527S(1)(c) and (d).
[270] Revised Explanatory Memorandum at para.504.
[271] Fair Work Act, s.527S(1)(e)(i).
[272] Fair Work Act, s.527S(2)
[273] See Fair Work Act, s.527T.

What can be ordered?

An application for the Commission to otherwise deal with the dispute is intended to remedy both past and future harm caused by sexual harassment.

Following arbitration, the Commission may grant or dismiss the application.

If the application is granted, the Commission may make one or more of the orders or express one or more of the opinions listed in s.527S(3). The types of orders that the Commission may make include:

- payment of compensation to the aggrieved person(s) in relation to the dispute
- payment of an amount to the aggrieved person(s) for remuneration lost in relation to the dispute, and
- requiring the performance of any reasonable act or course of conduct to redress loss or damage suffered by the aggrieved person(s) in relation to the dispute.[274]

The Commission may also express an opinion, including that:

- a respondent has sexually harassed one or more aggrieved person(s)
- a respondent has contravened the prohibition on sexual harassment, including through the operation of the vicarious liability provisions, and
- it would be inappropriate for any further action to be taken.[275]

The Revised Explanatory Memorandum states:

> 'The FWC may deal with the dispute between the notifying parties by arbitration, including by making one or more of the orders listed in subparagraphs 527S(3)(a)(i) to (iii) or by expressing one or more of the opinions listed in subparagraphs 527S(3)(b)(i) to (iii). These remedies are based on remedies available in relation to general protections dismissal disputes and under the SD Act and AHRC Act.'[276] [Emphasis added]

The Commission's General Protections Benchbook provides as follows:

> '***What can be included in an order for compensation after consent arbitration?***
>
> Compensation is a broad concept which should not be interpreted in a narrow way.[277]
>
> The Commission has power to make 'an order for the payment of compensation to the person'[278] in relation to a general protections matter. The Fair Work Act does not limit the scope of the compensation as it does in relation to unfair dismissal, where an amount ordered to be paid to a person who has been unfairly dismissed 'must not include a component by way of compensation for shock, distress or humiliation, or other analogous

[274] Fair Work Act, s.527S(3)(a).
[275] Fair Work Act, s.527S(3)(b).
[276] At [507].
[277] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v ACI Operations Pty Ltd* (2006) 150 IR 179 [4].
[278] Fair Work Act s.369(2)(b).

hurt, caused to the person by the manner of the person's dismissal'[279] and is otherwise limited to six months' pay.

Compensation can include compensation for non-economic loss such as hurt, humiliation and distress.[280]

There must be a causal connection between the contravention and the loss, which is always a question of fact.[281,282]

The General Protections Benchbook gives the following case example:

Order made	Case reference
The applicant was employed as General Manager Retirement Services. The applicant became ill and was away from work for several months. After returning to work she was provided with a performance warning. The applicant resigned from her employment indicating her resignation was to take effect on 30 January 2015. The respondent accepted the resignation but substituted 1 December 2014 as the date on which employment would end. The applicant made a general protections application alleging she was subjected to adverse action because she had been away from work for a considerable period because of personal illness (in breach of s.340 of the Fair Work Act). She also alleged that she was subjected to adverse action because she was 'an officer or member of an industrial association or was engaging in an industrial activity' (in breach of s.346). The Commission found the applicant was exercising a workplace right when she did not attend for work for reason of personal illness and also that she was an officer of an industrial association participating in a lawful activity organised by or promoted by an industrial association. The Commission held that the respondent took adverse action against the applicant through its dismissal of her by forced resignation, and the adverse action was taken because of a prohibited reason, or reasons which included a prohibited reason. The Commission ordered compensation in the amounts of $17,451 for remuneration lost, together with $3000 for non-economic loss.	*Masson-Forbes v Gaetjens Real Estate Pty Ltd* [2015] FWC 4329 (unreported, Wilson C, 26 June 2015).

[279] Fair Work Act s.392(4).

[280] *Australian Licenced Aircraft Engineers Association v International Aviations Service Assistance Pty Ltd* [2011] FCA 333 [443]–[444]; see also *Ucchino v Acorp Pty Limited* [2012] FMCA 9 218 IR 194 [78].

[281] *Wardley Australia Ltd v State of Western Australia* [1992] HCA 55; (1992) 175 CLR 514, 525; *Australian Licenced Aircraft Engineers Association v International Aviations Service Assistance Pty Ltd* [2011] FCA 333 (2011) 193 FCR 526 [423].

[282] Fair Work Commission, General Protections Benchbook (1 July 2022) at pp.169-170.

Some of the sexual harassment case examples included in Part 5 of this Benchbook also summarise the types of orders made in those cases.

The Commission has a broad discretion as to the orders it may make in a consent arbitration.

While the Commission may have regard to the types of orders made in other jurisdictions when considering what orders it might make (such as an award of damages), each case in the Commission turns on its own facts and circumstances. The assessment as to what orders are appropriate in the particular case will depend on the evidence before the Commission and the Commission Member's assessment of what is appropriate in the circumstances to resolve the sexual harassment dispute.

Where the Commission makes an order under s. 527S(3)(a), a person subject to the order must comply with its terms. This is a civil remedy provision under Part 4-1 of the Fair Work Act. For more information, see **Contravening an order of the Commission**.

Other sections in Part 5-1 of the Fair Work Act will also apply to Commission arbitral decisions, including provisions in relation to appeals and costs orders – see Part 11 of this Benchbook.[283]

[283] See, for example, Fair Work Act, ss.604, 607 and 611.

When can the Commission dismiss an application?

General power to dismiss

The Commission can dismiss an application under s.587(1) on its own motion or on application.[284]

Without limiting when the Commission can dismiss a matter, an application can be dismissed on the following grounds:

- the application is not made in accordance with the Act, or
- the application is frivolous or vexatious, or
- the application has no reasonable prospects of success.[285]

Frivolous or vexatious

An application will be considered frivolous or vexatious where the application:

- is so obviously untenable that it cannot possibly succeed
- is manifestly groundless
- is so manifestly faulty that it does not admit of argument
- discloses a case which the Commission is satisfied cannot succeed, or
- does not disclose a cause of action.[286]

No reasonable prospect of success

Generally, for an application to have no reasonable prospect of success, it must be manifestly untenable and groundless.[287]

The party raising the objection does not need to prove that the other party's case is hopeless or unarguable.

The Commission must critically assess whether the evidence of the party responding to the objection is of sufficient quality or weight to have reasonable prospects of success.

[284] Fair Work Act s.587(3).

