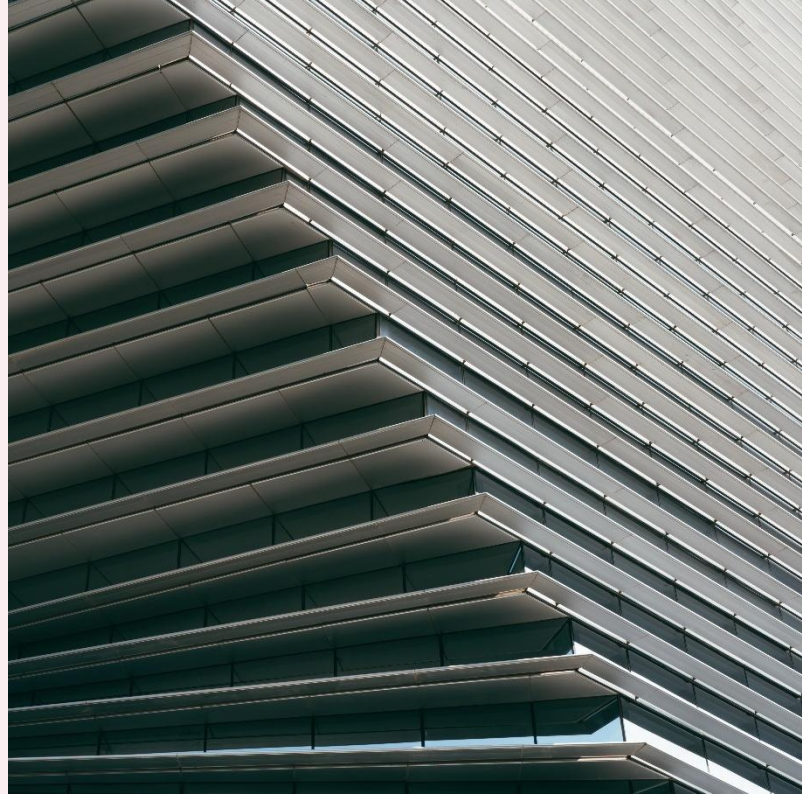


Federal Court clears ADF sexual harassment class action to proceed

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Executive Summary

In [MAN25 v Commonwealth of Australia \[2026\] FCA 1349](#), the Federal Court of Australia dismissed the Commonwealth's interlocutory application which would have derailed a class action brought by four former Australian Defence Force (**ADF**) members alleging systemic sexual harassment and sex discrimination in breach of the *Sex Discrimination Act 1984* (Cth) (**SD Act**).

Justice Abraham's judgment, handed down on 15 September 2026, is a significant decision for Australian class actions because it resolves, for the first time, how the *Federal Court of Australia Act 1978* (Cth) (**FCA Act**) and the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) interact when a systemic discrimination complaint is brought on a representative basis.

Central issues in the application were: whether the applicants' class action satisfied the threshold "gateway" requirements for representative proceedings under section 33C of the FCA Act; and, whether the Court had jurisdiction to hear the class claims at all given the precondition in section 46PO(3) of the AHRC Act that court proceedings must mirror the

substance of the complaint previously made to the Australian Human Rights Commission (**AHRC**).

The Court held that the applicants' pleading satisfied both the section 33C gateway and section 46PO(3). It separately found that serving ADF members can join the class action without giving individual written consent, rejecting the Commonwealth's argument that they are "officers of the Commonwealth" acting in that capacity for the purposes of section 33E(2)(d) of the FCA Act.

The decision matters well beyond the ADF context. It confirms that Australian class actions can be built around allegations of institutional or systemic misconduct by a single employer, even where the underlying incidents are factually diverse, occurred over decades, and involved different individuals. It also clarifies the relationship between the AHRC complaints process and Federal Court class actions, an issue with growing relevance as employment discrimination and sexual harassment class actions increase in frequency across Australian industries.

Key Takeaways

- A single employer's alleged systemic failure to prevent workplace discrimination or harassment can satisfy the gateway under section 33C(1) of the FCA Act, even where individual incidents differ in time, place and alleged perpetrator.
- The section 33C(1) gateway remains "deliberately undemanding": claimants need only show related circumstances and one substantial common issue of law or fact, not that every element of every claim is identical.
- A representative complaint terminated by the AHRC can be converted to a Federal Court class action, under section 46PO of the AHRC Act. That is so even where individual applicants later plead specific incidents not expressly detailed in the original complaint. They can be captured by a subsequent class action provided they fall within the same pattern of conduct.
- The AHRC Act and the FCA Act must be read harmoniously: a complaint accepted and terminated by the AHRC as a representative complaint should generally be capable of proceeding as a class action, notwithstanding differences in statutory language between the two regimes.
- Employers facing systemic discrimination or harassment allegations should expect the Federal Court to take a broad, purposive approach to the FCA Act class action gateway provisions and AHRC jurisdictional challenges, making early strike-out strategies harder to sustain.

