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ORGANISATIONAL POLICIES AND AUSTRALIAN
EMPLOYMENT LAW:
A PRELIMINARY STUDY OF INTERACTION

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ORGANISATIONAL POLICIES AND AUSTRALIAN EMPLOYMENT LAW: A PRELIMINARY STUDY OF INTERACTION

ANNA CHAPMAN, JOHN HOWE & SUSAN AINSWORTH*

INTRODUCTION

Employers are increasingly adopting written policies relating to the employment of their staff.¹ These organisational policies may cover a range of topics such as sexual harassment and bullying, social media use by employees, drug and alcohol standards and testing, in addition to a general employee code of conduct. The content of organisational policies typically falls into three groupings: policies that establish expected standards of behaviour by employees, often by interpreting or elaborating upon the legal obligations of employees; policies that establish processes in relation to, for example, internal grievances and disciplinary matters; and thirdly, policies that provide employee benefits such as redundancy entitlements.

The nature and extent of reliance on organisational policies varies by sector, industry and business size. State and Commonwealth public sectors have extensive policies and manuals.² In the private sector medium and large employers may rely on bespoke suites of policies, crafted by lawyers for the particular needs of their organisation. In contrast, smaller businesses appear more likely to draw on generic policies produced by a range of bodies, including the Australian Human Resources Institute and Business Victoria. In some industries and sectors, policies, including their content to varying degrees, are mandated. For example, in the road transport industry, employers and hirers must develop and implement a drug and alcohol policy applicable to their drivers.³ Local government may be required to adopt a code of conduct for councillors and employees, with regulations prescribing the content of those codes.⁴

At the same time as growth in the development and adoption by firms of organisational policies is apparent, such policies have become increasingly visible in the Australian employment law system. They potentially present great significance in the legal rights and

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¹ These documents are known by various names, including HR manuals, HR policy and procedure manuals, policy manuals, staff handbooks, company manuals, management policies and procedures, codes of conduct, work rules, instructions and memoranda. For the sake of simplicity in this working paper they are collectively referred to as organisational policies.

² See eg, Australian Public Service Commission, *Code of Conduct*; Public Service Commission, *Code of Conduct for the Queensland Public Service*.

³ *Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2014* [2013] RSRTFB 7. Amongst other matters it prescribes minimum content of the drug and alcohol policy. In the Victorian building and construction industry, see *Implementation Guidelines to the Victorian Code of Practice for the Building and Construction Industry* (2013).

⁴ See eg, Local Government Act 1995 (WA) s 5.103; Local Government (Rules of Conduct) Regulations 2007 (WA).

obligations of the employment relationship. This occurs through a range of different issues and mechanisms, including their interaction with the common law contract of employment, and it is also apparent in the interpretation and application of statutory rights relating to unfair dismissal, adverse action (General Protections) and bullying.

This working paper provides a preliminary study of the interactions between organisational policies and Australian employment law⁵ at a point in time when the legal framework has experienced a shift away from collective interests, expressed through conciliation and arbitration and the award system, towards individual rights and remedies,⁶ and self-regulation through individual bargaining. The use of contract as a regulatory instrument finds favour in this environment of deregulation, individualisation and human resource management.⁷

It is known anecdotally that most disputes involving organisational policies do not reach litigation. Although employees may be more willing to challenge a dismissal,⁸ very few challenge the application of an employer policy that results in a decision of lesser harm such as demotion or a penalty imposed by the employer.⁹ This suggests that the legal system sees only the tip of the iceberg of conflict over organisational policies. Whilst acknowledging this limitation of examining decided cases, the cases that are adjudicated are nonetheless worthy of study as a key source of interaction between organisational policies and employment law.

Organisational policies appear at many different points, and are relevant to a range of different issues in Australian employment law. Not all these points of intersection can be examined in this working paper. Rather, the working paper is structured around the main doctrinal areas of law where organisational policies are relevant, commencing with the contract to perform work. The paper then moves to examine work health and safety law, discrimination and sexual harassment, unfair dismissal, adverse action and the new power of the Fair Work Commission to make orders to stop bullying.

Structuring the paper around doctrinal categories of law is the most simple way to map the field of employment law and organisational policies. It is acknowledged though, that different doctrinal areas overlap in important respects. For example, contract issues are found discussed in determinations regarding unfair dismissal, as well as adverse action. Sexual harassment (and the relevance of organisational policies for employer liability) is regulated through anti-discrimination law and also work health and safety laws. Bullying (and policies regarding bullying) is regulated through powers given to the Fair Work Commission, as well as through work health and safety laws in addition to contract law, as the case of *Goldman Sachs JB Were v Nikolich*¹⁰ (examined below) evidences.

⁵ In this working paper the terminology of employment law is used as short-hand to refer to the range of legal rules imposing rights and obligations on organisations and their staff, and includes industrial law or labour law such as is encompassed in the Fair Work Act 2009 (Cth), common law, work health and safety regimes and anti-discrimination law such as the Sex Discrimination Act 1984 (Cth) and the Disability Discrimination Act 1992 (Cth).

⁶ The Hon G Giudice AO, Keynote Address, *21st Annual Labour Law Conference*, Workplace Research Centre, University of Sydney, 22 July 2013.

⁷ J Riley, *Employee Protection at Common Law* (2005), chap 1.

⁸ Even so, around 80% of claims of unfair dismissal made to the Fair Work Commission are settled at conciliation. Only around 10% of the remaining matters are finalised at arbitration: FWC, *Annual Report 2013-2014*, Table 13 (p 41).

⁹ B Creighton & A Stewart, *Labour Law* (2010), at [14.52].

¹⁰ *Goldman Sachs JBWere Services Pty Ltd v Nikolich* [2007] FCAFC 120 (*Nikolich*).

COMMON LAW CONTRACT

Every paid work relationship is underpinned by a common law contract of one form or another, under which the worker agrees to provide services in return for remuneration. Employees provide their services under a contract of employment, whilst other workers provide services under a range of different types of contracts, including independent contractors working under contracts for services. The common law is the source of the distinction between contract of employment and other non-employment contractual arrangements. Importantly, the contract of employment provides the touchstone for many, but not all, rights and obligations in employment law, in the sense that these legal rights and obligations are triggered by the existence of a contract of employment, as distinct from another type of contract to perform services. Many of these other employment rights and obligations are discussed at later points of this working paper.

Contract is a central point at which employment law interacts with organisational policies. This may occur in a number of different ways. A main way in which organisational policies intersect with contract is the issue of whether a policy has been incorporated into the contract, thereby giving the policy contractual force. If a policy has been incorporated, then a breach of the policy is a remediable breach of the contract.¹¹ Incorporation depends on all the circumstances, and raises complex issues.

Like other external sources, an organisational policy may be expressly incorporated into the contract by reference.¹² This occurs where the worker and/or organisation expressly agree that the policy forms part of the contract through, for example, a signed letter of offer or a signed contract document that makes it clear that the policy is incorporated.¹³ An organisational policy can also be expressly excluded from incorporation.¹⁴

Complex issues arise in circumstances where the policy has been neither explicitly agreed to, nor expressly excluded from incorporation. It may still form terms of the contract.¹⁵ The question then becomes whether the policy has been impliedly incorporated into the contract. The language of the contract, viewed in context, provides the starting point for this inquiry. In addition, regard ought to be had to the objective or purpose of the transaction.¹⁶ The legal test is whether the parties intended the organisational policy to be incorporated, in an objective sense. In other words, ‘if a reasonable person in the position of a promisee would conclude

¹¹ For a 2014 decision in which an employee’s several breaches of policy amounted to a serious breach of contract justifying summary dismissal, see *Bingham v St John’s Ambulance Western Australia Limited* [2014] WADC 122.

¹² See generally, M Irving, *The Contract of Employment* (2012), chap 5. Irving writes about the incorporation of policy manuals, and other ‘external source documents’: esp [5.36].

¹³ *Cicciarelli v Qantas Airways Ltd* [2012] CA 56.

¹⁴ *Yousif v Commonwealth Bank of Australia* (2010) 193 IR 212 at [95]-[98]. The relevant statement was: ‘The manual is not in any way incorporated as part of any industrial award or agreement entered into by the Bank, nor does it form any part of any employee’s contract of employment.’

¹⁵ A policy can never be impliedly incorporated into a contract where it is inconsistent with the express terms of the contract itself: *Zafiriou v Saint-Gobain Administration Pty Ltd* [2013] VSC 377 at [235]. In this case a policy providing for lengthy performance management procedures prior to dismissal was held to be inconsistent with an express contract term providing for termination by either party (for any reason, good or otherwise) on the giving of four weeks’ notice.

¹⁶ *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* [2014] FCAFC 177 at [35].

that a promisor intended to be contractually bound by a particular statement, then the promisor will be so bound.¹⁷

Three leading employment law cases illustrate the complexities that may attend the interaction of organisational policies and contract. In the first case of *Riverwood International v McCormick*, the legal issue was whether a policy setting out redundancy entitlements was enforceable against the employer as terms of the contract.¹⁸ The employee had signed a written contract document that contained a clause stating that ‘[y]ou agree to abide by all Company Policies and Practices currently in place, any alterations made to them, and any new ones introduced’, but the employer had not expressly made a reciprocal promise to abide by the ‘Company Policies and Practices’ through a signature or affixing its seal. The Full Federal Court held by majority (with Lindgren J dissenting) that as a matter of construction the redundancy policy had been expressly incorporated into the contract of employment, and could be enforced by the employee against the employer, just as it could be enforced by the employer against the employee. Justice North (in the majority) emphasised the mutuality of obligations underlying the contract.¹⁹ The majority (North and Mansfield JJ) drew on the Macquarie Dictionary on the ordinary meaning of ‘abide by’ to determine that expression in the clause encompassed both compliance by the employee with the obligations imposed by the organisational policy, and also acceptance by the employee of the benefits bestowed by the policy.²⁰ The language of the policy as a whole, and the factual context in which the contract was formed, were important.²¹ In the result the clause imposed an obligation on the employer to provide the severance benefits to the employee as set out in the organisational policy.²²

In a December 2014 decision of the Full Court of the Federal Court – *Romero v Farstad Shipping* – an employee argued that her employer’s Workplace Harassment and Discrimination Policy comprised terms of her contract of employment.²³ The policy established processes to handle grievances, and included a statement that the employer (Farstad Shipping) ‘will ... handle complaints promptly, with confidentiality, impartiality and with sensitivity to the complainant’s needs’.²⁴ Farstad Shipping clearly did not fulfil this promise. The employee’s letter of engagement contained a sentence: ‘In addition, all Farstad Shipping Policies are to be observed at all times.’ The court drew on the notion of exchange or bargain underlying the legal conception of a contract to determine that the policy was part of the contract binding the employer.²⁵ It stated:

In situations where clear language is used and sufficient emphasis is placed upon the need for compliance (implicitly by both parties) with the terms of a company policy, then especially where that goes to fundamental conditions of employment, such as payment and the method of compliance with external statutory obligations, objectively viewed, the parties would be expected to regard such terms as contractually binding.

¹⁷ *Nikolich*, above n 10, at [23] (per Black CJ). See also *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40]-[41]; *Gramotnev v Queensland University of Technology* [2013] QSC 158 (*Gramotnev*) at [11]. There are cases where an employee is taken to have agreed to a policy by continuing to work without objecting to it: *Muir v Bartholomew* (1991) 104 ALR 537. Cf *Downie v Sydney West Area Health (No 2)* (2008) 71 NSWLR 633 at [341].

¹⁸ *Riverwood International Australia Pty Ltd v McCormick* (2000) 177 ALR 193 (*Riverwood*) at [24].

¹⁹ *Riverwood*, above n 18, at [107]. See also [150] (per Mansfield J).

²⁰ *Riverwood*, above n 18, at [106]-[107] (per North J); [146]-[147] (per Mansfield J).

²¹ *Riverwood*, above n 18, at [89]-[103] (per North J), [142]-[144], [148]-[151] (per Mansfield J).