[285] Fair Work Act s.587(1).

[286] *Micheletto v Korowa Anglican Girls' School* PR940392 (AIRCFB, Giudice J, Hamilton DP, Deegan C, 11 November 2003) at para. 17, [(2003) 128 IR 269]; citing *General Steel Industries Inc v Commissioner for Railways (NSW)* [1964] HCA 69 (9 November 1964) at paras 8–10, [(1964) 112 CLR 125 at pp. 128–130].

[287] *Wright v Australian Customs Services* PR926115 (AIRCFB, Giudice J, Williams SDP, Foggo C, 23 December 2002) at para. 23.

The party responding to the objection does not need to present their entire case but must present a sufficient outline to enable the Commission to reach a preliminary view on the merits of their case.

The real question is not whether there is any issue that could arguably be heard, but whether there is any issue that should be *permitted* to be heard.[288]

An application can be dismissed on the basis that it has no reasonable prospects of success, including after the Commission has heard the applicant's case but before the respondent has started to present its case. However, if a respondent applies at that point for the applicant's case to be dismissed, it may be required to elect not to call any evidence.[289]

Note: The following case examples relating to the dismissal of applications on the basis that they were frivolous, vexatious and/or had no reasonable prospects of success are drawn from unfair dismissal, stop bullying and other cases.

Related information

- Part 6 – Applications to stop sexual harassment - risk of continued sexual harassment

[288] *Applicant v Respondent* [2010] FWA 1765 (McCarthy SDP, 4 March 2010) at para. 15; citing *Wang v Anying Group Pty Ltd* [2009] FCA 1500 at para. 43; and *Davis v Insolvency and Trustee Service Australia (No 3)* [2010] FCA 69 (12 February 2010) at para. 15.

[289] *Townsley v State of Victoria (Department of Education & Early Childhood Development)* [2013] FWCFB 5834 (Hatcher VP, Hamilton DP, Wilson C, 20 September 2013) at paras 17–24.

Case example: **Application dismissed – No reasonable prospects of success**[290]

Shaw v Australia and New Zealand Banking Group Limited t/A ANZ Bank [2014] FWC 3408 (Gostencnik DP, 26 May 2014).

Facts

An application was made by Mr Shaw under s.789FC of the Fair Work Act for an order to stop bullying. Before the matter could be heard, Mr Shaw was dismissed from his employment with ANZ.

ANZ applied pursuant to s.587(3) of the Fair Work Act for an order under s.587(1) dismissing Mr Shaw's application because, since Mr Shaw's dismissal, there ceased to be a risk that Mr Shaw would continue to be bullied at work by any individual or group.

Outcome

The Commission found that, as the employment relationship had ended, there was no power to make an order to stop bullying and, as a consequence, was satisfied that Mr Shaw's application had no reasonable prospect of success. The application was dismissed.

Relevance

A key consideration for the making of an order to stop bullying and/or sexual harassment is that there is a risk that the worker will continue to be bullied and/or sexually harassed at work. Once the employee has been dismissed then there would not usually be a risk that the employee will continue to be bullied and/or sexually harassed at work.

[290] See also *Re P.K.* [2015] FWC 562 (Hampton C, 11 February 2015), *Dekort v Johns River Tavern Pty Limited T/A Blacksmiths Inn Tavern* [2010] FWA 3389 (Harrison DP, 28 April 2010) and *Applicant v Respondent* [2010] FWA 1765 (McCarthy SDP, 4 March 2010).

Case example: **Application NOT dismissed – Frivolous, vexatious or lacking in substance – Facts in dispute**

Perrella v ITW Australia Pty Ltd T/A Hobart Food Equipment Service and Sales [2009] AIRC 107 (Williams C, 3 February 2009).

Facts

The employee was dismissed for poor performance. There were fundamental disagreements between the parties on the facts of the matter.

Outcome

The employer sought to dismiss the application and had to prove to the Commission that the employee's case was so untenable that it could not possibly succeed. The Commission was not able to decide which of the 2 conflicting versions was correct based on the parties' written submissions alone. To resolve the conflicting views, the Commission would need to have all relevant witnesses called to give evidence under oath and be subject to cross-examination and to then hear argument from both parties regarding that evidence.

The Commission was not satisfied that the application was frivolous, vexatious or lacking in substance such that it should be dismissed without any further hearing.

Relevance

The respondent could not satisfy the Commission that the application was frivolous or vexatious or lacking in substance. As a result, the matter was listed for hearing so that the evidence in the matter could be heard.

Case example: **Application dismissed – Frivolous or vexatious**[291]

Application by Mr Jeffrey Vassallo [2021] FWC 132 (Cirkovic C, 12 January 2021), confirmed on appeal: ***Jeffery Vassallo v Easitag Pty. Ltd.*** [2021] FWCFB 1554 (Dean DP, Colman DP, Platt C, 23 March 2021)

Facts

Mr Vassallo initially filed a claim with the Commission that he had been misclassified under the applicable modern award. The claim was rejected in November 2017. Mr Vassallo was refused permission to appeal that decision (First Appeal) and subsequently applied under s.603 of the Fair Work Act to have the Commission's 2017 decision varied or revoked. Easitag P/L (Easitag) asked the Commission to dismiss Mr Vassallo's revocation application under s.587(1)(b).

Outcome

The Commission dismissed Mr Vassallo's revocation application under s.587(1)(b) of the Fair Work Act. The Commission concluded that the majority of Mr Vassallo's submissions sought to reagitate matters that were the subject of its 2017 decision, and that the application was an abuse of process, groundless and vexatious.

Relevance

In finding that Mr Vassallo's revocation application was an abuse of process, the Commission considered the decision of *Rogers v The Queen* (1994) 181 CLR 251 at 286 where it was held: 'Although the categories of abuse of procedure remain open, abuses of procedure usually fall into one of three categories: (1) the court's procedures are invoked for an illegitimate purpose; (2) the use of the court's procedures is unjustifiably oppressive to one of the parties; or (3) the use of the court's procedures would bring the administration of justice into disrepute.'

The Full Bench on appeal held that the approach taken by the Commissioner to Easitag's s.587 application was entirely orthodox. While such applications generally face a high hurdle, in the present case it was clearly open to the Commissioner to reach the conclusion that the proceedings were groundless and vexatious and plainly open to her to dismiss the application under s.587.

[291] See also *West v Hi-Trans Express t/as NSW Logistics Pty Ltd* PR974807 (AIRC, Hamberger SDP, 4 December 2006) and *Taminiau and Thomson v Austin Group Limited* PR974223 (AIRC, Harrison C, 5 October 2006).