Background

Four lead applicants, all former ADF members, have commenced a representative proceeding against the Commonwealth under Part IVA of the FCA Act, alleging they and other women who served in the ADF

between 13 November 2003 and 25 May 2025 were subjected to sexual harassment, sex-based harassment, sex discrimination and victimisation in breach of the SD Act. The claims involve allegations of systemic failings: that the Commonwealth, as the ADF's single-deemed statutory employer, permitted or failed to prevent the alleged misconduct across all three service branches over an extended period.

Before commencing the class action, the applicants lodged a representative complaint with the AHRC. That complaint was accepted and, save for one aspect, terminated under section 46PH(1B)(b) of the AHRC Act on the basis there was no reasonable prospect of conciliation – a precondition to commencing proceedings in the Federal Court.

The Commonwealth filed an interlocutory application challenging the class action on three fronts: *first*, that serving ADF members should not be treated as group members without their individual written consent; *second*, that the amended statement of claim should be struck out because the applicants' claims did not satisfy the section 33C(1) gateway for representative proceedings; and *third*, in the alternative, that specific paragraphs of the pleading should be struck out because they exceeded the scope of the terminated AHRC complaint under section 46PO(3) of the AHRC Act.

The Court's Decision

Class action gateway: section 33C(1) of the Federal Court of Australia Act

The Commonwealth argued the claims were too individualistic and fact-specific to satisfy the gateway requirements in section 33C(1)(b) and (c) of the FCA Act – that claims arise out of the same, similar or related circumstances, and give rise to a substantial common issue of law or fact. The Commonwealth sought to draw an analogy with facts in *Philip Morris (Australia) Ltd v Nixon* [2000] FCA 229, where a class action concerning decades of separate, diffuse conduct by multiple tobacco companies and their interactions with consumers failed the gateway test.

Justice Abraham rejected that analogy. Her Honour held that the applicants' case was fundamentally different: it concerned a single-deemed statutory employer, a unified chain of command, a single disciplinary system, and ADF-wide policies governing unacceptable behaviour that persisted throughout the claim period. The Court held these were sufficient common threads to satisfy both limbs of section 33C(1), reiterating that the gateway is "deliberately undemanding" and does not require the claims themselves to be identical – only for the underlying circumstances to be related and for at least one substantial common issue to exist.

The Court identified the Commonwealth's potential liability under sections 105 and 106 of the SD Act – being the sections concerning whether an employer permitted, or failed to take reasonable steps to prevent, unlawful discrimination – as a clear common issue capable of resolution across the class, notwithstanding that individual group members' underlying experiences would necessarily differ.

AHRC standing and jurisdiction: section 46PO of the AHRC Act

The Commonwealth's alternative argument was that the Federal Court lacked jurisdiction over parts of the claims because they exceeded the scope of the AHRC complaint, as required by section 46PO(3) of the AHRC Act. The Commonwealth contended that only the four individual complainants were "affected persons" able to bring proceedings, because the representative AHRC complaint separated a general, class-wide description of systemic conduct from the individual complainants' personal accounts. The Commonwealth argued that that only the AHRC – not private complainants – can pursue "systemic" discrimination complaints.

The Court firmly rejected this approach. It held the AHRC Act and the FCA Act must be construed harmoniously: a complaint that the AHRC has accepted and terminated as a valid representative complaint should ordinarily be capable of proceeding to the Federal Court as a class action, within the constraints of section 46PO(3). The Court also rejected the submission that section 35L of the AHRC Act (which confers a systemic inquiry function on the Commission) impliedly excludes individuals from bringing representative complaints alleging systemic discrimination – finding nothing in the text, context or purpose of the AHRC Act to support that reading.

As to the paragraphs the Commonwealth sought to have struck out, the Court applied the established principle that additional incidents not expressly detailed in the original AHRC complaint can still fall within section 46PO(3) if they reflect the same pattern of conduct already described. As Her Honour explained, drawing on *Dye v Commonwealth Securities Limited (No 2)* [2010] FCAFC 118, complaints should not be read "with the same strictures" as a court pleading, and the relevant question is the shape of the complaint at the time of its termination, not its original wording.