²² *Riverwood*, above n 18, at [106]-[108] (per North J), [146]-[150] (per Mansfield J). See similarly, *Murphy v Westpac Banking Corporation* [2014] FCA 1104 at [1199]-[1200].

²³ *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* [2014] FCAFC 177 (*Farstad Shipping*).

²⁴ *Farstad Shipping*, above n 23 at [27].

²⁵ *Farstad Shipping*, above n 23 at [57]. See also the other matters discussed at [60]-[62].

... The language used in this instance, taking the Policy as a whole, makes it clear that there is an expectation by the company that there will be mutual obligations. In return for the employee complying with the terms of the Policy, the employer gives a responsive assurance that complaints of non-compliance by other employees will be treated in a certain way.²⁶

A key component of the inquiry regarding incorporation is that in order to be incorporated, the clauses in the policy sought to be enforced through contract must be written in language that is promissory, rather than merely being of an aspirational, informative or descriptive character.²⁷ This is illustrated in the third case of *Goldman Sachs JB Were v Nikolich* which was a claim brought by an employee who had been bullied at work. The employee sought to enforce a number of provisions in a lengthy policy document, entitled 'Working With Us'.²⁸ The manual contained a number of clauses that the Full Federal Court determined were not promissory, but rather were aspirational or informational and descriptive, and so could not be incorporated to form part of the contract. An example of such a clause is provided in the company's grievance procedure, in sections entitled 'Support for Personal Issues', 'Feeling Uncomfortable?' and 'Concerns or Grievances':

We are committed to make sure that anyone who has a genuine concern will be supported, and the issue will be handled with discretion.

The door is wide open at all times for people to discuss any issue, not only with Department Heads, Directors, and Human Resources, but also with the Chairman. Such discussions are welcome as the firm has been built on the principle that it is a team with common interests and ideals. This interest extends beyond the range of career and business issues to more personal concerns.

We are committed to make sure that anyone who makes a genuine complaint will be able to discuss his concern confidentially, will be supported by the firm and is not penalised in any way.²⁹

In contrast, one promise in the 'Working With Us' document was found to be promissory and incorporated into the contract. It was a promise that 'JBWere will take every practicable step to provide and maintain a safe and healthy work environment for all people'. The language of promise, through the use of words of 'will take', indicated this was not merely aspirational.³⁰

Many employers have addressed the need to ensure that employees are bound to organisational policies as altered by the employer over the years. An example of such a clause is found in *Riverwood* (and quoted above).³¹ Notably in that case the severance policy was inserted into the organisational policy after the employee had signed the contract. Courts have held that such clauses are effective, but that an employer must exercise the power to alter policies in a way that pays due regard to the purposes of the contract and is reasonable, and must not exercise the power to vary policies arbitrarily or capriciously.³² Commentators suggest that the more disadvantageous to the employee the alteration to the policy is, the

²⁶ *Farstad Shipping*, above n 23 at [55]-[56].

²⁷ *Farstad Shipping*, above n 23 at [58].

²⁸ *Nikolich*, above n 10.

²⁹ *Nikolich*, above n 10, at [39]-[42] (per Black CJ), [162] (per Marshall J), [305]-[315] (per Jessup J). A further illustration of a non-contractual aspirational statement is provided in *Patankar v Excom Education Pty* [2008] FCA 475, where the organisational policy committed the employer to assist an employee to achieve 'your potential and the goals agreed with the Company'. For other examples of non-contractual policies, see *Farstad Shipping*, above n 23, at [30]; *Gramotnev*, above n 17, at [91]-[98].

³⁰ *Nikolich*, above n 10, at [24]-[32] (per Black CJ), [134] (per Marshall J), [324]-[329] (per Jessup J).

³¹ *Riverwood*, above n 18; *Akmeemana v Murray* (2009) 190 IR 66 at [3].

³² *Riverwood*, above n 18, at [150], [152] (per Mansfield J), [111] (per North J); *Health Administration Corp v Crocker* (2004) 138 IR 147; *Nikolich*, above n 10, at [124].

more likely the alteration will be limited by the need to ensure that the employer's power has been exercised reasonably.³³

Even where not incorporated as contractual terms, organisational policies may affect the contractual rights and obligations of workers and organisations in complex ways. In a number of cases in different jurisdictions, judges and the Fair Work Commission have expressed the view that the contents of an organisational policy may constitute lawful and reasonable directions of the employer given to the employee, with which the employee is bound to comply under their implied common law duty of obedience.³⁴ In addition, there has been a line of common law cases on contract to the effect that a serious breach of a policy by an employer may constitute a breach of an implied term of mutual trust and confidence in employment contracts, regardless of whether that policy is incorporated itself into the contract.³⁵ That line of reasoning on an implied term of mutual trust and confidence has now been closed as the High Court confirmed in September 2014 that the Australian common law does not recognise such an implied duty.³⁶ Nonetheless, developments on this front continue, with lawyers reportedly considering the possibilities of an argument that breach of an organisational policy by an employer constitutes breach of an implied term of good faith in employment contracts.³⁷

WORK HEALTH AND SAFETY

Legislation on work health and safety is long-standing in Australia, with the Australian colonies from the late 19th Centuries adopting the model of regulation established in the British factories Acts. Health and safety was and remains, largely a matter for State and Territory parliaments. During the 1970s all the State and Territory schemes were reformed to impose broad general duties on key stakeholders such as employers and manufacturers of plant, to take reasonable steps to ensure the health and safety of employees, leaving it to the discretion of those duty-holders to identify the best way to achieve the standard of reasonableness. Differences existed between the States and Territories, leading to calls for harmonisation.³⁸ In 2008 the National Review of Model Occupational Health and Safety Laws led to the development of a Model Work Health and Safety Bill (2011) (Model Act).³⁹ This Model Act was subsequently adopted by a number of State and Territory parliaments

³³ C Sappideen et al, *Macken's Law of Employment* (7th edn 2011), p 134.

³⁴ *Downe v Sydney West Area Health Service (No 2)* (2008) 71 NSWLR 633 at [342] (claims for breach of contract, contravention of the Trade Practices Act 1974 (Cth), and an application to vary an unfair contract under the Industrial Relations Act 1996 (NSW)); *Woolworths Ltd v Brown* (2005) 145 IR 285 at [32] (an unfair dismissal claim); *B, C and D v Australian Postal Corporation* [2013] FWCFB 6191 at [36] (an unfair dismissal claim). See also the discussion in *Farstad Shipping*, above n 23, at [49]-50]. Similar reasoning has been accepted in the UK: *R v Secretary of State for Employment; Ex p ASLEF (No 2)* [1972] 2 QB 455.

³⁵ *Thomson v Orica Australia Pty Ltd* (2002) 116 IR 186 at [148]; *Dare v Hurley* [2005] FMCA 844 at [121]. See also *Farstad Shipping* where it was held that the employer's breaches of the policy were not sufficiently serious to constitute a breach of the implied term of mutual trust and confidence: *Farstad Shipping*, above n 23, at [40].

³⁶ *Commonwealth Bank of Australia v Barker* [2014] HCA 32.

³⁷ Workplace Express, 'After Barker, Lawyers Turn to Implied Duty of Good Faith', 11 December 2014.

³⁸ See generally, R Johnstone, *Occupational Health and Safety Law and Policy: Texts and Materials* (2nd edn, 2004) chap 2.

³⁹ Model Work Health and Safety Bill: PCC 23/6/2011.

from January 2012. To date, Victoria and Western Australia have not adopted the Model Act, although the Victorian legislation is in any event similar to the obligations and scheme of the Model Act.⁴⁰

The central provision in the Model Act is to impose a primary duty of care on ‘persons conducting a business or undertaking’ (PCBU)⁴¹ to ensure, ‘so far as is reasonably practicable’, the health and safety of workers and others (such as the general public) who may be affected by the carrying out of work by the business or undertaking (wherever that work occurs).⁴² The concept of ‘worker’ in the Model Act is defined broadly as a person who carries out ‘work in any capacity’ for a PCBU, including employees engaged under a contract of employment, contractors engaged under contracts for services, volunteers, students gaining work experience and others.⁴³ The Model Act contains a number of further duties on PCBU to do what is reasonably practicable, for example, in the management or control of a workplace, in the design or manufacture of plant, in the supply of substances or in the installation of structures.⁴⁴

The concept of ‘reasonably practicable’ ‘means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including:

- (a) the likelihood of the hazard or the risk concerned occurring; and
- (b) the degree of harm that might result from the hazard or the risk; and
- (c) what the person concerned knows, or ought reasonably to know, about:
 - (i) the hazard or the risk; and
 - (ii) ways of eliminating or minimising the risk; and
- (d) the availability and suitability of ways to eliminate or minimise the risk; and
- (e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.⁴⁵

Officers of PCBU have a positive duty to ‘exercise due diligence’ to ensure that their PCBU complies with its legal obligations under the Model Act,⁴⁶ and workers themselves (as well as others at the workplace) have a duty to take reasonable care for their own health and safety and for that of others.⁴⁷ These duties on PCBU, officers and workers, are embedded in a number of other features of the Model Act. There is a scheme for reporting incidents; obligations on PCBU to consult other duty holders (horizontal consultation), as well as their own workers (vertical consultation); protections against victimisation; and authorisations and permits for a range of purposes such as the use of hazardous substances.⁴⁸

The Model Act is accompanied by model regulations and approved codes of practice, with further model codes of practice to be developed in the future.⁴⁹ Codes of practice provide

⁴⁰ Occupational Health and Safety Act 2004 (Vic).

⁴¹ Model Act s 5.

⁴² Model Act s 19. See also s 17.

⁴³ Model Act s 7.

⁴⁴ Model Act ss 20-26.

⁴⁵ Model Act s 18. This is an objective test: Safe Work Australia, *Interpretative Guideline - Model WHS Act – the Meaning of ‘Reasonably Practicable’* (2011), p 1; R Johnstone & M Tooma, *Work Health & Safety Regulation in Australia: The Model Act* (2012), p 72, 74.

⁴⁶ Model Act s 27.

⁴⁷ Model Act ss 28, 29.

⁴⁸ Model Act Part 3 (incident notification); Part 5 (consultation); Part 6 (victimisation); Part 4 (authorisations and permits).

⁴⁹ Model Work Health and Safety Regulations: PCC 4/11/2011.

practical guidance on ways to address certain risks, intended to assist PCBU and other duty-holders in complying with their primary duties to do what is reasonably practicable. Codes of practice are not directly legally binding and duty-holders may identify a superior method of satisfying their primary duty. However, codes are admissible in evidence of whether a general duty has been complied with,⁵⁰ as well as the existing state of knowledge of the risk and methods to address it. Johnstone and Tooma write that in practice if a duty holder has complied with a code of practice then in most cases it will follow that the duty holder has complied with its primary duty in relation to the topic of the code, but this is not guaranteed.⁵¹ In contrast, regulations and general duties are more directly linked so that a duty-holder must comply with a regulation in order to comply with a primary duty as it relates to the topic or issue dealt with in the regulation.⁵²

The key obligation then on duty holders is to do what is ‘reasonably practicable’ to ensure the health and safety of workers and others in proximity to the workplace. In 2006 Johnstone and Jones explored the ways in which work health and safety legislation at that time required duty holders to develop and implement systematic occupational health and safety management processes.⁵³ They explored the case law to show that duty-holders are required to adopt a ‘proactive, holistic and systematic assessment of risks’.⁵⁴ Some judges described that the duty-holder must take ‘positive’ steps or a ‘positive and pro-active approach’ in order to discharge a general duty.⁵⁵ Others described the need for a ‘coherent and systematic’ system of work, or a ‘structured or systematic approach’.⁵⁶ In 1992 Harper J stated that an employer must take an ‘active and imaginative’ approach to discharging its duties.⁵⁷ Some commentators argue that taking a positive and pro-active approach implicitly requires a risk management approach.⁵⁸ In 2012 Johnstone and Tooma wrote that case law on the pre-Model Act legislation indicates that the duties of the Model Act impliedly ‘require a structured, systematic approach to work health and safety, and that it is not enough to endeavour to comply with these obligations on an ad-hoc basis by looking at particular matters from time to time.’⁵⁹ Although the Model Act (in their opinion, regrettably) stops short of imposing an express requirement on a PCBU to develop and implement a work health and safety system, in effect that is what is required in order for the PCBU to discharge its primary duty.⁶⁰ Work health and safety organisational policies are clearly part of such a

⁵⁰ Model Act s 275(3).