Defence, Security and Australian Federal Police (AFP) Operations

The Commission may dismiss an application for an order to stop sexual harassment if the Commission considers that the application involved matters that relate to:

- Australia's defence
- Australia's national security, or
- An existing or future covert operation, or international operation; of the Australian Federal Police (AFP).[292]

A ***covert operation*** is a 'function' or 'service' of the AFP[293] where knowledge of the operation by an unauthorised person may:

reduce the effectiveness of the performance of the function or service, or

expose a person to the danger of physical harm or death arising from the actions of another person'.[294]

A covert operation might, for example, include an undercover operation to identify those involved in drug trafficking, but would not include general duties policing.[295]

An ***international operation*** is an 'operation to maintain order in a foreign country' where:

it would not be reasonably practicable to eliminate risks to the health and safety of the AFP appointee involved in the operation because of the environment in which the operation is undertaken, and

the Commissioner of the AFP has taken all steps reasonably practicable to minimise any risks to the health and safety of the AFP appointee.[296]

[292] Fair Work Act s.527J(4).
[293] *Australian Federal Police Act 1979* (Cth) s.8.
[294] WHS Act s.12E(2).
[295] Note to WHS Act s.8.
[296] WHS Act s.12E(2).

Contravening an order of the Commission

A person subject to a stop sexual harassment order or an order made by the Commission in consent arbitration must comply with its terms.[297] The requirements in the Fair Work Act to comply with such orders are civil remedy provisions.[298]

A ***civil remedy provision*** is a provision of the Fair Work Act that if breached, allows a person affected to apply to a Court for a financial penalty against the alleged wrong-doer, or any other order the Court considers appropriate (such as an injunction).

An application for a breach of a civil remedy provision is made to the Federal Court, the Federal Circuit and Family Court of Australia or an eligible state or territory court. The application may be made by the person affected by the contravention, an industrial association or a Fair Work Inspector.[299] To seek the assistance of a Fair Work Inspector in relation to the enforcement of an order, a party should contact the Fair Work Ombudsman.

An application regarding a breach of a civil remedy provision must be made within 6 years of the alleged contravention.[300]

Related information

- Role of the Court

[297] Fair Work Act ss.527K and 527S(4).

[298] Fair Work Act, s.539(1) (see items 27B and 27C of the table at s.539(2)).

[299] Fair Work Act s.539(2).

[300] Fair Work Act s.544. A new note to s.544 clarifies that the time limits in that section do not apply to sexual harassment court applications (as other time limits apply).[301] Fair Work Act s.611(1).

Part 11 – Associated applications

Costs

See Fair Work Act s.611

People who incur costs in a matter before the Commission (such as legal costs) must generally pay their own costs.[301]

The Commission has the discretion to order one party to pay the other party's costs in limited circumstances.[302]

This is called a 'costs order'.

What are costs?

Costs are the amounts a party has paid to a lawyer or paid agent for advice and representation in a matter before a court or tribunal, including their fees and disbursements (out-of-pocket expenses).

Legal costs may be ordered to be paid on either a party-party basis or an indemnity basis:

Party–party costs

Party–party costs are the legal costs that are deemed necessary and reasonable. The Commission will look at whether the legal work done was necessary and will decide what a fair and reasonable amount is for that work.[303] These are also known as ordinary costs.

Indemnity costs

Indemnity costs are also known as solicitor–client costs.

Indemnity costs are all costs including fees, charges, disbursements, expenses and remuneration, as long as they have not been unreasonably incurred.[304]

Indemnity costs cover a larger proportion of the legal costs than party-party costs.

[301] Fair Work Act s.611(1).
[302] Fair Work Act s.611(2).
[303] LexisNexis Australia, *Encyclopaedic Australian Legal Dictionary* (online at 21 July 2021) 'party and party costs'.
[304] Ibid. (online at 21 July 2021) 'indemnity costs'.

Indemnity costs may be ordered when there has been an element of misconduct or delinquency on the part of the party being ordered to pay costs.[305]

What costs may be recovered?

The Fair Work Regulations include a 'schedule of costs' which sets out appropriate rates for common legal services. The schedule provides the Commission with guidance when exercising its jurisdiction to make an order for costs.[306]

The Commission is not limited to the items in the schedule of costs but cannot exceed the rates or amounts in the schedule if an item is relevant to the matter.[307]

Applying for costs

An application for costs **must be made within 14 days** after the Commission finishes dealing with a matter.[308]

Related information

- For calculating 14 days - What is a day?

When are costs ordered?

 See Fair Work Act s.611

Section 611 of the Fair Work Act sets out the general provision for when the Commission may order costs. The Commission may order a person to pay the other party's costs if it is satisfied:

- that the person's application or response to an application was made vexatiously or without reasonable cause, or
- it should have been reasonably apparent that the person's application or response to an application had no reasonable prospect of success.

The power to award costs is discretionary. Awarding costs is a 2-stage process:

- First, a Commission Member will decide whether there is power to award costs, and

[305] *Oshlack v Richmond River Council* [1998] HCA 11; 193 CLR 72; 152 ALR 83; 72 ALJR 578 (25 February 1998) at para. 44, [(1998) 193 CLR 72]; cited in *Vassallo v Easitag P/L* [2021] FWCFB 3974 (Dean DP, Colman DP, Platt C, 26 July 2021) at para. 5.
[306] Fair Work Regulations reg 3.04; sch 3.1.
[307] Fair Work Regulations reg 3.04; sch 3.1. See *Vassallo v Easitag P/L* [2021] FWCFB 3974 (Dean DP, Colman DP, Platt C, 26 July 2021) at paras. 16 to 21.
[308] Fair Work Act s.377.

