



## *Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022 – Sexual Harassment & Anti-Discrimination*

On 2 December 2022, the [Fair Work Legislation Amendment \(Secure Jobs, Better Pay\) Act 2022](#) (Cth) (**Amendment Act**) was passed by the Commonwealth Parliament and received Royal Assent on 6 December 2022.

The Amendment Act introduces major changes to the Fair Work Act 2009 (**FW Act**) including a new prohibition against sexual harassment (attracting a civil penalty) combined with an expanded dispute resolution jurisdiction in the Fair Work Commission (FWC) to deal with sexual harassment disputes.

This summary provides an overview to the new sexual harassment laws introduced by the Amendment Act.

**The changes commence on 6 March 2023.**

### **The new prohibition against sexual harassment**

The Amendment Act introduces a prohibition against sexual harassment in the FW Act. This was one of the recommendations made by the Respect@Work Report, prepared by the Sex Discrimination Commissioner in relation to sexual harassment in Australian workplaces.

The FW Act 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 prohibition is framed such that a person must not sexually harass another person who is:

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

The terms 'worker' and 'person conducting a business or undertaking' are aligned with definitions in work health and safety (WHS) laws and extend beyond an employer and employee. That is, a worker also includes a contractor, a subcontractor, a trainee, a student on work experience or a volunteer.

The prohibition against sexual harassment is a civil remedy provision.

An employer or principal may be vicariously liable for a person who sexually harasses another person (in one of the three categories above) if the alleged harasser is an employee or agent of the employer or principal. An employer or principal would not be vicariously liable if it proves that it took all reasonable steps to prevent the employee or agent from contravening the prohibition.

### **The Fair Work Commission's dispute jurisdiction to deal with sexual harassment**

The Amendment Act also introduces a new dispute resolution framework largely modelled on the compliance framework in the FW Act that applies to general protections dismissal disputes.

This amendment gives workers a new avenue to pursue complaints relating to sexual harassment. Applications may be made to the Fair Work Commission (**FWC**) to deal with a dispute about an alleged contravention of this prohibition, including by making an application for a stop sexual harassment order, or for the FWC to otherwise deal with the dispute.

The amendments to the FWC's jurisdiction to issue stop sexual harassment orders are similar to provisions introduced in 2021 as part of the FWC's expanded anti-bullying jurisdiction but ensure consistency with the Amendment Act's prohibition.

Stop sexual harassment orders are intended to prevent any future harassment and the FWC may make any order it considers appropriate other than orders for the payment of compensation.

For the FWC to otherwise deal with dispute applications (applications that do not consist solely of an application for a stop sexual harassment order), the FWC must first deal with the dispute by conciliation or mediation. If the dispute remains unsettled and following the issue of the relevant certificate by the FWC, the parties could proceed to consent arbitration by the FWC (if the parties consent), or the applicant could proceed to a Federal Court.

If a dispute is dealt with by consent arbitration, the FWC can make orders, including an order for payment of compensation, or require a person to perform any reasonably necessary act, or carry out any reasonable course of conduct, to redress loss or damage suffered.

Central to these changes is the ability for applications to be made jointly by multiple aggrieved persons, as well as by a union, as opposed to a single individual. This will enable the FWC to deal with multiple parties together if it is appropriate to do so – for example, where there is a common perpetrator or principal or work location of where the sexual harassment has occurred, from a practical perspective.

A contravention of an arbitration order or a stop sexual harassment order is also a civil remedy provision.

### **Concurrent applications**

An applicant may only make a simultaneous application for the FWC to deal with a sexual harassment dispute and court application if the court application includes an application for an interim injunction.

The Amendment Act removes the prohibition of proceedings commencing under WHS laws if an application to the FWC for a stop sexual harassment order is made.

Importantly, the Amendment Act at section 734B does not permit concurrent applications to the FWC, a sexual harassment court application or complaint under the *Australian Human Rights Commission Act 1986* (Cth), or anti-discrimination law. An exception to this is where a FWC dispute application only nominates a stop sexual harassment order (i.e. where the FWC is unable to order monetary compensation).

### **When do these changes come in effect?**

These provisions dealing with sexual harassment commence on 6 March 2023.

### **Anti-discrimination and special measures**

“Breastfeeding”, “gender identity” and “intersex status” definitions are now included into the anti-discrimination provisions of the FW Act allowing for the harmonisation of defined terms with other Commonwealth anti-discrimination laws, including the Sex Discrimination Act.

These attributes will be protected from discrimination for the purposes of the general protections provisions, but also will inform how the FWC exercises its functions and powers so that its functions and powers are not discriminatory on these grounds.

The changes came into effect on 7 December 2022.

### **What should growers do?**

The legal landscape with respect to workplace sexual harassment has changed significantly, and current practices may not be sufficient to comply with new legislative requirements.

Growers should assess what steps need to be taken within their operations to prevent and prohibit sexual harassment, which may include:

- fostering a culture to encourage complainants of sexual harassment to raise any grievances or concerns so they can be dealt with efficiently and effectively;
- reviewing and updating policies to ensure they clearly prohibit discrimination and harassment and apply to the broad spectrum of workers, prospective workers and other parties that will come within the scope of the new framework;
- reviewing and updating procedures available to resolve grievances or disputes, including investigation processes, noting the FWC must have regard to these matters when considering an application for a “stop sexual harassment” order;
- ensuring employees understand that discrimination and harassment may result in disciplinary action, to support the prohibition against sexual harassment;
- developing targeted discrimination and harassment training for staff and keeping clear records of staff attendance – to ensure all staff are made aware that discrimination and harassment is prohibited and how to raise any concerns; and
- monitoring of the workplace environment and culture and responding to any risks or incidents – including undertaking a sexual harassment-specific risk assessment and implementing appropriate controls in response to any risks identified.

*The contents do not constitute legal advice, are not intended to be a substitute for legal advice and should not be relied upon as such. You should seek legal advice or other professional advice in relation to any particular matters you or your organisation may have.*