⁵¹ Johnstone & Tooma, above n 45, p 36.

⁵² Model Reg 9.

⁵³ R Johnstone & N Jones, ‘Constitutive Regulation of the Firm: OHS, Dismissal, Discrimination and Sexual Harassment’, in C Arup et al (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006) p 483 at p 494.

⁵⁴ *Ibid*, p 495.

⁵⁵ *Drake Personnel Ltd* (1999) 90 IR 432 at 456; *Labour Co-operative Ltd v WorkCover Authority of NSW (Inspector Robins)* (2003) 121 IR 78 at 84-5. See also *WorkCover Authority of NSW (Inspector Egan) v Atco Chemicals Pty Ltd* (1998) 82 IR 80 at 85.

⁵⁶ *Fletcher Constructions Australia Ltd* (2002) 123 IR 121 at 149 (per Walton J) (with whom Wright P agreed); *Inspector Ching v Bros Bins Systems Pty Ltd* [2004] NSWIRComm 197 at [32].

⁵⁷ *Holmes v Spence* (1992) 5 VIR 119 at 123.

⁵⁸ E Bluff & R Johnstone, ‘The Relationship between “Reasonably Practicable” and Risk Management Regulation’ (2005) 18(3) *Australian Journal of Labour Law* 197. Some cases are explicit that a risk management approach is required: *WorkCover Authority of NSW (Inspector Kelsey) v University of Sydney* [1997] NSWIRComm 44 at [21]; *Department of Mineral Resources of NSW (McKensley) v Kembla Coal and Coke Pty Ltd* (1999) 92 IR 8 at 27, discussed in Bluff and Johnstone (2005).

⁵⁹ Johnstone & Tooma, above n 45, p 50.

⁶⁰ Johnstone & Tooma, above n 45, p 95, p 265. The authors note that exceptions exist in relation to some sectors and activities, including mining, rail, aviation, marine, and major hazard facilities, where work health and safety management systems are required. In the past, positive obligations to develop and implement an

work health and safety system. In developing such a systematic approach, including organisational policies, officers of the PCBU have a legal obligation to ‘exercise due diligence’ in ensuring that their PCBU complies with its obligations under the Model Act.

DISCRIMINATION LAW AND SEXUAL HARASSMENT

Discrimination statutes have been in force in Australia at the Commonwealth level, and the State and Territory level, since at least the 1970s. The statutes contain prohibitions on discrimination on a range of attributes, such as race, sex and disability. They apply to all aspects of employment and independent contracting arrangements, as well as to education and the commercial provision of goods and services and accommodation. In addition to proscribing discrimination, the statutes contain prohibitions on a range of other conduct, such as sexual harassment, victimisation and some forms of vilification.

The legislation establishes different forms of liability of employers and principals in relation to wrongful conduct by their employees, independent contractors or agents. Organisational policies have been a central feature of this framework on employer liability from the beginning of the legislative schemes some thirty years ago, and have been the subject of academic investigation and discussion.⁶¹ Generally speaking, the statutes stipulate that an employer or principal is liable for an act of unlawful discrimination committed by a worker (or agent) in connection with his or her employment, where the act would have been unlawful if committed by the employer.⁶² Liability is avoided though where employers are able to establish that they took ‘all reasonable steps’⁶³ (or in some statutes ‘reasonable steps’),⁶⁴ or in other statutes ‘reasonable precautions’ and ‘exercised due diligence’ to prevent that wrongful

organisational policy on health and safety were imposed by the following former statutes: Occupational Health and Safety Act 1991 (Cth) s 16(2)(d); Occupational Health and Safety (Committees in Workplaces) Regulation 1999 (NSW) cl 13(b); Occupational Health, Safety and Welfare Act 1986 (SA) s 20. See also Occupational Health and Safety Act 2004 (Vic) s 72(3)(b).

⁶¹ See in particular, C Parker, ‘Public Rights in Private Government: Corporate Compliance with Sexual Harassment Legislation’ (1999) 5(1) *Australian Journal of Human Rights* 159; S Charlesworth, ‘Risky Business: Managing Sexual Harassment at Work’ (2002) 11(2) *Griffith Law Review* 355; L Thornthwaite, ‘Ever-Widening Ripples: The Impact of Specialist Industrial Tribunals on Management Practice’ (1994) 36 *Journal of Industrial Relations* 285.

⁶² See eg, Sex Discrimination Act 1984 (Cth) s 106(1); Age Discrimination Act 2004 (Cth) s 57 (1); Disability Discrimination Act 1992 (Cth) s 123(1); Anti-Discrimination Act 1977 (NSW) s 53(3). The aspect of ‘in connection with’ can be complex, especially in relation to conduct that occurs outside work hours and off the employer’s premises. On this connection, see further B Healy, ‘Open All Hours: The Reach of Vicarious Liability in “Off-Duty” Sexual Harassment Complaints’ (2008) 36(2) *Federal Law Review* 173; P Eastale & S Saunders, ‘Interpreting Vicarious Liability with a Broad Brush in Sexual Harassment Cases’ (2008) 33(2) *Alternative Law Journal* 75.

⁶³ See eg, Sex Discrimination Act 1984 (Cth) s 106(2); Anti-Discrimination Act 1977 (NSW) s 53(3).

⁶⁴ See eg, Anti-Discrimination Act 1991 (Qld) s 133 (2); Equal Opportunity Act 2010 (Vic) s 110 (although worded as ‘reasonable precautions’). The test of ‘reasonable’ steps or precautions is seen to impose a lower threshold for an employer than the test of ‘all reasonable’ steps: *Walgama v Toyota Motor Corporation Australia Ltd* [2007] VCAT 1318 t [98]; *Caton v Richmond Club Limited* [2003] NSWADT 202 at [175]. See further N Rees, S Rice and D Allen, *Australian Anti-Discrimination Law* (2nd edn, 2014), [12.8.28]; Healy, above n 62, at 188.

conduct occurring in the first place.⁶⁵ The respondent employer bears the burden of proving this defence.⁶⁶

The issue of employer liability frequently arises in relation to claims of sexual harassment, where the employer may seek to avoid liability in relation to the sexually harassing conduct perpetrated by one or more of its workers.⁶⁷ Typically an employer will point to an organisational policy on equal opportunity or sexual harassment, as at the core of its 'reasonable' steps or precautions.⁶⁸ Only the Northern Territory statute contains guidance on the meaning of reasonable precautions in this context, by providing a list of matters that ought to be taken into account when determining whether an employer has taken reasonable steps:

- (a) the provision of anti-discrimination training by the person;
- (b) the development and implementation of an equal opportunity management plan by the person;
- (c) the publication of an anti-discrimination policy by the person;
- (d) the financial circumstances of the person;
- (e) the number of workers or agents of the person.⁶⁹

The Australian Human Rights Commission (AHRC) has prepared and issued a Code of Practice on Sexual Harassment.⁷⁰ The Code details a number of steps that employers may wish to take to address the issue of sexual harassment. These relate to many matters, including implementing a sexual harassment policy, providing information and training, making the policy available to all employees, asking employees to sign a copy of the policy to indicate their receipt and understanding of it, and taking appropriate remedial action where sexual harassment does occur. Although the AHRC Code has no formal legal standing, evidence that an employer has complied with the Code may provide the basis of an argument that the employer has taken reasonable preventative steps and is not therefore liable for the sexual harassment committed by an employee or other worker.⁷¹ The Anti-Discrimination Act 1977 (NSW) was amended in 2004 to provide for Codes of Practice to be developed by the Anti-Discrimination Board of NSW, and further that evidence of compliance with such a Code, or indeed contravention of the Code, may be considered by the NSW tribunal in its considerations on liability.⁷² At the time of writing it does not appear that any such Codes have been issued by the Board.

⁶⁵ See eg, Age Discrimination Act 2004 (Cth) s 57 (4); Disability Discrimination Act 1992 (Cth) s 123(2). Note that this form of attributed employer liability is often referred to as vicarious liability. This is a misnomer as this statutory liability is not synonymous with vicarious liability at common law: *South Pacific Resort Hotels Pty Ltd v Trainor* (2005) 144 FCR 402 at [64]-[70] (per Kiefel J), at [42] (per Black CJ & Tamberlin J). See further Rees et al, above n 64, at [12.8.4]; Healy, above n 62, 174-5.

⁶⁶ *Johanson v Blackledge* [2001] FMC 6; *South Pacific Resort Hotels Pty Ltd v Trainor* (2005) 144 FCR 402 at [70].

⁶⁷ A claimant may bring a claim against both the individual perpetrator (or perpetrators) and the employer. See generally Rees et al, above n 64, at [12.8].

⁶⁸ Because the focus is on preventative steps, an employer's lack of knowledge that sexual harassment has occurred is not sufficient to exonerate it of liability: *Boyle v Ishan Ozden* (1986) EOC 92-165; *Johanson v Michael Blackledge Meats* (2001) 163 FLR 58

⁶⁹ Anti-Discrimination Act (NT) s 105(3).

⁷⁰ AHRC, *Effectively Preventing and Responding to Sexual Harassment: A Code of Practice for Employers* (2008). This document is available free to download from the AHRC website. The Code is now in its fourth edition, having been first issued in late 1996: Parker, above n 61.

⁷¹ *Asnicar v Mondo Consulting Pty Ltd* [2004] NSWADT 143 at [104]. But see *Johanson v Michael Blackledge Meats* (2001) 163 FLR 58, 81. See also C Ronalds & E Raper, *Discrimination Law and Practice* (4th edn, 2012), p 143. A weaker inference to this effect is contained in Rees et al, above n 64, at [9.5.11]-[9.5.12].

⁷² Anti-Discrimination Act 1977 (NSW) s 120A.

The question of whether an employer has taken reasonable precautions turns on the particular circumstances of each case. Clearly though it is not sufficient for an employer to merely have a policy; implementation is required.⁷³ The general approach is summarised well in *Sammatt v Distinctive Operations Limited*, where the member of the Victorian Civil and Administrative Tribunal stated:

it was not enough that [the employer] had policies in place. It was reasonable to ensure that management understood them, acted in accordance with them, and took seriously complaints made about matters covered by the policies. Reasonable precautions would probably also include ensuring employees had a sufficient understanding, of what those policies meant in practice to recognise issues with their own conduct. Even in a small organisation, this is not too much to ask.⁷⁴

Generally speaking, larger organisations are expected to do more by way of reasonable precautions than are smaller employers.⁷⁵ Nonetheless, all employers, even very small businesses, are expected to take ‘active steps’.⁷⁶ A number of matters may suggest, to the employer and the tribunal, that there has been a lack of implementation of a policy in a workplace. Examples include permitting the display of pornography in the workplace or permitting sexually explicit conversations to take place on a regular basis,⁷⁷ failing to respond to an internal grievance of sexual harassment, or managers failing to respond after witnessing an incident of sexual harassment itself.⁷⁸ Other factors specific to a workplace may also alert to a problem with policy implementation. For example, significantly different attrition rates for female apprentices compared to male apprentices in a mining operation suggested shortcomings in the implementation of an equal opportunity policy.⁷⁹ In terms of the policy itself, inadequacies within the policy, such as establishing a process of reporting incidents of sexual harassment to an officer located in a geographically removed Head Office and so necessarily by telephone (and during office hours), will be relevant to indicating a lack of reasonable precautions.⁸⁰

In practice the test of reasonable preventative steps is difficult for employers to satisfy, although certainly some employers have been successful in litigation in establishing that it is made out.⁸¹ This difficulty is acknowledged by Buchanan J in the case of *Richardson v*

⁷³ See eg, *D v Berkeley Challenge Pty Ltd* [2001] NSWADT 92; *Cooper v Western Area Local Health Network* [2012] NSWADT 39 at [83]; *Hopper v Mt Isa Mines* (1997) EOC 92-879 at p 37; *Caton v Richmond Club Limited* [2003] NSWADT 202 at [164]; *Chaisty v City of Perth* (2004) EOC 93-233. However, in citing *Bevacqua v Klinkert & Ors* (No 1) (1993) EOC 92-515, the NSW Administrative Decisions Tribunal in *Asnicar v Mondo Consulting Pty Ltd* [2004] NSWADT 143 at [102]. See also *Aleksovski v AAA Pty Ltd* [2002] FMCA 81, [88]; C Sutherland, ‘Avoiding Liability for Sexual Harassment: Enforcement of Workplace Policies’ (2005) 79(4) *Law Institute Journal* 46.