- if there is power, the Commission Member will consider whether an order for costs is appropriate in all the circumstances.[309]

Vexatiously

An application is made vexatiously if:

- the main purpose of the application (or response) is to harass, annoy or embarrass the other party,[310] or
- there is another purpose for the action other than resolving the issues arising from the application (or response).[311]

Without reasonable cause

The test for 'without reasonable cause' is that the application (or response):

- is 'so obviously untenable that it cannot possibly succeed'
- is 'manifestly groundless'
- is 'so manifestly faulty that it does not admit of argument'
- 'discloses a case which the Court is satisfied cannot succeed', or
- 'under no possibility can there be a good cause of action'.[312]

The Commission may also consider whether, at the time the application (or response) was made, there was a 'substantial prospect of success.'[313] It is inappropriate to find that an application (or response) was without reasonable cause if success depends on the resolution of an arguable point of law.[314]

[309] *McKenzie v Meran Rise Pty Ltd t/as Nu Force Security Services* Print S4692 (AIRCFB, Giudice J, Watson SDP, Whelan C, 7 April 2000) at para. 7.
[310] *Nilsen v Loyal Orange Trust* [1997] IRCA 267 (11 September 1997), [(1997) 76 IR 180 at p. 181]; citing *Attorney-General v Wentworth* (1988) 14 NSWLR 481, at p. 491; cited in *Holland v Nude Pty Ltd T/A Nude Delicafe)* [2012] FWAFB 6508 (Harrison SDP, Richards SDP, Blair C, 3 August 2012) at para. 7, [(2012) 224 IR 16].
[311] Ibid.
[312] *General Steel Industries Inc v Commissioner for Railways (NSW)* [1964] HCA 69 (9 November 1964) at para. 8, [(1964) 112 CLR 125 at p. 129]; cited in *Walker v Mittagong Sands Pty Limited T/A Cowra Quartz* [2011] FWA 2225 (Thatcher C, 14 April 2011) at para. 17, [(2011) 210 IR 370].
[313] *Re Joseph Michael Kanan v Australian Postal and Telecommunications Union* [1992] FCA 366 (31 July 1992) at para. 29, [(1992) 43 IR 257]; cited in *Dryden v The Bethanie Group Inc* [2013] FWC 224 (Williams C, 11 January 2013) at para. 20.
[314] Ibid.

An application (or response) is not without reasonable cause just because the court rejects a person's arguments.[315]

In simple terms, ***without reasonable cause*** means that an application (or response) is made without there being any real reason, basis or purpose.

'Reasonably apparent' and 'no reasonable prospect of success'

Whether it *should have been reasonably apparent* that an application (or response) had no reasonable prospect of success is an **objective test** that is directed to a belief formed on an objective basis, rather than a subjective test.[316]

A finding that an application (or response) has no reasonable prospect of success 'should only be reached with extreme caution in circumstances where the application [or response] is manifestly untenable or groundless or so lacking in merit or substance as to be not reasonably arguable.'[317]

An ***objective test*** considers the view of a reasonable person. It looks at whether it would have been apparent to a *reasonable person* that an application or response had no reasonable prospect of success. This is the appropriate test.

A ***subjective test*** considers the view of the person themselves. It would look at whether it would be reasonably apparent to the person that their application or response had no reasonable prospect of success. This is not the test.

[315] *R v Moore; Ex Parte Federated Miscellaneous Workers' Union of Australia* [1978] HCA 51 (14 December 1978) at para. 3 (Gibbs J), [(1978) 140 CLR 470 at p. 473]; cited in *Walker v Mittagong Sands Pty Limited T/A Cowra Quartz* [2011] FWA 2225 (Thatcher C, 14 April 2011) at para. 20, [(2011) 210 IR 370].

[316] *Baker v Salver Resources Pty Ltd* [2011] FWAFB 4014 (Watson SDP, Drake SDP, Harrison C, 27 June 2011) at para. 10; citing *Wodonga Rural City Council v Lewis* PR956243 (AIRCFB, Watson SDP, Lloyd SDP, Gay C, 4 March 2005) at para. 6, [(2005) 142 IR 188].

[317] *Baker v Salver Resources Pty Ltd* [2012] FWAFB 4014 (Watson SDP, Drake SDP, Harrison C, 27 June 2011) at para. 10; citing *Deane v Paper Australia Pty Ltd* PR932454 (AIRCFB, Giudice J, Williams SDP, Simmonds C, 6 June 2003) at para. 7 and *A Smith v Barwon Region Water Authority* [2009] AIRCFB 769, at para 48.

Case example: **Costs ordered – Vindictive and frivolous**

Hill v L E Stewart Investments Pty Ltd T/A Southern Highlands Taxis and Coaches and Others [2014] FWC 5588 (Hatcher VP, 21 August 2014).
Decision on the substantive application [2014] FWC 4666 (Hatcher VP, 25 July 2014).

Facts

An application was made by Mr Paul Hill under s.789FC(1) of the Fair Work Act for an order to stop bullying. At the hearing of Mr Hill's application, which he did not attend, the respondents (the employer and persons named) foreshadowed an intention to apply for costs.

The respondents claimed the costs on the grounds of inconvenience and disruption, evidenced by the time they spent preparing for and participating in the listed telephone conferences and attending the hearing. The respondents supported the claim for costs on the ground that Mr Hill's application was 'vindictive and frivolous'. Mr Hill did not file any submission on the question of costs.

Outcome

The Commission was satisfied that it should have been reasonably apparent to Mr Hill that his application had no reasonable prospect of success. Mr Hill's working relationship with the respondents came to an end on 11 March 2014, 6 days before Mr Hill filed his application. As there was no reasonable prospect of the working relationship re-commencing at some future time, there was no further risk of Mr Hill continuing to be bullied by the respondents at work. The legislative scheme is directed to preventing potential future conduct, not punishing or compensating for past conduct. Costs were ordered with respect to the hearing in Wollongong on 10 July 2014.

Relevance

Mr Hill's unreasonable behaviour in not attending the hearing of his application, not advising that he would not attend, not responding to the Commission's prior inquiries as to whether he would attend, and his failure to provide any reasonable explanation for this conduct, justified the awarding of costs. As the respondents were self-represented, the Commission awarded costs in the nature of witness fees for their attendance at the court hearing.

Case example: **Costs NOT ordered – Not reasonably apparent there was no reasonable prospects of success**[318]

Luke Tamu v World Vision Australia [2020] FWCFB 5342 (Hatcher VP, Sam DP, Spencer C, 6 November 2020)

Facts

The Full Bench refused Mr Tamu permission to appeal a decision to issue a certificate in respect of his general protections dismissal application. The Full Bench concluded that Mr Tamu's appeal was 'entirely lacking in merit'. World Vision Australia (World Vision) subsequently applied for costs under s.611 of the Fair Work Act.

Outcome

The Full Bench was satisfied that Mr Tamu's appeal was lodged without reasonable cause and had no reasonable prospects of success. However, it was not prepared to find that the appeal was lodged vexatiously in order to harass World Vision or to seek some collateral advantage.

As s.611(2)(b) was satisfied, the Bench considered whether it should exercise its discretion to award costs to World Vision. The Bench rejected World Vision's submission that costs should be awarded to deter Mr Tamu from making or continuing other legal proceedings against World Vision, as the Bench had no basis to assess the merits of Mr Tamu's claim that his dismissal was unlawful.

