

X. Use of non-disclosure agreements and confidentiality provisions in the settlement of sexual harassment matters

(1) In the settlement of any claim or dispute relating to any matter arising in relation to workplace sexual harassment or discrimination, the following shall apply:

(2) Other than in accordance with sub-section (3), the employer must not enter into a non-disclosure agreement or confidentiality provision with an employee (**'relevant employee'**) who has been the subject of or has alleged they have been the subject of workplace sexual harassment or discrimination (**'relevant conduct'**).

(a) **'non-disclosure agreement'** means a provision in an agreement, or an agreement, however described, which as the purpose or effect, whether directly or indirectly, of prohibiting the employee from being able to disclose or communicate any information about the relevant conduct (including the identity of the person or people involved in the relevant conduct); and/or

(b) a non-disparagement agreement or provision in an agreement which has the purpose and effect whether directly or indirectly, of prohibiting the employee from being able to disclose or communicate any information about the relevant conduct.

(3) The employer must not enter into a non-disclosure agreement with the employee unless a non-disclosure agreement is initiated by and is the express wish and preference of the relevant employee.

(4) Where a non-disclosure agreement is entered into under sub-section (3), the non-disclosure agreement shall only be enforceable where:

(a) the impacted employee was offered independent legal advice, in writing, prior to their entry into the non-disclosure agreement, by and at the expense of the employer;

(b) there have been no undue attempts to influence the impacted employee in respect of their decision to enter into the non-disclosure agreement; and

(c) the non-disclosure agreement entitles the impacted employee to terminate the non-disclosure agreement upon 7 days' notice in writing to the employer without cost or penalty to the impacted employee.

(5) The employer must not enter into an agreement with the impacted employee or any person to the extent that such an agreement has the purpose and effect, whether directly or indirectly of concealing or protecting from disclosure or communication any information about the relevant conduct.

(6) Where a non-disclosure agreement is entered into that does not comply with the requirements of this provision, the non-disclosure agreement is null and void and of no legal effect. To avoid doubt, only the non-disclosure agreement or provision of the agreement is of no legal effect.

(7) A non-disclosure agreement entered into in accordance with sub-section (3) shall not apply to any communication or disclosure of any information about the relevant conduct between the impacted employee and:

(a) an industrial organisation (union);

(b) an industrial association;

- (c) an Australian legal practitioner;
- (d) a medical or mental health professional;
- (e) the Victorian Workcover Authority or related authority;
- (f) any entity or body that regulates workplace safety, such as WorkSafe;
- (g) Victoria Police or a police officer;
- (h) an integrity body;
- (i) a prospective employer;
- (j) a friend, family member or personal supporter;
- (h) a State or Federal Commission or Tribunal including the Fair Work Commission or other related industrial bodies.

(8) A non-disclosure agreement entered into in accordance with subsection (3) shall not apply to any communication or disclosure of any information made in the course of any proceeding before a Court, Tribunal or Commission.

(8) A non-disclosure agreement made under subsection (3) shall be written in plain English.