⁷⁴ [2010] VCAT 1735 at [117]. In this case the employer’s policies on bullying and harassment included strong statements condemning such behaviour, and established a process for dealing with grievances, but management practices fell far short of the policies: [107], [114].

⁷⁵ *Johanson v Michael Blackledge Meats* [2001] FMC 6 [101]; *Bevacqua v Klinkert (No 1)* (1993) EOC 92-515; *Caton v Richmond Club Limited* [2003] NSWADT 202; *Lee v Smith* [2007] FMCA 59; *Cooke v Plauen Holdings* [2001] FMCA 91, [37]; *Gilroy v Angelov* (2000) 181 ALR 57.

⁷⁶ *Asnicar v Mondo Consulting Pty Ltd* [2004] NSWADT 143 at [103], [130]. The tribunal discussed the similar view expressed in the then HREOC Code of Practice on sexual harassment: [104].

⁷⁷ *Lee v Smith* [2007] FMCA 59 at [198]; *Sharma v QSR Pty Ltd* [2009] NSWADT 166 at [111], [113]-[114].

⁷⁸ *D v Berkeley Challenge Pty Ltd* [2001] NSWADT 92; *Sammatt v Distinctive Operations Limited* [2010] VCAT 173 at [114]; *Caton v Richmond Club Ltd* [2003] NSWADT 202 at [171], [174]-[175].

⁷⁹ *Hopper v Mt Isa Mines* (1997) EOC 92-879 at 37-38.

⁸⁰ *Shiels v James* [2000] FMCA 2.

⁸¹ See eg, *Cooper v Western Area Local Health Network* [2012] NSWADT 39 at [84]: ‘It seems to the Tribunal that the steps taken by the employer were sufficient, in the sense that all steps that could have been taken were

Oracle Corporation, who noted that '[i]t may be inferred that Parliament intended that [difficulty] to be so.'⁸² The case is a good illustration of this point. Oracle called evidence that all employees were provided with a copy of its Code of Ethics and Business Conduct when they joined the company. The code contained a clear prohibition on harassment, including sexual harassment, and encouraged employees to report incidents of that description.⁸³ Employees were required to undergo online training on sexual harassment every two years.⁸⁴ Oracle also relied on the fact that it had promptly commenced an investigation into the claimant's grievance, that the perpetrator had been given the strongest sanction short of dismissal, and that there was no culture of tolerance of sexual harassment evident in its workplace.⁸⁵

Justice Buchanan determined that Oracle had not taken all reasonable steps. His honour found that there were 'some serious inadequacies in Oracle's own training packages'.⁸⁶ This had been implicitly acknowledged by Oracle when it introduced a new Workplace Diversity Policy, including the rollout of a new training program of face to face training. The previous policy and program had applied to Oracle workplaces across the world, whereas the new policy had been drafted for the Australian situation. Indeed, Buchanan J found that the new policy and training program had been introduced by Oracle so that it could be considered an 'employer of choice' for women by the then Equal Opportunity for Women in the Workplace Agency.⁸⁷

The specific criticisms of the original Code of Ethics and Business Conduct were that it did not refer to the legislative framework in Australia on the prohibition on sexual harassment; it did not include a clear statement that such conduct was unlawful; and it did not state that Oracle might be vicariously liable for sexual harassment occurring in the workplace. Justice Buchanan said:

In my view, advice in clear terms that sexual harassment is against the law, and identification of the source of the relevant legal standard, is a significant additional element to bring to the attention of employees in addition to a statement that sexual harassment is against company policy, no matter how firmly the consequences for breach of company policy might be stated. I take the same view about advice that an employer might also be liable for sexual harassment by an employee. That is an additional element emphasising the lively and real interest that an employer will have in scrupulous adherence to its warnings. These elements were absent from Oracle's global online training package.⁸⁸

For these reasons Buchanan J determined that Oracle had not satisfied the court that it had taken 'all reasonable steps' in prevent the sexual harassment from occurring, and so was liable for the actions of its employee that constituted sexual harassment of the claimant.⁸⁹

in fact taken to fulfil the employer's responsibility that its employees be aware of the various policies affecting their conduct at work and the necessity to abide by them, including penalties if they do not.' See also *McAlister v SEQ Aboriginal Corporation* [2002] FMCA 109; *Wattle v Kirkland* [2001] FMCA 66.

⁸² *Richardson v Oracle Corporation Australia Pty Ltd* [2013] FCA 102 [152]. The claimant successfully appealed this decision on the question of the amount of compensation awarded: *Richardson v Oracle Corporation Australia Pty Ltd* (2014) FCAFC 82. Researchers confirm that the case law indicates that the test is interpreted narrowly against employers: Eastel & Saunders, above n 62, at 75.

⁸³ [2013] FCA 102 [153].

⁸⁴ *Ibid*, [154].

⁸⁵ *Ibid*, [155].

⁸⁶ *Ibid*, [158].

⁸⁷ *Ibid*.

⁸⁸ *Ibid*, [163].

⁸⁹ *Ibid*, [164].

UNFAIR DISMISSAL LAW

Federal industrial law has contained provisions giving redress to employees for unfair dismissal since 1993.⁹⁰ The current provisions are contained in Part 3-2 of the Fair Work Act 2009 (Cth) (FW Act). This Part enables employees in specified categories to bring a claim to the Fair Work Commission alleging that their dismissal was unfair.⁹¹ The key legal test of whether a person was ‘unfairly dismissed’ is whether the dismissal was ‘harsh, unjust or unreasonable’.⁹²

The Commission is directed by the FW Act to take into account a non-exhaustive list of factors in determining whether the dismissal was ‘harsh, unjust or unreasonable’. This list includes ‘whether there was a valid reason for the dismissal related to the person’s capacity or conduct (including its effect on the safety and welfare of other employees)’.⁹³ In addition to this substantive matter, also listed are a number of procedural matters, such as whether the employee was notified of the reason for dismissal, given an opportunity to respond to reasons relating to their capacity or conduct, and whether the employee was warned regarding unsatisfactory performance.⁹⁴ Also relevant is the size of the employer’s organisation, and whether it has dedicated human resource management specialists or expertise.⁹⁵ The legislation contains a catch-all direction to the Commission to take into account ‘any other matters that the Commission considers relevant’.⁹⁶

Exceptions exist where a small business has complied with the Small Business Fair Dismissal Code,⁹⁷ and otherwise where the dismissal is a case of ‘genuine redundancy’.⁹⁸ In both these

⁹⁰ The unfair dismissal jurisdiction was inserted as part of the Industrial Relations Reform Act 1993 (Cth). The precursor to this was a 1984 award test case: *Termination Change and Redundancy Case* (1984) 8 IR 34. The unfair dismissal jurisdiction has taken a relatively similar form over the years, apart from the 2005 Work Choices era. See further, A Chapman, ‘The Decline and Restoration of Unfair Dismissal Rights’ in A Forsyth & A Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (2009), p 207; A Chapman, ‘Protections in Relation to Dismissal: From the Workplace Relations Act to the Fair Work Act’ (2009) 32 *University of New South Wales Law Journal* 746.

⁹¹ The employees that are entitled to bring a claim are ‘national system employees’ (FW Act s 380, s 13) who have completed the ‘minimum employment period’ with their employer (6 months or 12 months if a ‘small business employer’ (s 23)) (s 382(a), s 383) and secondly, that their employment is covered by a modern award or enterprise agreement or their annual earnings are less than the ‘high income threshold’ (s 382(b), s 333). The high income threshold is \$133,000 pa for the 2014 – 2015 financial year. On the meaning of dismissed in this context, see FW Act s 386.

⁹² FW Act s 385(b).

⁹³ FW Act s 387(a).

⁹⁴ FW Act s 387 (b), (c), (e). The Fair Work Commission is also directed to take into account any other matter that the Commission considers relevant: s 387(h).

⁹⁵ FW Act s 387(f), (g).

⁹⁶ FW Act s 387(h). Factors that have been considered under this heading include the applicant’s length of service; whether the applicant has a history of disciplinary incidents; the applicant’s age; evidence of remorse; the applicant’s likelihood of finding new employment; and whether there were other suitable sanctions available short of dismissal. See eg, *Batterham v Dairy Farmers Limited* [2011] FWA 1230 at [301]; *Fisher v ANZ Banking Group Limited* [2013] FWC 347 at [33] ff; *Genio v Woolworths Limited* [2012] FWA 6678 at [103]-[112]; *Harbour City Ferries Pty Ltd v Toms* [2014] FWC 6249 at [24].

⁹⁷ FW Act s 385(c). See further FW Act s 388.

⁹⁸ FW Act s 385(d). A ‘genuine redundancy’ is where the employer no longer requires the person’s job ‘to be performed by anyone because of changes in the operational requirements of the employer’s enterprise’, and the employer has complied with the obligations in an applicable modern award and enterprise agreement regarding consultation about redundancy. In addition, there will not be a ‘genuine redundancy’ where it would have been reasonable for the person to be deployed, within the employer’s organisation or an associated entity: FW Act s 389.

circumstances the dismissal cannot be challenged as an unfair dismissal under Part 3-2 of the FW Act.⁹⁹

Case decisions on unfair dismissal claims turn very much on their own facts, as the question of whether the termination of employment was ‘harsh, unjust or unreasonable’ is dependent on all the factual circumstances. The issue of whether there was a ‘valid reason’ for termination is only one relevant factor to consider, although undoubtedly it is ‘a very important consideration’.¹⁰⁰ Notably, it is clear that a termination of employment may be ‘harsh, unjust or unreasonable’ notwithstanding the existence of a ‘valid reason’ for the dismissal.¹⁰¹ The concept of ‘valid reason’ for termination of employment is frequently interpreted in the cases to mean a reason that is ‘sound, defensible or well-founded’ from the perspective of the employer, and that ‘a reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason.’¹⁰² On the meaning of ‘harsh, unjust or unreasonable’, decisions often cite a 1995 High Court decision:

It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted.¹⁰³

The unfair dismissal case decisions are peppered with circumstances in which employers have argued that a breach (or breaches) of an organisational policy by an employee provides a ‘valid reason’ for dismissal within the meaning of the legislation. It is well established in the case law that a breach of an organisational policy does not necessarily provide a ‘valid reason’ for dismissal, let alone mean that a dismissal will not be ‘harsh, unjust or unreasonable’.¹⁰⁴ It all depends on the specific circumstances of each case. On the

⁹⁹ FW Act s 385(c), (d).

¹⁰⁰ *Parmalat Products Pty Ltd v Wililo* [2011] FWA 1166 at [24]. Further at [24]: ‘[t]he absence of a valid reason will almost invariably render the termination unfair. The finding of a valid reason is a very important consideration in establishing the fairness of a termination. Having found a valid reason for termination amounting to serious misconduct and compliance with the statutory requirements for procedural fairness it would only be if significant mitigating factors are present that a conclusion of harshness is open.’

¹⁰¹ *B, C and D v Australian Postal Corporation* [2013] FWC 6191 at [41], [51]; *Agnew v Nationwide News PR927597* (unreported, AIRC, Rafaelli C, 11 February 2003) (leave to appeal refused in (2003) 126 IR 461); *Flanagan v Thales Australia Ltd t/a Thales Australia* [2012] FWA 6291 (unreported, Bull C, 7 September 2012); *Atfield v Jupiters Limited* (2002) 123 IR 273 (leave to appeal refused in (2003) 124 IR 217).