The following matters were relevant to the Full Bench's decision to decline to award costs:

- World Vision did not file a Form F53 notice and so did not place Mr Tamu on notice that it was incurring costs for which he could be liable
- although World Vision applied for permission to be represented in the appeal, this was never actually granted
- the application for representation was made on the basis that it would enable the matter to be dealt with more efficiently, taking into account its complexity. As the Bench did not need to hear from World Vision in the appeal, this could not be said to be the case. Further, as World Vision did not seek to rely on s.596(2)(b) of the Fair Work Act, an inference was available that World Vision was capable of representing itself, and
- the directions made in respect of the appeal did not require World Vision to file any written submissions or take any other step in relation to the appeal.

Relevance

The decision to award costs is a discretionary decision. Simply because an appeal is without merit does not mean that it is made vexatiously, or that the appellant will necessarily be made responsible for the respondent's costs.

[318] See also *Re Ms S.W.* [2014] FWC 4476 (Hampton C, 2 June 2014) (costs not ordered as not reasonably apparent that there was no reasonable prospects of success).

Appeals

See Fair Work Act s.604

The following information is limited to providing general guidance for **appeals against:**

- **a stop sexual harassment order or a decision to refuse to grant such an order**, and
- **orders made or refused in consent arbitration.**

For information about lodging an appeal, stay orders, appeals directions and the appeals process please refer to the Appeal Proceedings Practice Note.

Overview

A person who is aggrieved by a decision made by the Commission (other than a decision of a Full Bench or Expert Panel) may appeal the decision, with the permission of the Commission.[319]

A ***person who is aggrieved*** is generally a person who is affected by a decision or order of the Commission and who does not agree with the decision or order. The term can extend beyond people whose legal interests are affected by the decision in question to people with an interest in the decision beyond that of an ordinary member of the public, such as, in some circumstances, a union or an employer association.[320]

In determining whether a person is a 'person aggrieved' for the purposes of exercising a statutory right of appeal, it is necessary to consider the relevant statutory context.[321]

Intervention

There is no provision of the Fair Work Act expressly dealing with the ability of a person to intervene in a case if they are not a party. The Commission may use the broad procedural power in s.589(1) to permit a person to participate in appropriate cases. There are also limited rights for government ministers to make submissions in certain cases in the public interest.[322]

[319] Fair Work Act s.604(1).

[320] See for e.g. *Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited T/A Coles and Bi Lo* [2015] FWCFB 7090 (Watson VP, Kovacic DP, Roe C, 27 October 2015).

[321] *Tweed Valley Fruit Processors Pty Ltd v Ross and Others* [1996] IRCA 407 (16 August 1996).

[322] *J.J. Richards & Sons Pty Ltd v Transport Workers' Union of Australia* [2010] FWAFB 9963 (Lawler VP, O'Callaghan SDP, Bissett C, 23 December 2010) at para. 9. Note: ss.597 and 597A of the Fair Work Act provide for workplace relations Ministers to make a submission in a Full Bench Commission matter if it is in the public interest, and for the Commonwealth Minister to also make a submission if the matter involves public sector employment.

Time limit for appeal – 21 days

A Notice of Appeal must be lodged with the Commission **within 21 days** after the date of the decision being appealed.[323] If an appeal is lodged late, application also needs to be made for an extension of time to lodge the appeal.[324] An extension of time is not a right. The person seeking an extension of time will need to persuade the Commission that additional time is warranted in the circumstances.

Related information

- For calculating 21 days - What is a day?

Considerations

An appeal under s.604 of the Fair Work Act is an appeal by way of rehearing [325] and the Commission's powers on appeal are only exercisable if there is error on the part of the primary decision-maker.

There is no right to appeal a Commission decision relating to an application to stop sexual harassment in connection with work or a decision made in consent arbitration. An appeal may only be made with the permission of the Commission.[326]

In such appeals, a Full Bench of the Commission needs to determine 2 key issues:

- whether permission to appeal should be granted, and
- whether there has been an appealable error in the original decision.

Permission to appeal

Permission granted in the public interest

The Fair Work Act provides that the Commission **must** grant permission to appeal if it is satisfied that it is in the public interest.[327] The 'public interest' is not defined in the Fair Work Act, but it is generally understood to refer to a benefit or advantage to the whole community, as opposed to an individual.

[323] *Fair Work Commission Rules* rr.56(2)(a)–(b).
[324] *Fair Work Commission Rules* r.56(2)©. To do so the appellant needs to indicate this in the Notice of Appeal (Form F7).
[325] This is so because on appeal, the Commission has the power to receive further evidence, pursuant to s.607(2); see *Coal and Allied v AIRC* [2000] HCA 47 (31 August 2000) at para. 17, (per Gleeson CJ, Gaudron and Hayne JJ) [(2000) 203 CLR 194].
[326] See *Krcho v University of New South Wales (UNSW); Lucian Hiss; Phil Allen; Karen Scott* [2019] FWCFB 8269 (Gostencnik DP, Millhouse DP, Spencer C, 10 December 2019) at para. 35.
[327] Fair Work Act s.604(2).

The task of assessing whether the public interest test has been met is a discretionary one involving a broad value judgment.[328]

Some considerations that may attract the public interest include where:

- a matter raises issues of importance and general application
- there is a diversity of decisions so that guidance from an appellate court is required
- the original decision manifests an injustice or the result is counter intuitive, or
- the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters.[329]

Permission to appeal will usually only be granted if there is an arguable case of appealable error, because an appeal cannot succeed without it. Even if a relevant error is found, or a decision-maker might prefer a different result to the original decision-maker, it might not be in the public interest to grant permission to appeal and the appeal might not succeed.[330] An appealable error is one that is material to the outcome of the case. Hearing and determining an appeal must also have a practical purpose – this is known as 'utility'.[331]

It is generally considered to be in the public interest to discourage appeals from preliminary or procedural rulings.[332]