Officer of the Commonwealth: section 33E(2)(d) of the Federal Court of Australia Act

The Court also resolved a novel question with no prior judicial guidance: whether serving ADF members are "officers of the Commonwealth" who must give written consent before becoming group members, under section 33E(2)(d) of the FCA Act (which otherwise displaces the default opt-out model for representative proceedings in Australia for discrete classes of persons). The Court held that all ADF members, commissioned and enlisted alike, are officers of the Commonwealth given the unique statutory nature of ADF service – appointment and service under statute rather than contract, no unilateral right of resignation, and a bespoke disciplinary regime.

However, the Court found the consent requirement did not apply because serving members are not group members "in their capacity" as ADF officers. Their claims arise from their position as employees who allege unlawful sex discrimination, a private right unconnected to the discharge of any military duty or function. The Court otherwise observed that requiring individual consent from serving members would be a "real imposition", not the "modest" one the Commonwealth suggested, given the nature of discrimination claims.

Why this Matters

Litigation risk for large, decentralised employers

The decision confirms that Australian courts will continue to be slow to 'de-class' class actions even where there is significant divergence in the underlying facts affecting group members. Perhaps even more important is the Court's willingness to recognise that factual divergences can be looked over where there are allegations of institutional or systemic conduct by a single employer, even where the underlying conduct spans many years, multiple locations, and different alleged wrongdoers. Employers with large, decentralised workforces – government agencies, universities, franchisors, and multinational corporates with numerous sites – should treat this as confirmation that a track record of individual complaints can be aggregated into an institutional systems case if there is a common employer, common policies, and a common chain of accountability.

AHRC complaints process and future discrimination class actions

The judgment is likely to be influential for future Australian sex discrimination and workplace harassment class actions that originate as AHRC complaints. By confirming that representative complaints to the AHRC can found a subsequent Federal Court class action – and that the scope of that action is assessed by reference to the complaint's substance at termination, not its literal wording – the decision lowers a jurisdictional hurdle that may have been previously available to narrow AHRC-derived class actions. Organisations facing AHRC representative complaints should assume that broadly framed, systemic complaints can expand into equally broad class actions. Much as is the case with other subject areas, secondary tribunal and court proceedings should be treated as a harbinger of class action risk and managed accordingly.

Governance and workplace culture implications

The judgment repeatedly emphasises the relevance of institutional knowledge, policy adequacy, and the employer's response to known risk under sections 105 and 106 of the SD Act. Boards, general counsel and human resources leadership should treat this as a reminder that documented awareness of harassment or discrimination risk, together with the adequacy of preventative systems, will be squarely in issue in any systemic discrimination class action (not simply the conduct of individual perpetrators).

Practical Considerations

- Audit workplace policies dealing with harassment, discrimination and victimisation for consistency and currency across all business units, sites and reporting lines, particularly where the organisation operates as a single deemed employer across diverse operations.
- Maintain clear records of when and how the organisation became aware of harassment or discrimination risk, and the steps taken in response, given the evidentiary significance of "knowledge" and "reasonable steps" defences in systemic discrimination litigation.

Those steps should include not just the management of an individual claim, but also reflections on whether the individual issue is of broader application or significance, and should be treated accordingly.

- Treat AHRC representative complaints as a potential precursor to a Federal Court class action and resource the conciliation stage accordingly, rather than assuming a narrow reading of the complaint will limit later court proceedings.
- Re-assess any historic fact-specific, individualised misconduct allegations; it is possible they can be aggregated into a class action if there was a common employer, common systems or a common chain of reporting.

Looking Ahead

This is an interlocutory decision, meaning the underlying class action will now proceed to a substantive hearing on liability and, if established, damages. The Commonwealth may seek leave to appeal the interlocutory rulings, and the judgment leaves scope for further argument, including on the extraterritorial application of the SD Act and on individual causation and damages issues as the proceeding progresses.

The Court's approach to harmonising the AHRC Act and the FCA Act, and its rejection of a narrow reading of section 35L of the AHRC Act, may attract appellate attention given the significance of the issue for the broader landscape of discrimination class actions.

More generally, the decision is likely to encourage further systemic discrimination and harassment class actions against large employers, particularly in sectors with hierarchical structures, centralised policies, and long institutional histories. Organisations should monitor developments closely as this area of Australian class action and employment law continues to evolve. Individual claims and complaints should be looked on as potential seeds capable of growing into a much larger bushel of claims if not properly managed and addressed.



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