¹⁰² *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 at 373 per Northrop J. This formulation has been endorsed and cited in many cases. See eg, *B, C and D v Australian Postal Corporation* [2013] FWC 6191 at [17]-[19]; *Chew v Qantas Airways Limited* [2014] FWC 4885 at [35]; *Cooper v Australian Taxation Office* [2014] FWC 7551 at [37].

¹⁰³ *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at p 465-6 (per McHugh and Gummow JJ). Cited for example in *Eng v Goodman Fielder Limited* [2011] FWA 317 at [58]; *B, C and D v Australian Postal Corporation* [2013] FWC 6191 at [53]; *Cronin v Choice Homes (Qld) Pty Ltd* [2013] FWC 10240 at [14]; *Cooper v Australian Taxation Office* [2014] FWC 7551 at [23]. On the meaning of ‘valid reason’ and ‘harsh, unjust or unreasonable’ generally, see further FWC, *Benchmark: Unfair Dismissals* (July 2014), pp 99-127; T Donaghey, *Termination of Employment* (2nd edn, 2013), [23.21]-[23.27], [23.49]-[23.70].

¹⁰⁴ See, eg, *Bostik (Australia) Pty Ltd v Gorgevski (No 1)* (1992) 41 IR 452 at 460 per Sheppard and Heerey JJ; *B, C and D v Australian Postal Corporation* [2013] FWC 6191 at [47]-[52]; *Queensland Rail v Wake* (2006) 156 IR 393 at [23]; *Atfield v Jupiters Ltd* (2003) 124 IR 217 at [12]-[14]. A related point is that a ‘valid reason’ for termination might lie completely outside any breach of an organisational policy of the employer: *Robot v Iveco Trucks Australia Ltd* [2011] FWA 2915 at [40].

relationship between breach of policy and ‘valid reason’ for termination of employment, in 2009 Commissioner Deegan explained that:

Not every breach of a policy will provide a valid reason for termination of employment. However in circumstances where the policy is both lawful and reasonable and an employer has stressed the importance of the particular policy to the business and made it clear to employees that any breach is likely to result in termination of employment, then an employee who knowingly breaches that policy will have difficulty making out an argument that there is no valid reason for the termination.¹⁰⁵

The case before Deegan C involved a process worker who worked in the packing department at the James Boag Brewery. The applicant was convicted of a drink driving offence, and was subsequently dismissed on the basis of his breach of the company’s Responsible Drinking Policy. The offence was committed out of work hours and did not involve a work vehicle. The company gave evidence of the importance to it, from ‘both a corporate social responsibility viewpoint and a brand viewpoint’, to ‘demonstrate leadership on responsible drinking.’¹⁰⁶ In finding that the termination of employment was not ‘harsh, unjust or unreasonable’, Commissioner Deegan said:

An employer is entitled to have policies designed to protect the interests of the business and a legitimate interest in ensuring that such policies are observed by the workforce. ... While not every policy adopted by an employer will necessarily be found to be reasonable, particularly in circumstances where that policy purports to constrain the activities of employees outside working hours, some such policies will have the necessary connection to the workplace to be upheld. Where the employer can make out a legitimate interest in the conduct of its employees outside work hours, a policy aimed at regulating that conduct and protecting the employer’s legitimate interests will generally be found to be reasonable. ... A policy directed at restraining employees from engaging in criminal conduct which could have a deleterious impact on the employer’s legitimate business interests has a sufficient nexus with the employment to be a reasonable imposition on an employee.¹⁰⁷

The issue of out of hours conduct and the requisite connection to the employment relationship has also arisen in relation to social media policies,¹⁰⁸ in addition to a case involving an employee who was convicted on two counts of indecency on a person under 16 years of age outside of Australia.¹⁰⁹ In these situations the tribunal has ascertained whether there was a connection to the employer’s legitimate interests to protect in the words of one Commissioner, ‘the reputation and security of a business.’¹¹⁰

In addition to drug and alcohol policies,¹¹¹ a range of other organisational policies appear in the unfair dismissal case law, including policies relating to such matters as work health and safety;¹¹² the use of IT and social media;¹¹³ anti-discrimination and sexual harassment

¹⁰⁵ *Kolodjashnij v Lion Nathan T/A J Boag and Son Brewing Pty Ltd* [2009] AIRC 893 (*Kolodjashnij*) at [54]. For another unsuccessful claim brought by an employee of this employer convicted of a drink driving offence, see *J Boag & Sons Brewing Pty Ltd v Button* (2010) 195 IR 292.

¹⁰⁶ *Kolodjashnij*, above n 105, at [10].

¹⁰⁷ *Kolodjashnij*, above n 105, at [52].

¹⁰⁸ *Pearson v Linfox Australia Pty Ltd* [2014] FWC 446.

¹⁰⁹ *Cooper v Australian Taxation Office* [2014] FWC 7551.

¹¹⁰ *Pearson v Linfox Australia Pty Ltd* [2014] FWC 446 at [46]. See also [47]-[48]. *Cooper v Australian Taxation Office* [2014] FWC 7551 at [55]. See also [52]. In this case the ‘special value’ of public sector employment, as requiring the ‘highest ethical standards’ from employees, was noted: [50], [52]. For an illustration of behaviour on Facebook that did not breach a social media policy because it lacked the requisite connection to the employment relationship, see *Wilkinson-Reed v Launtoy Pty Ltd* [2014] FWC 644 at [66].

¹¹¹ See eg, *Gane v Rail Corp of NSW* (2010) 197 IR 138; *Dowling v Atwood Oceanics Pacific Limited* [2011] FWA 1934; *Dawson v Railway Transport Services* [2011] FWA 4915; *Selak v Woolworths Ltd* (2008) 171 IR 267.

¹¹² See eg, *Lawrence v Coal & Allied Mining Services Pty Ltd* (2010) 202 IR 388; *Parmalat Food Products Pty Ltd v Wililo* (2011) 207 IR 243; *Tabro Meat Pty Ltd v Heffernan* (2011) 208 IR 101.

policies;¹¹⁴ dress / jewellery codes;¹¹⁵ confidentiality;¹¹⁶ hygiene standards;¹¹⁷ and conflict of interest matters.¹¹⁸ Tribunals have repeatedly stated that in order to ground an argument of ‘valid reason’ for termination, the policy in question ought to be ‘lawful and reasonable’ (as noted in the quote from Commissioner Deegan above).¹¹⁹ These statements in the unfair dismissal context appear to draw on the role of an organisational policy as constituting a lawful and reasonable direction that employees are under an implied duty at common law to obey. Notably though the decisions themselves do not explicitly acknowledge this connection to the common law.¹²⁰

Tribunals have drawn on a number of matters relating to the organisational policy in question, in determining whether there was a ‘valid reason’ for the termination, and the broader question of whether the dismissal was ‘harsh, unjust or unreasonable’. These matters go to both the employer’s role in relation to the policy, as well as the employee’s conduct. In relation to the employer’s conduct, relevant matters include:

- whether the employer had adequately communicated the relevant organisational policy to the employee;¹²¹
- whether the employer had adhered to its own policy, for example, in relation to disciplinary procedures or summary dismissal;¹²²
- whether the employer had been consistent in enforcing the policy in the past against other employees, or against that particular employee;¹²³

¹¹³ See eg, *Australian Postal Corp v Rashiti* [2012] FWAFB 7423; *B, C and D v Australian Postal Corporation* [2013] FWCFB 6191; *Batterham v Dairy Farmers Limited* [2011] FWA 1230; *Vu v Commonwealth Bank of Australia* [2014] FWC 755; *Wilkinson-Reed v Launtoy Pty Ltd* [2014] FWC 644.

¹¹⁴ *Green v MSS Security Pty Ltd* [2010] FWA 1822.

¹¹⁵ *Genio v Woolworths Limited* [2012] FWA 6678.

¹¹⁶ *Potter v WorkCover Corporation* (2004) 133 IR 458.

¹¹⁷ *Eng v Goodman Fielder* [2011] FWA 317.

¹¹⁸ *Atfield v Jupiters Limited* (2002) 123 IR 273. Permission to appeal was refused in (2003) 124 IR 217.

¹¹⁹ *B, C and D v Australian Postal Corporation* [2013] FWCFB 6191 at [36]; *Potter v WorkCover Corporation* (2004) 133 IR 458 at [67]; *Kolodjashnij*, above n 105, at [54]. ‘A policy will be reasonable if a reasonable employer, in the position of actual employer and acting reasonably, could have adopted the policy. That is, a policy will only be unreasonable if no reasonable employer could have adopted it. A policy will not be unreasonable merely because a member of the Commission considers that a better or different policy may have been more appropriate’: *Woolworths Ltd v Brown* (2005) 145 IR 285 at [35].

¹²⁰ Beyond this particular point of intersection, the relationship between common law and the statutory unfair dismissal regime is complex. The status of the organisational policy at common law, and more broadly the interpretation of the employee’s conduct under common law, and specifically whether that misconduct would justify summary dismissal at common law, may be relevant to the question of whether there was a ‘valid reason’ for termination, as well as the broader issue of whether the dismissal was ‘harsh, unjust or unreasonable’. Those common law questions though are not necessarily determinative of the issues posed in unfair dismissal. This is because the questions to be addressed under the statutory unfair dismissal scheme are not synonymous with the issues posed at common law. See further, *Atfield v Jupiters Ltd* (2003) 124 IR 217 at [19].

¹²¹ *Queensland Rail v Wake* (2006) 156 IR 393; *Hember v Greater South East Projects Pty Ltd* [2012] FWA 6098 at [96], [121]; *Farley v Toll Transport Pty Ltd* [2011] FWA 1683 at [100]-[107]; *Robot v Iveco Trucks Australia Ltd* [2011] FWA 2915 at [38], [47], [50]; *Chew v Qantas Airways Limited* [2014] FWC 4885 at [76]-[80].

¹²² See eg, *Ghirocian v J Blackwood & Sons* (2010) 194 IR 264; *Batterham v Dairy Farmers Limited* [2011] FWA 1230 at [293]-[299]; *Fisher v ANZ Banking Group Limited* [2013] FWC 347 at [42].

¹²³ See eg, *Dowling v Atwood Oceanics Pacific Limited* [2011] FWA 1934 at [113]ff; *B, C and D v Australian Postal Corporation* [2013] FWCFB 6191 at [67], [91], [94], [110] (arguments of a culture of condonation); *Batterham v Dairy Farmers Limited* [2011] FWA 1230 at [288] (arguments of a culture of condonation); *Colson v Barwon Health – Geelong Hospital* [2013] FWC 766 at [122]; *Cronin v Choice Homes (Qld) Pty Ltd* [2013] FWC 10240 at [93]-[95], [99].

- whether the policy was clear and comprehensible itself, and whether there were internal inconsistencies between the employer’s various policies themselves, such as to deliver confusing or contradictory messages to the employee;¹²⁴
- whether the policy was itself effective to meet the employer’s objectives.¹²⁵

In terms of employee conduct, relevant matters include whether:

- the employee has adequately informed himself or herself of the policy in question;¹²⁶
- the breach of the organisational policy was done knowingly (meaning deliberately), by the employee;¹²⁷
- the breach was singular, or involved repeated breaches of policy by the employee;¹²⁸
- the breach in fact raised matters of serious concern, in terms of, for example, health and safety or the employer’s reputational interests, rather than less serious matters where the actual probability of harm to the employer (or others) was low.¹²⁹

The discussion to this point on unfair dismissal has been about the existence of an organisational policy which the employee has allegedly breached. One interesting unfair dismissal case involved the absence of a policy. The employer, Linfox Australia, had dismissed the employee, a truck driver, for sexually and racially harassing comments about two managers posted on his Facebook page. For a number of reasons the tribunal found that the dismissal was ‘unfair’, and in its decision it took the opportunity to inform the employer that it ought to have had a policy in place to deal with instances of the abusive use of social media by its employees:

At the time of [the applicant’s] dismissal, [the respondent] did not have any policy relating to the use of social media by its employees. Indeed, even by the time of the hearing, it still did not have such a

¹²⁴ *Fisher v ANZ Banking Group Limited* [2013] FWC 347 at [47]; *Day v Sodexo Remote Sites Australia Pty Ltd* [2011] FWA 8505 at [63]-[65].