[328] *Coal and Allied Mining Services Pty Ltd v Lawler* [2011] FCAFC 54 (19 April 2011) at para. 44, [(2011) 192 FCR 78].
[329] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343 (Kaufman SDP, Ives DP, Spencer C, 23 July 2010) at paras. 24-27, [(2010) 197 IR 266].
[330] See *Krcho v University of New South Wales T/A UNSW Sydney* [2021] FWCFB 350 (Asbury DP, Clancy DP, Masson DP, 29 January 2021) at para. 49; *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/Warkworth* [2010] FWAFB 10089 at para. 28, affirmed on judicial review and *NSW Bar Association v Brett McAuliffe*; *Commonwealth of Australia represented by the Australian Taxation Office* [2014] FWCFB 1663 (Ross J, Hatcher VP, Cargill C, 13 March 2014) at para. 28.
[331] See *Galloway v Molina and Zhai* [2021] FWCFB 5419 (Catanzariti VP, Easton DP, O'Neill C, 1 September 2021) at para. 26; *Bechtal Construction (Australia) Pty Ltd v Maritime Union of Australia* [2013] FWCFB 4250 (Hatcher VP, Harrison SDP, Simpson C, 5 July 2013) at paras. 9-12; *Ferrymen Pty Ltd v Maritime Union of Australia* [2013] FWCFB 8025 (Ross J, Booth DP, McKenna C, 17 December 2013) at para. 48.
[332] See *Krcho v University of New South Wales T/A UNSW Sydney* [2021] FWCFB 350 (Asbury DP, Clancy DP, Masson DP, 29 January 2021) at paras. 51-52, although '[t]here may be cases where an interim or provisional decision does affect substantive rights in a manner which cannot be redressed in an appeal against a final decision … [which] may warrant a departure from the well-established position', at para. 58).

Permission granted on other discretionary grounds

The Commission can grant permission to appeal 'on conventional grounds' (not limited to those that are in the public interest) if it is considered appropriate in the circumstances of a particular case. [333]

The grounds for granting permission to appeal other than in the public interest are not specified. Considerations that have traditionally been seen as justifying the grant of permission to appeal include where a decision is attended with sufficient doubt to warrant its reconsideration or where substantial injustice may result if permission to appeal is refused.[334]

Grounds for appeal

Appeals under s.604 of the Fair Work Act exist for the correction of appealable error. Their purpose is not to allow an unsuccessful party a further opportunity to argue their case in the absence of error.[335]

A Full Bench of the Commission must identify some error of law or fact in the decision at first instance before it can intervene.[336] An error of law may be jurisdictional (when the Commission makes a decision or order that it does not have power to make) or relate to any question of law that arises for decision in a matter. An error of fact must be material to the outcome of the case. Not all errors of fact will warrant correction on appeal.

The approach of a Full Bench to appeals depends on the nature of the decision under appeal:[337]

Correctness standard

The **correctness standard** applies where the 'legal criterion applied or purportedly applied by the primary [decision-maker] to reach the conclusion demands a unique outcome'.[338] The correctness standard applies to errors of law or fact in circumstances where, by the nature of the fact or conclusion, only one view is legally possible.

For example, a Full Court of the Federal Court has said that the question of whether or not a worker is an 'employee' within the meaning of the Fair Work Act involves the application of a legal standard to a given set of facts. The question of whether particular facts satisfy that legal standard is generally a question of fact, and therefore any appeal of that conclusion is an appeal on a question of fact.

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[333] Fair Work Act s.604(2).

[334] *Construction, Forestry, Mining and Energy Union v AIRC* [1998] FCA 1404, (1998) 89 FCR 200, (1998) 84 IR 314 (6 November 1998) at 220; *Wan v AIRC* [2001] FCA 1803 (17 December 2001) at para. 26 [(2001) 116 FCR 481]; *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343 (Kaufman SDP, Ives DP, Spencer C, 23 July 2010) at para. 3 (and see also para. 24) [(2010) 197 IR 266].

[335] *Vassallo v Easitag P/L* [2021] FWCFB 3974 (Dean DP, Colman DP, Platt C, 26 July 2021) at para. 13.

[336] *Linfox Australia Pty Ltd v Fair Work Commission* [2013] FCAFC 157 (13 December 2013) at para. 40.

[337] *Australian Workers' Union v BlueScope Steel (AIS) Pty Ltd* [2021] FWCFB 5030 (Clancy DP, Colman DP, McKinnon C, 13 August 2021) at para. 11.

[338] *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30,264 CLR 541 at para. 49 per Gageler J.

However, as there is only one legally correct answer – either the worker is in an employment relationship or they are not – the correctness standard applies.[339]

Where the correctness standard applies, the Commission is concerned with the correctness of the conclusion reached in the decision at first instance, not whether that conclusion was reasonably open.[340] The task of the appellant is to demonstrate that the conclusion in the decision was wrong, not that there was some error in the decision-maker's reasoning process.[341] In determining the appeal, the Full Bench will substitute its own conclusion for that of the original decision-maker if it finds that their conclusion was not correct.[342]

Discretion standard

In contrast, where the decision under appeal is discretionary in nature, a successful appeal will usually require the appellant to demonstrate that the original decision-maker's discretion was not exercised correctly. The **discretion standard** applies to the review of evaluative conclusions, such as where the Commission must "be satisfied" of something before it can make a decision. These are matters where the Commission has some latitude about the decision to be made because the decision under appeal is one that 'tolerates a range of outcomes', on which 'reasonable minds may differ'.[343]

The correctness of a discretionary decision can only be challenged by showing error in the decision-making process.[344] If permission to appeal is granted, the Full Bench will consider whether the conclusion reached by the original decision-maker was reasonably open to them on the facts.[345] If the conclusion was reasonably open on the facts, the Full Bench cannot change or interfere with the original decision, for example, by substituting its own views for the views of the original decision-maker.[346] It is not enough that a Full Bench would have arrived at a different conclusion to that of

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[339] *Jamsek v ZG Operations Australia Pty Ltd* [2020] FCAFC 119 at paras. 4-5, 171-173 and 252, [[2020] 297 IR 210].

[340] *SPC Ardmona Operations Ltd v Esam* PR957497 (AIRCFB, Ross VP, Hamilton DP, Hingley C, 20 April 2005) at para. 40, [(2005) 141 IR 338]; *Moszko v Simplot Australia Pty Ltd* [2021] FWCFB 6046 (Catanzariti VP, Saunders DP and Wilson C, 10 November 2021)

[341] *Hempel v Northern Territory Air Services Pty Ltd* [2021] FWCFB 3707 (Hatcher VP, Cross DP, Lee C, 2 July 2021) at para. 27.

[342] *Rail Commissioner v Craig Rogers* [2021] FWCFB 371 (Hatcher VP, Masson DP, Wilson C, 27 January 2021) at para. 61.

[343] *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30 (8 August 2018) at para. 49 per Gageler J, [(2018) 264 CLR 541]; *Rail Commissioner v Craig Rogers* [2021] FWCFB 371 (Hatcher VP, Masson DP, Wilson C, 27 January 2021) at para. 61, citing *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30 at para. 44 per Gageler J [(2018) 264 CLR 541]; *Jamsek v ZG Operations Australia Pty Ltd* [2020] FCAFC 119 at para. 168 [[2020] 297 IR 210].