¹²⁵ A Full Bench of the FWC has expressed reservations about the efficacy of a urine test (administered under the employer’s drug and alcohol policy) to accurately measure the actual presence of marijuana in an employee’s system or a current impairment. Nonetheless, the Full Bench proceeded on the basis that the applicant had attended work in breach of the drug and alcohol policy: *Harbour City Ferries Pty Ltd v Toms* [2014] FWC 6249 at [8]-[9].

¹²⁶ For example, in *Applicant v Microsoft Australia Pty Ltd* (2012) 223 IR 256 at [28] the tribunal held that the provision of a privilege such as a corporate credit card carried a heightened obligation on the employee to familiarise himself with the policy regarding its proper use. In another case, the tribunal appeared to impose an obligation on an employee who carried a firearm to make himself aware of the exact requirements of the employer’s firearm handling policy: *Anderson v Linfox Armaguard Pty Ltd* (2012) 225 IR 1 at [79]-[84]. In yet another case it was determined that a lengthy period of employment (there almost 25 years) might lead to a greater expectation that the employee would be aware of, and understand how to comply with, the relevant employer policies: *Labuguen v Commonwealth of Australia* [2012] FWA 8522 at [110]. See also *Harbour City Ferries Pty Ltd v Toms* [2014] FWC 6249 at [25]; *Vu v Commonwealth Bank of Australia* [2014] FWC 755 at [82]-[83].

¹²⁷ See eg, *Dickinson v Calstores Pty Ltd* (2011) 214 IR 40; *Aperio Group (Australia) Pty Ltd v Sulemanovski* (2011) 203 IR 18 at [52]; *Eng v Goodman Fielder Limited* [2011] FWA 317 at [45]; *Kolodjashnij*, above n 105, at [54]; *Vu v Commonwealth Bank of Australia* [2014] FWC 755 at [83].

¹²⁸ See eg, *Dickinson v Calstores Pty Ltd* (2011) 214 IR 40; *Aperio Group (Australia) Pty Ltd v Sulemanovski* (2011) 203 IR 18 at [52]; *Harbour City Ferries Pty Ltd v Toms* [2014] FWC 6249 at [24]; *Pearson v Linfox Australia Pty Ltd* [2014] FWC 446 at [51].

¹²⁹ Examples of serious matters are provided in: *Anderson v Linfox Armaguard Pty Ltd* (2012) 225 IR 1; *Dowling v Atwood Oceanics Pacific Limited* [2011] FWA 1934; *Rawat v Westbus Region 1 Pty Ltd* [2011] FWA 4411; *Tabro Meat Pty Ltd v Heffernan* (2011) 208 IR 101. Examples of less serious matters are provided in: *Fisher v ANZ Banking Group Limited* [2013] FWC 347; *Labuguen v Commonwealth of Australia* [2012] FWA 8522; *Atfield v Jupiters Limited* (2002) 123 IR 273; *Lawrence v Coal & Allied Mining Services Pty Ltd* (2010) 202 IR 388.

policy. ... In the current electronic age, this is not sufficient and many large companies have published detailed social media policies and taken pains to acquaint their employees with those policies.¹³⁰

In one other decision the tribunal commented adversely on an employer not having a social media policy in place.¹³¹

ADVERSE ACTION

Protections for trade unionists against victimisation have been part of the federal industrial system since 1904, and over the years have been extended, including in the 1990s to non-unionist employees and also to independent contractors.¹³² Provisions prohibiting termination of employment on a range of discriminatory grounds including race and sex were enacted into the federal industrial statute in 1994.¹³³ The FW Act built on these earlier developments to enact a more extensive set of General Protections in Part 3-1.¹³⁴ Organisational policies, and in particular employee codes of conduct, have had a significant impact in practice on the liability of respondents in a number of key cases brought under Part 3-1.

The central provision in Part 3-1 of relevance to this working paper prohibits a person (typically an employer or principal) from taking ‘adverse action’ against another person (typically a worker) ‘because’ of various prescribed grounds, subject to several exceptions.¹³⁵ The concept of ‘adverse action’ is articulated broadly in the Act to include dismissal, in addition to conduct by an employer that ‘injures the employee in his or her employment’, ‘alters the position of the employee to the employee’s prejudice’, or ‘discriminates between the employee and other employees of the employer’.¹³⁶ Whilst the concept of ‘injures’ in employment has been held by the High Court to mean a ‘compensable harm’, the test of prejudicial alteration of position has been interpreted more broadly to mean ‘any adverse

¹³⁰ *Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444 at [84]. Appeal unsuccessful: *Linfox Australia Pty Ltd v Stutsel* [2012] FWAFB 7097; *Linfox Australia Pty Ltd v Fair Work Commission* [2013] FCAFC 157. It appears that Linfox did subsequently introduce a social media policy: *Pearson v Linfox Australia Pty Ltd* [2014] FWC 446 at [46].

¹³¹ *Mitchell v HWE Mining Pty Ltd* [2012] FWA 2721 at [36] (extension of time application).

¹³² See further A Chapman, K Love & E Gaze, ‘The Reverse Onus of Proof Then and Now: The Barclay Case and the History of the Fair Work Act’s Union Victimisation and Freedom of Association Provisions’ (2014) 37 *University of New South Wales Law Journal* 471.

¹³³ Inserted with the Industrial Relations Reform Act 1993 (Cth).

¹³⁴ FW Act s 342(1). Threatening to take such action, or organising such action, is also itself ‘adverse action’: s 342(2). See also FW Act s 354 which provides that a person must not take adverse action against an employer because employees of that employer are, or are not, covered by minimum standards, a workplace agreement or other instrument.

¹³⁵ Part 3-1 protects employees as well as independent contractors: s 342(1). The table in s 342(1) contains many different permutations of unlawful conduct. Although Part 3-1 does not apply to all employers in Australia, it applies in relation to most: ss 30G, 30R, 338, 339.

¹³⁶ FW Act s 342(1). Note also the similar forms of ‘adverse action’ articulated in s 342(1), including by a prospective employer (item 2), and a principal against an independent contractor or prospective independent contractor (items 3 and 4). It also includes an employee or independent contractor taking industrial action against their employer or principal (items 5 and 6) and various actions by an industrial association against a person or its member (item 7). Threatening to take such action, or organising such action, is also itself ‘adverse action’: s 342(2). See also FW Act s 354 which provides that a person ‘must not discriminate against an employer because’ employees of that employer are, or are not, covered by minimum standards, a workplace agreement or other instrument.

affection of, or deterioration in, the advantages enjoyed by the [worker]’.¹³⁷ A broad range of employer conduct is able to be challenged under these provisions, including for example, decisions in relation to recruitment and hiring, disciplinary proceedings, transfer, as well as termination of employment.

There are three different categories of prescribed grounds of ‘adverse action’. The first is that the applicant has, or has exercised, a ‘workplace right’.¹³⁸ The second is that the applicant is, or is not, a union member, or has engaged or not engaged, in ‘industrial activities’.¹³⁹ The third group of grounds is contained in s 351(1) and comprises a list: ‘race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin’.¹⁴⁰

Part 3-1 contains exceptions that exonerate ‘adverse action’ that would otherwise be unlawful. Conduct of the respondent that was ‘authorised by or under’ the FW Act or other law of the Commonwealth, or a prescribed State or Territory law, is exempted from liability under Part 3-1.¹⁴¹ Three further exceptions apply solely in relation to the list of grounds in s 351(1): conduct that was taken because of the ‘inherent requirements of the particular position’,¹⁴² conduct taken against a staff member of a religious institution,¹⁴³ and conduct that was ‘not unlawful under any anti-discrimination law in force in the place where the action is taken’.¹⁴⁴

As noted above, the legislation provides that the causal link between the ‘adverse action’ and a prescribed ground is articulated through the word ‘because’. That is, Part 3-1 prohibits the respondent from taking ‘adverse action’ only where that ‘adverse action’ is taken ‘because’ of one of the prescribed grounds. Importantly, the Act provides that the prescribed ground need only be one reason for the ‘adverse action’; it need not be the sole or dominant reason.¹⁴⁵ In addition, Part 3-1 contains a reverse onus of proof.¹⁴⁶ This means, broadly speaking, that although the applicant must still establish by evidence that they possess a prescribed ground, and that they have suffered conduct amounting to ‘adverse action’ (such as dismissal or demotion), once the applicant alleges the respondent took action for a particular prohibited reason, it is presumed that the respondent’s action was taken for that

¹³⁷ *Patrick Stevedores Operations No 2 Pty Ltd v MUA* (1998) 195 CLR 1 at 18.

¹³⁸ FW Act s 340(1)(a), (b). This includes that the person has not exercised a ‘workplace right’. The term ‘workplace right’ is broadly defined and includes being entitled to the benefit of, or having a role or responsibility under, a ‘workplace law’ or ‘workplace instrument’ such as a modern award or enterprise agreement (FW Act s 341), and ‘workplace law’ is defined broadly in s 12 to mean the FW Act and any other law of the Commonwealth or State or Territory ‘that regulates the relationships between employers and employees’. An organisational policy, and a contract of employment (with or without a policy incorporated into it) are not ‘workplace instruments’, and nor do they give rise to a ‘workplace right’ unless they become ‘safety net contractual entitlements’ under s 12 of the FW Act: *Bayford v Maxxia Pty Ltd* (2011) 207 IR 50 at [155]; *Aitken v Virgin Blue* [2013] FCCA at [57], [65].

¹³⁹ The concept of ‘industrial activities’ includes various forms of lawful activities such as participating in protected industrial action: FW Act ss 346–7. The provisions also protect a person who refuses to engage in unlawful industrial activities: s 347(c)–(e).

¹⁴⁰ FW Act s 351(1).

¹⁴¹ FW Act s 342(3) (and see sub-s (4)). On this exception see *CFMEU v Mammoet Australia* (2013) 248 CLR 619; *CFMEU v Rio Tinto Coal Australia Pty Ltd* [2014] FCA 462 at [37]–[38], [41]–[43], [49]–[56], [65]–[70].

¹⁴² FW Act s 351(2)(b).

¹⁴³ FW Act s 351(2)(c).

¹⁴⁴ FW Act s 351(2)(a). On the meaning of anti-discrimination law in this rule, see s 351(3).

¹⁴⁵ FW Act s 360: ‘a person takes action for a particular reason if the reasons for the action include that reason’.

¹⁴⁶ FW Act s 361. This reverse onus of proof though does not apply in relation to applications for interlocutory injunctions.

reason unless the respondent proves otherwise. In short, the applicant is relieved of the burden of proving the respondent's reason for taking the action.

Organisational policies appear in a number of decisions under Part 3-1. Typically they are raised by the employer to explain why it took the adverse action that it did. In these cases the employer's submission may be that the reason that it reached the decision to engage in the 'adverse action' that it did, was because the applicant had breached an organisational policy (or policies). The types of organisational policies that appear in the Part 3-1 decisions in this way include general employee codes of conduct,¹⁴⁷ performance management policies,¹⁴⁸ and safety policies.¹⁴⁹

Two High Court decisions on Part 3-1 in 2012 and 2014 provide useful illustrations of this intersection between organisational policies and legal redress under Part 3-1 of the FW Act. These are both seminal cases on the scope and meaning of causation and the reverse onus of proof under Part 3-1. Both cases involved employees, both of who were union members and who were subjected to adverse treatment by their employer (in the form of disciplinary proceedings and dismissal, respectively). In defending both claims the employers argued that the reason that motivated their impugned decisions were breaches of an employee code of conduct by the employee concerned, and not the employee's union membership, office-holding or industrial activities. In both cases the employers were ultimately successful before the High Court.