[344] *House v The King* [1936] HCA 40 (17 August 1936) at p.505, [(1936) 55 CLR 499]*; BlueScope Steel Limited v Trevor Knowles* [2020] FWCFB 3439 (Millhouse DP, Young DP, Cirkovic C, 19 August 2020) at para. 26.

[345] *SPC Ardmona Operations Ltd v Esam* PR957497 (AIRCFB, Ross VP, Hamilton DP, Hingley C, 20 April 2005) at para. 40, [(2005) 141 IR 338].

[346] *House v The King* [1936] HCA 40 (17 August 1936), [(1936) 55 CLR 499]*; BlueScope Steel Limited v Trevor Knowles* [2020] FWCFB 3439 (Millhouse DP, Young DP, Cirkovic C, 19 August 2020) at para. 26.

the decision-maker at first instance.[347] The Full Bench may only intervene in such cases if it can be demonstrated that an appealable error has been made in exercising the powers of the Commission.[348]

The High Court decision of *House v The King*[349] describes appealable errors of this kind. They include where a decision-maker:

- acted upon a wrong principle
- was guided by irrelevant factors
- mistook the facts, or
- failed to take some material consideration into account.[350]

A Full Bench of the Commission may also intervene on the basis that the decision under appeal was, on the facts, unreasonable or plainly unjust[351] or 'contrary to the overwhelming weight of the evidence'.[352] There is a high threshold for intervening in a decision on this basis.

Appealable error will not be demonstrated simply because a decision-maker at first instance failed to give a particular matter 'sufficient weight' or failed to give it 'proper regard', unless the failure was, in substance, a failure by the decision-maker to exercise their discretion properly.[353]

Link to application form

Form F7 - Notice of Appeal

All forms are available on the Forms page of the Commission's website.

[347] *House v The King* [1936] HCA 40 (17 August 1936), at pp.504-505, [(1936) 55 CLR 499].

[348] Ibid. at p.505.

[349] ibid.

[350] ibid. at p.505. A further illustrative list of errors which may be made by a Tribunal is set out in *Craig v The State of South Australia* [1995] HCA 58 (24 October 1995), [(1995) 184 CLR 163] and approved in *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30 (31 May 2001), [(2001) 206 CLR 323] and *Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* [2010] HCA 1 (3 February 2010), [(2010) 239 CLR 531].

[351] *House v The King* [1936] HCA 40 (17 August 1936), [(1936) 55 CLR 499 at p.505.

[352] *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139, at pp. 155–156.

[353] *Appeal by BlueScope Steel Limited against decision of Riordan C of 11 May 2020 [2020] FWC 1015] Re: Knowles* [2020] FWCFB 3439 (Millhouse DP, Young DP, Cirkovic C, 19 August 2020) at para. 50.

Case example: **Permission to appeal granted – Jurisdiction of the Commission**[354]

Hempel v Northern Territory Air Services Pty Ltd [2021] FWCFB 3707 (Hatcher VP, Cross DP, Lee C, 2 July 2021).

Decision at first instance [2021] FWC 886 and order PR727109 (Bissett C, 4 March 2021).

Facts

Mr Hempel appealed a decision to dismiss his unfair dismissal application. The Commission found at first instance that the respondent was a small business employer (with fewer than 15 employees) and that Mr Hempel had not served the minimum employment period of one year. As a result, he was not protected from unfair dismissal.

Outcome

Permission to appeal was granted on some of the appeal grounds in the public interest, as the appeal had substantive merit and the decision had deprived Mr Hempel of the opportunity to obtain an unfair dismissal remedy.

At issue in the appeal was whether a co-worker was an employee or contractor of the respondent. If the co-worker was an employee, the respondent would not be a small business employer. Because this issue was determinative of whether the Commission had jurisdiction to deal with Mr Hempel's application, the task of the Full Bench was to decide whether the decision at first instance was correct.

On appeal, the Full Bench found the co-worker was an employee of the respondent and the respondent was not a small business employer. This meant Mr Hempel had served the relevant minimum employment period and he was eligible to apply for an unfair dismissal remedy.

Relevance

This case is an example of how the 'correctness standard' applies. Whether a person is an employee or independent contractor involves the application of a legal standard to a given set of facts. Although the answer requires an evaluation, it is not 'an exercise in, or akin to, discretionary decision-making'. The person can be 'either an employee or independent contractor'. That is, only one of these two possibilities will be legally correct in each case.

Where the correctness standard applies, the appellant's task is to demonstrate that the decision at first instance was wrong, not that there was some error in the decision-maker's reasoning process.

[354] See also – **permission to appeal granted:** *Obatoki v Mallee Track Health & Community Services and Others* [2015] FWCFB 1661 (Catanzariti VP, Smith DP, Blair C, 27 March 2015), *Dianna Smith T/A Escape Hair Design v Fitzgerald* [2011] FWAFB 1422 (Acton SDP, Cartwright SDP, Blair C, 15 March 2011) (duty to provide adequate reasons for decisions), *Aperio Group (Australia) Pty Ltd (T/a Aperio Finewrap) v Sulemanovski* [2011] FWAFB 1436 (Watson SDP, McCarthy SDP, Deegan C, 4 March 2011), (misapplication of statutory test) and *Ulan Coal Mines Limited v Honeysett* [2010] FWAFB 7578 (Giudice J, Hamberger SDP, Cambridge C,

Staying decisions

See Fair Work Act s.606

If the Commission hears an appeal from, or conducts a review of a decision, the Commission may order that the operation of the whole or part of the decision be stayed (that is, suspended from taking effect) by making a stay order.

The stay order can be made on any terms and conditions that the Commission considers appropriate. For example, a stay order might operate until a decision in relation to the appeal or review is made, or until the Commission makes a further order.

If a Full Bench is hearing the appeal or conducting the review, a stay order in relation to the appeal or review may be made by:

- the Full Bench
- the President
- a Vice President, or
- a Deputy President.

12 November 2010). (interpretation of Fair Work Act provisions); **permission to appeal refused:** *Qantas Airways Limited v Carter* [2012] FWAFB 5776 (Harrison SDP, Richards SDP, Blair C, 17 July 2012) (not in public interest).