The first case is *BRIT v Barclay*.¹⁵⁰ In the months leading up to an audit of his employer, Bendigo Regional Institute of Technical and Further Education (BRIT), the applicant sent an email from his BRIT email address to all members of the Australian Education Union (AEU) employed at BRIT stating that 'several members ... have witnessed or been asked to be part of producing false and fraudulent documents for the audit' and warning members not to become involved in these activities. The applicant closed his email message with 'Greg Barclay President BRIT AEU Sub-Branch'.¹⁵¹ The email came to the attention of the Chief Executive Officer of BRIT, who made the decision to institute disciplinary proceedings against Mr Barclay. The CEO gave evidence that she had formed the view that the email constituted a number of breaches by Mr Barclay of the Code of Conduct for Victorian Public Sector Employees, and that this was the sole reason why she initiated the disciplinary action against the applicant. In her (show cause) letter to Mr Barclay, the CEO expressed her view that Mr Barclay had engaged in three breaches of the Code of Conduct. One was of a requirement in the Code on employees to report suspected unethical behaviour to an appropriate authority. The applicant had failed to do this. Another breach related to a requirement in the Code of Conduct that employees not behave in such a way as to bring the public service into 'disrepute'. A final breach was said to be of the Code requirement that employees be 'fair, objective and courteous in their dealings with other public sector

¹⁴⁷ *Bendigo Regional Institute of TAFE v Barclay* (2012) 248 CLR 500 (*BRIT v Barclay*); *CFMEU v BHP Coal Pty Ltd* [2014] HCA 41; *United Voice v GEO Group Australia Pty Ltd* [2014] FCA 928. See also *Ramos v Good Samaritan Industries (No 2)* [2011] FMCA 341; *AMACSU v Shire of Mundaring* [2011] FMCA 731 (interim injunction).

¹⁴⁸ *AFMEPKIU v Visy Packaging Pty Ltd (No 3)* [2013] FCA 525.

¹⁴⁹ *LHMU v Arnotts Biscuits Ltd* [2010] FCA 770.

¹⁵⁰ *BRIT v Barclay*, above n 147.

¹⁵¹ Mr Barclay's evidence was that four AEU members raised concerns with him (in his union capacity) regarding inaccurate information in the audit documents, and that each wished to remain anonymous. Mr Barclay did not report these allegations to his supervisor.

employees'.¹⁵² In her evidence the BRIT CEO denied that the disciplinary action was taken because of Mr Barclay's union membership, his union office, or because he had engaged in industrial activities.

BRIT conceded it had taken conduct constituting 'adverse action' by instituting disciplinary action against Mr Barclay, including suspension on full pay. Accordingly, the main issue at all stages of the litigation was whether BRIT's 'adverse action' was taken for a prescribed reason – that is, whether the causal link was made out.

In the High Court all of the judges found in favour of BRIT. For all judges, the central question is why the action was taken. Direct evidence given by the employer's decision maker as to his or her state of mind, or intention, ought to be the focus of this inquiry.¹⁵³ All judges explicitly recognised though that evidence from the decision-maker may not always be accepted as reliable on the question of causation, for example if it is contradicted by other evidence.¹⁵⁴ Chief Justice French and Justice Crennan stated most clearly that 'direct testimony from the decision-maker which is accepted as reliable is capable of discharging the burden upon an employer'.¹⁵⁵

The evidence of the BRIT CEO, that she made the decision to institute disciplinary proceedings against the applicant because of her view that he had breached the Code of Conduct, and not for any reason prohibited by Part 3-1, was accepted as reliable. This was sufficient to discharge the reverse onus of proof on the employer, leaving the applicant ultimately unsuccessful in his application. This High Court decision in *BRIT v Barclay* in 2012 is thought to have led to many medium and large organisations revising their organisational policies to ensure they maximised the protection afforded to the company in a claim of adverse action under Part 3-1.

The second case is *CFMEU v BHP*.¹⁵⁶ The context of this case is protracted negotiations for a new enterprise agreement at a mine operated by BHP. Protected industrial action, including work stoppages and bans on overtime, had been underway for some time. At a time when he was not rostered to work, Mr Doevendans took part in a lawful protest at the entrance to the mine. At the protest he waved a sign (on four occasions) at vehicles entering the site stating 'No principles SCABS No guts'. The sign was one of many with a range of messages printed on them distributed by the union to the protestors. The employer sent a letter to Mr Doevendans alleging that his behaviour in waving the sign had breached the 'BMA Workplace Conduct Policy, BMA's Charter Values and expected workplace behaviours'.¹⁵⁷ Some months later, and after a meeting between mine management, Mr Doevendans and a union representative, Mr Doevendans was dismissed. Mr Doevendans was Vice President and member of a lodge of the district branch of the CFMEU.

Justice Jessup, the primary judge, accepted the reasons given by the employer's decision maker for arriving at the decision to dismiss Mr Doevendans.¹⁵⁸ Those reasons included that

¹⁵² As reported in the show cause letter issued to Mr Barclay: *Barclay v BRIT* [2010] FCA 284 at [8].

¹⁵³ *BRIT v Barclay*, above n 147, at [44] (per French CJ and Crennan J), [71], [127] (per Gummow and Hayne JJ), [140] (per Heydon J).

¹⁵⁴ *BRIT v Barclay*, above n 147, at [45] (per French CJ and Crennan J), [71], [127] (per Gummow and Hayne JJ), [141] (per Heydon J).

¹⁵⁵ *BRIT v Barclay*, above n 147, at [45]. Justices Gummow and Hayne were in 'general agreement' with the reasons of French CJ and Crennan J: [71]. See also Justice Heydon at [140].

¹⁵⁶ *CFMEU v BHP Coal Pty Ltd* [2014] HCA 41.

¹⁵⁷ *CFMEU v BHP Coal Pty Ltd (No 3)* (2012) 228 IR 195 at [15].

¹⁵⁸ *Ibid*, at [36].

the word ‘scab’ was ‘offensive, humiliating, harassing and intimidating behaviour’, and a ‘[f]lagrant violation of Charter and Conduct Policy’.¹⁵⁹ This was intentional and deliberate (repeated) breaches of a known policy with no sign of contrition. The decision maker formed the view that Mr Doevendans’ conduct was antagonistic to the culture that BHP was endeavouring to develop at the mine.¹⁶⁰ Justice Jessup accepted the evidence that the fact that Mr Doevendans was an office holder of the CFMEU, had engaged in lawful industrial activity by taking part in the protected industrial action and the protest, did not play any part in the decision to dismiss him.¹⁶¹ The mere fact of taking part in the protest, and waving a sign were not reasons for the decision to dismiss him, according to Jessup J. Rather, the reasons for dismissal had to do with the manner by which Mr Doevendans took part in the protest, and in particular the word ‘scab’ used on the sign.¹⁶²

The High Court discussed the reasoning in *BRIT v Barclay* and in a split decision of 3:2 found in favour of the employer.¹⁶³ All judges held that the focus of the inquiry is upon the reasons of the employer’s decision maker for taking the adverse action, and this involves, in the words of French CJ and Kiefel J, ‘a search for the reasoning actually employed by that decision maker’.¹⁶⁴ The majority of the Bench accepted the trial judge’s findings of fact on the reasons of the employer’s decision maker. In contrast, the dissentients were not prepared to accept as legitimate a splitting of reasons between taking part in the protest and the manner of taking part in the protest. Justice Hayne stated:

The conclusion that [the employer’s decision maker] did not act for a prohibited reason can be reached only by distinguishing between Mr Doevendans’ participation in the protest near the entrance to the mine property and the manner in which he expressed his protest. No relevant distinction of that kind can be drawn.¹⁶⁵

And further:

Both the activity [of protesting] and the manner in which Mr Doevendans took part in it were lawful. So long as the protest was conducted lawfully, it was not to the point to ask (as [the employer’s decision maker] did) whether what was said or done in the protest would offend others or, in particular, would offend some employees. And when [the employer’s decision maker] concluded that Mr Doevendans should be dismissed because he had deliberately and repeatedly protested in an offensive manner, [he] acted for a prohibited reason. He dismissed Mr Doevendans because he had participated in a lawful activity organised by the CFMEU.¹⁶⁶

More broadly, where a court forms the view that the organisational policy in question would not be likely to warrant the adverse action taken by the employer, this may raise an inference that the employer was not merely applying the policy to the employee’s conduct, but rather that it may have been motivated by reasons lying outside the policy.¹⁶⁷ Similarly, inconsistent

¹⁵⁹ Ibid, referring to [28]-[31].

¹⁶⁰ Ibid.

¹⁶¹ Ibid, [37]-[41]. Justice Jessup accepted the evidence of the decision-maker that the union activities of Mr Doevendans had ‘entered and operated in my mind only to the extent that I was conscious that because of his standing in these positions, any decision I made to take any disciplinary action against him would be controversial’, but that otherwise Mr Doevendans union activities did not play any part in the decision-making process: [31]

¹⁶² Ibid, [117]-[124].

¹⁶³ *CFMEU v BHP Coal Pty Ltd* [2014] HCA 41. In a joint judgement French CJ and Kiefel J dismissed the appeal by the CFMEU, as did Gageler J; Hayne J and Crennan J allowed the appeal. Justice Crennan agreed with the reasoning of Hayne J.

¹⁶⁴ Ibid, at [7] per French CJ and Kiefel J.

¹⁶⁵ Ibid, at [45].

¹⁶⁶ Ibid, at [47].

¹⁶⁷ *AFMEPKIU v Visy Packaging Pty Ltd (No 3)* [2013] FCA 525 at [54]-[57]; *Stephens v Australian Postal Corp* [2011] FMCA 448 at [73].

or partisan application by the employer of its policy may also suggest it was motivated by factors that lie outside the policy itself.¹⁶⁸

BULLYING UNDER THE FAIR WORK ACT

From 1 January 2014 the Fair Work Commission was given a new jurisdiction to make orders to stop bullying.¹⁶⁹ The new Part 6-4B of the FW Act provides a mechanism for a worker who reasonably believes that he or she has been bullied at work to apply to the Commission for an order to stop the bullying behaviour.¹⁷⁰ The objective of these new provisions is to provide a mechanism to deal with issues of bullying in a quick and inexpensive manner.¹⁷¹ The new jurisdiction is not intended to be a comprehensive means to address bullying,¹⁷² and it does not replace other avenues, most notably work health and safety mechanisms.¹⁷³ The Full Bench of the Commission has found that Part 6-4B is remedial and or beneficial legislation and as such ambiguity in the words used should be construed to give the fullest relief to workers as the provisions allow.¹⁷⁴

The concept of bullying under these provisions is defined to mean that an individual or group ‘repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member’ and ‘that behaviour creates a risk to health and safety.’¹⁷⁵ The Explanatory Memorandum explains:

¹⁶⁸ *CFMEU v Bengalla Mining Company Pty Limited* [2013] FCA 267 at [68].

¹⁶⁹ FW Act Part 6-4B, inserted by the Fair Work Amendment Act 2013 (Cth).

¹⁷⁰ FW Act s 789FC(1). The concept of worker in these provisions is defined broadly to mean a person who carries out paid work in any capacity, including as an employee, independent contractor, apprentice or trainee, or student on work experience: FW Act s 789FC(2). The conduct must have taken place in a ‘constitutionally-covered business’, which is then articulated in an unsurprising manner to include, for example, a business or undertaking conducted by a ‘constitutional corporation’ (defined in s 12), the Commonwealth or a Commonwealth authority: FW Act s 789FD(3). Exemptions from the bullying jurisdiction exist in relation to the Defence Force, the Australian Federal Police and in relation to matters of national security. FW Act s 789FE(2), s 789FI-s 789FL, Fair Work Regulations, reg 6.08(2).

¹⁷¹ Supplementary Explanatory Memorandum, Fair Work Amendment Bill 2013 at [88]-[89]. The Commission is required to start dealing with an application for an order to stop bullying within 14 days after the application is made: FW Act s 789FE.