Part 12 – Role of the Court

Sexual harassment court applications

A sexual harassment court application is an application to a court under s.539 of the Fair Work Act for orders in relation to a contravention of the prohibition on sexual harassment in connection with work.[355]

Section 527T(1) sets out the 2 circumstances in which an aggrieved person, or an industrial association entitled to represent their industrial interests, can make a sexual harassment court application in relation to a dispute. These are:

- where attempts by the Commission to resolve the dispute have been unsuccessful and the Commission has issued a certificate to that effect, or
- the aggrieved person or industrial association is seeking an injunction.

This means an aggrieved person or industrial association must first attempt to resolve a dispute about sexual harassment in connection with work (at least to the extent that a remedy is sought for past harm) through conciliation or mediation in the Commission before proceeding to court, unless they are seeking an injunction.

An application to court must be within a specified timeframe.[356] An aggrieved person or industrial association must make a sexual harassment court application (other than an application seeking an injunction) within one of the following timeframes (unless the court grants an extension):

- 60 days after the Commission has issued a certificate under s.527R(3)(a) stating that all reasonable attempts to resolve the dispute other than by arbitration have been, or are likely to be unsuccessful, or
- if the aggrieved person or industrial association making the sexual harassment court application is removed as party to the dispute because they have not agreed to arbitration—14 days after the Commission has notified the aggrieved person or industrial association of their removal. [357]

On application, the court may allow a further period in which to make a sexual harassment court application.[358] Principles relevant to the exercise of discretion to grant an extension of time for an application were considered by the Industrial Relations Court of Australia in *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298.

The court will conduct a hearing to determine an application for an interim injunction or a sexual harassment court application.

[355] Fair Work Act, s.527T(2). Section 539 is in of Division 2 of Part 4-1 of the Fair Work Act.
[356] Fair Work Act, s.527T(1)(a)(ii).
[357] Fair Work Act, s.527T(3)(a) and (b).
[358] Fair Work Act, s.527T(3)(c).

Provisions in the Fair Work Act dealing with the enforcement of civil penalties also apply to sexual harassment court applications (as well as applications for contraventions of stop sexual harassment orders and orders made by the Commission in consent arbitration). These include a court making orders such as:

- the types of orders listed in s.545 of the Fair Work Act, including an order for compensation or any other order the court considers appropriate,
- orders that a person pay a pecuniary penalty under s.546, and
- orders for costs under s.570 of the Fair Work Act.

The course of conduct rule in s.557 of the Fair Work Act has been amended to also apply to contraventions of the prohibition on sexual harassment in s.527D(1).[359]

Parties who have agreed to consent arbitration in the Commission cannot make a sexual harassment court application against another 'notifying party' involved in that arbitration. A sexual harassment court application can be made against a respondent to a sexual harassment dispute in the Commission who was removed from the dispute because they did not agree to consent arbitration.[360]

Enforcement of Commission orders

If a person does not comply with a stop sexual harassment order or an order made by the Commission in consent arbitration[361] then:

- a person affected by the contravention
- a union or an employer organisation, or
- an inspector;

may seek enforcement of the Commission's order through civil remedy proceedings in:

- the Fair Work Division of the Federal Circuit and Family Court of Australia
- the Fair Work Division of the Federal Court of Australia, or
- an eligible State or Territory Court.[362]

[359] Fair Work Act, s.557(2)(la).

[360] Fair Work Act, s,734A(1). Put differently, a notifying party (i.e. a party that has notified the Commission that it agrees to the Commission arbitrating a sexual harassment dispute) cannot make a sexual harassment court application against another notifying party.
An aggrieved person or industrial association that did not consent to arbitration could make a sexual harassment court application (within the specified timeframes) against any respondent involved in the matter, including a respondent that consented to arbitration with another aggrieved person or industrial association.

[361] See Fair Work Act, ss.527K and 527S(4).

[362] Fair Work Act s.539, table item 38.

Failure to comply with a stop sexual harassment order or an order made by the Commission in consent arbitration may result in the Court imposing a pecuniary penalty or making other orders.

Normally an order from the Commission will provide a timeframe within which the order must be complied with. It is advisable to wait until the timeframe has lapsed before seeking enforcement of the order.

Related information

- Part 6 – Applications to stop sexual harassment - risk of continued sexual harassment

Types of order made by the Court

See Fair Work Act ss.545, 546, 547 and 570

The Federal Court or the Federal Circuit and Family Court of Australia may make any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision (such as s.527D(1), which prohibits sexual harassment in connection with work, s.527K, which prohibits a person contravening a stop sexual harassment order, and s.527S(4), which prohibits a person contravening an order made by the Commission in consent arbitration).

Orders the Federal Court or Federal Circuit and Family Court of Australia may make include the following:

- an order granting an injunction, or interim injunction, to prevent, stop or remedy the effects of a contravention, and
- an order awarding compensation for loss that a person has suffered because of the contravention (which can include interest).

Pecuniary penalty orders

The Federal Court, the Federal Circuit and Family Court of Australia or an eligible State or Territory court may, on application, order a person to pay a pecuniary penalty that the court considers is appropriate if the court is satisfied that the person has contravened a civil remedy provision.

The pecuniary penalty for an individual must not be more than the maximum penalty for the relevant contravention set out in s.539(2) of the Fair Work Act.

In the case of a body corporate, the maximum penalty is 5 times the maximum for an individual.

A **pecuniary penalty** is a penalty requiring the payment of money.

*A **penalty unit*** is used to define the amount payable for pecuniary penalties.

The maximum number of penalty units for contravening each of s.527D(1) (which prohibits sexual harassment in connection with work), s.527K (which prohibits a person contravening a stop sexual harassment order), and s.527S(4) (which prohibits contraventions of orders made by the Commission in consent arbitration) is 60 penalty units.[363]

From 1 January 2023 a penalty unit is $275:[364]

- for an individual – 60 penalty units = $16,500
- for a body corporate – 5 x 60 penalty units = $82,500.

The court may order that the pecuniary penalty, or a part of the penalty, be paid to:

- the Commonwealth
- a particular organisation (such as a union), or
- a particular person.

Costs orders

A party to proceedings (including an appeal) in a court in relation to a matter arising under the Fair Work Act may be ordered by the court to pay costs incurred by another party to the proceedings.

The party may be ordered to pay the costs only if the court is satisfied that:

- the party instituted the proceedings vexatiously or without reasonable cause
- the party's unreasonable act or omission caused the other party to incur the costs, or
- the party unreasonably refused to participate in a matter before the Commission, and the matter arose from the same facts as the proceedings.[365]

[363] Fair Work Act, s.539(2) items 27A-27C.
[364] *Crimes Act 1914* (Cth) s.4AA.
[365] Fair Work Act, s.570.