¹⁷² The Supplementary Explanatory Memorandum to the Bill states that the Bill is ‘part of’ the Government’s response to the report of the House of Representatives Standing Committee on Education and Employment titled, *Workplace Bullying — We Just Want it to Stop*: Supplementary Explanatory Memorandum, Fair Work Amendment Bill 2013 at [86].

¹⁷³ FW Act s 789H. See also Revised Explanatory Memorandum, Fair Work Amendment Bill 2013 at [92]. Legislative concepts from work health and safety law and workers compensation law are used both in the drafting of Part 6-4B itself, and by the Commission in its publication on Part 6-4B: FWC, *Benchbook: Anti-Bullying* (July 2014) (*Anti-Bullying Benchbook*).

¹⁷⁴ *Bowker* [2014] FWCFB 9227 at [24]-[27].

¹⁷⁵ FW Act s 789FD(1). The requirement of ‘repeatedly’ unreasonable behaviour necessitates more than one instance of unreasonable behaviour, although the repetition need not be of the same behaviour and may constitute a range of different behaviours: Revised Explanatory Memorandum, Fair Work Amendment Bill 2013 at [109]; *Anti-Bullying Benchbook*, above n 173, at p 24; *Ms SB* [2014] FWC 21 at [41] (using the word ‘persistent’ unreasonable behaviour); *YH v Centre* [2014] FWC 8905 at [67]. The use of the word ‘risk’ indicates that actual danger or harm to health and safety is not required: *Ms SB* [2014] FWC 2104 at [45]; *YH v Centre* [2014] FWC 8905 at [69]; *Anti-Bullying Benchbook*, above n 173, at p 12.

that “unreasonable behaviour” is behaviour that a reasonable person, having regard to the circumstances may see as unreasonable (in other words it is an objective test). This would include (but is not limited to) behaviour that is victimising, humiliating, intimidating or threatening.¹⁷⁶

The legislation is explicit that ‘reasonable management action carried out in a reasonable manner’ is not bullying.¹⁷⁷ The Explanatory Memorandum suggests that everyday management actions to ‘direct and control the way work is carried out’, and not merely more formal decisions such as those relating to disciplinary proceedings, may fall within the meaning of ‘management action’ in this provision.¹⁷⁸ In the key case of *Ms SB*, Hampton C explained that the formula of ‘reasonable management action carried out in a reasonable manner’ contains three components: the behaviour alleged to be bullying ‘must be management action’, secondly, ‘it must be reasonable for the management action to have been taken’, and thirdly, ‘the management action must have been carried out in a manner that is reasonable’.¹⁷⁹ The Commissioner emphasised that ‘[t]he test is whether the management action was reasonable, not whether it could have been undertaken in a manner that was “more reasonable” or “more acceptable”’.¹⁸⁰ He went on to state that:

- management actions do not need to be perfect or ideal to be considered reasonable;
- a course of action may still be ‘reasonable action’ even if particular steps are not;
- to be considered reasonable, the action must also be lawful and not be ‘irrational, absurd or ridiculous’;
- any ‘unreasonableness’ must arise from the actual management action in question, rather than the applicant’s perception of it; and
- consideration may be given as to whether the management action involved a significant departure from established policies or procedures, and if so, whether the departure was reasonable in the circumstances.¹⁸¹

The bullying behaviour must take place ‘at work’.¹⁸² This may give rise to issues regarding bullying through social media or at social functions associated with work but which are held outside work premises. The phrase ‘at work’ is not defined or further articulated in Part 6-4B. In its Benchbook the Commission points out that the same expression is used in work health and safety legislation where the Explanatory Memorandum explains it to mean ‘the work activities wherever they occur and is not limited to the confines of a physical workplace.’¹⁸³ The Full Bench of the Commission has interpreted the test of ‘at work’ as follows:

It seems to us that the concept of being ‘at work’ encompasses both the performance of work (at any time or location) *and* when the worker is engaged in some other activity which is authorised or

¹⁷⁶ Supplementary Explanatory Memorandum, Fair Work Amendment Bill 2013 at [109]. The objective reasonable person test has been referred to in a number of cases: *Ms SB* [2014] FWC 2104 at [43]; *YH v Centre* [2014] FWC 8905 at [13]; *GC* [2014] FWC 6988 at [47].

¹⁷⁷ FW Act s 789FD(2).

¹⁷⁸ Supplementary Explanatory Memorandum, Fair Work Amendment Bill 2013 at [112]: ‘Persons conducting a business or undertaking have rights and obligations to take appropriate management action and make appropriate management decisions. They need to be able to make necessary decisions to respond to poor performance or if necessary take disciplinary action and also effectively direct and control the way work is carried out. For example, it is reasonable for employers to allocate work and for managers and supervisors to give fair and constructive feedback on a worker’s performance. These actions are not considered to be bullying if they are carried out in a reasonable manner that takes into account the circumstances of the case and do not leave the individual feeling (for example) victimised or humiliated.’ See also *Ms SB* [2014] FWC 2104 at [48].

¹⁷⁹ *Ms SB* [2014] FWC 210 at [47] adopted in *YH v Centre* [2014] FWC 8905 at [15]; *GC* [2014] FWC 6988 at [52]. This articulation is also adopted in the *Anti-Bullying Benchbook*, above n 173, at p 35. It is an objective test: *Ms SB* [2014] FWC 210 at [49].

¹⁸⁰ *Ms SB* [2014] FWC 210 at [51]. See also *YH v Centre* [2014] FWC 8905 at [69].

¹⁸¹ *Ms SB* [2014] FWC 210 at [51].

¹⁸² FW Act s 789FC(1).

¹⁸³ *Anti-Bullying Benchbook*, above n 173, at p 34.

permitted by their employer, or in the case of a contractor their principal (such as being on a meal break or accessing social media while performing work).¹⁸⁴

Where the Commission is satisfied that the worker has been bullied within the meaning of Part 6-4B, and ‘there is a risk that the worker will continue to be bullied’, then the Commission may make ‘any order it considers appropriate’, ‘to prevent’ the worker from being bullied at work.¹⁸⁵ The Commission has stated: ‘Relevant considerations [on the issue of whether there is a risk of ongoing bullying] will be whether the worker is still working with bully or bullies, and action that may have been taken by the [organisation] or a work health and safety regulator to deal with the behaviour.’¹⁸⁶ Where the worker has been dismissed or is otherwise no longer employed at that workplace, there will usually be no risk on ongoing bullying.¹⁸⁷

Section 789FF(2) specifies a number of matters that the Commission must take into account in its consideration of the terms of an order:

- (a) if the FWC is aware of 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—those outcomes; and
- (b) if the FWC is aware of any procedure available to the worker to resolve grievances or disputes—that procedure; and
- (c) if the FWC is aware of any final or interim outcomes arising out of any procedure available to the worker to resolve grievances or disputes—those outcomes; and
- (d) any matters that the FWC considers relevant.

Organisational policies are relevant in the new Part 6-4B jurisdiction at a number of different points. Although it remains early days in the jurisdiction, a number of potential areas of intersection are already apparent. Importantly, organisational policies might be expected to shape the meaning of the test of ‘reasonable management action carried out in a reasonable manner’.¹⁸⁸ The Commission has pointed out that reasonableness in this context is a question of fact to be determined in all the circumstances through an objective test.¹⁸⁹ It might be expected that if the management behaviour that is challenged as bullying was authorised under an organisational policy, and especially where carried out in accordance with procedures in that policy, in most situations that behaviour would likely constitute ‘reasonable management action’ and not bullying within the meaning of Part 6-4B. The converse may not necessarily hold. In one decision it has been held that a manager’s behaviour ‘could be argued to be inconsistent with’ the organisation’s policies, including an employee code of conduct, yet nonetheless it was determined that the behaviour did not constitute bullying.¹⁹⁰ A number of decisions in the workers compensation jurisdiction are to the effect that where the employer has followed its own procedures, its behaviour is likely to

¹⁸⁴ *Bowker* [2014] FWCFB 9227 at [51]. The Full Bench was clear that a cautious approach to demarcating the boundaries of ‘at work’ was warranted, to enable developments to emerge over time: [52], [58]. Note that the Explanatory Memorandum states that ‘[o]rders [under Part 6-4B] could be based on behaviour such as threats made outside the workplace, if the threats relate to work’: Revised Explanatory Memorandum, Fair Work Amendment Bill 2013 at [119]. This suggests a broad interpretation of the phrase ‘at work’ may be appropriate.

¹⁸⁵ FW Act s 789FF(1). Notably the Commission does not have power to order the payment of money. The Commission may refer the matter to a work health and safety inspector: Revised Explanatory Memorandum, Fair Work Amendment Bill 2013 at [91].

¹⁸⁶ *Anti-Bullying Benchbook*, above n 173, at p 35.

¹⁸⁷ See eg, *Mr T* [2014] FWC 3852; *GC* [2014] FWC 6988 at [166]-[167], *Obatoki v Mallee Track Health & Community Services* [2014] FWC 8828. In relation to dismissal, the employee may have a right to bring a claim of unfair dismissal, depending on the circumstances.

¹⁸⁸ FW Act s 789FD(2).

¹⁸⁹ *Ms SB* [2014] FWC 2104 at [52].

¹⁹⁰ *YH v Centre* [2014] FWC 8905 at [78].

constitute ‘reasonable administrative action undertaken in a reasonable manner’ (as the test is stated in the relevant workers compensation statute).¹⁹¹ Notably, these decisions are cited by the Commission in its discussion of the likely meaning of the phrase ‘reasonable management action carried out in a reasonable manner’ in Part 6-4B, suggesting that where an employer has followed its organisational policies, the conduct is unlikely to amount to bullying under Part 6-4B.¹⁹²

A second area of intersection between organisational policies and the new bullying jurisdiction lies in the discretion of the Commission to make an order to stop bullying.¹⁹³ First, the existence of such a policy may go to the issue of whether ‘there is a risk that the worker will continue to be bullied’. The existence of a policy, and especially an internal grievance procedure, may mean that now that the employer is aware of the bullying, there is no longer any risk that the worker will continue to be bullied because the grievance will be dealt with under the internal policy. Indeed, the Commission may form the view that the employer has already dealt with the problem through its internal complaints process and for that reason there is no risk of continued bullying, a scenario that the Commission itself envisages as possible.¹⁹⁴ A second way in which the existence of an organisational policy is relevant to the making of an order lies in the list of factors in s 789FF(2) that the Commission is required to take into account in making an order. The Commission interprets this list as meaning that an employer’s own internal complaint policy and procedure, and outcomes of any such procedures, are matters that the Commission is required to take into account in considering whether to make an order and if so on what terms.¹⁹⁵ In at least two decisions the Commission has so taken into account an internal investigation conducted by the employer into the claimant’s allegations of bullying.¹⁹⁶ The Explanatory Memorandum to the new provisions supports this interpretation as correct.¹⁹⁷

A final way in which organisational policies may be relevant in Part 6-4B arises in relation to the types of orders the Commission might make. The Explanatory Memorandum to Part 6-4B contemplates that such an order might require compliance with the employer’s anti-bullying policy, or indeed a review of that policy.¹⁹⁸ These examples are used by the Commission in its Benchbook.¹⁹⁹ The step of developing and adopting such a policy is not mentioned in the Explanatory Memorandum, or the Benchbook, but there is no reason why those steps could not also be ordered in appropriate cases.

¹⁹¹ *Department of Education & Training v Sinclair* [2005] NSWCA 465; *Yu and Comcare* (2010) 121 ALD 583; [2010] AATA 960; *Devasahayam and Comcare* [2010] AATA 785.

¹⁹² *Anti-Bullying Benchbook*, above n 173, at p 39-42.

¹⁹³ Importantly, the Commission has power to inform itself of any matter that it considers appropriate: FW Act s 590.

¹⁹⁴ *Anti-Bullying Benchbook*, above n 173, at p 35.

¹⁹⁵ FW Act s 789FF(2)(b), (c); *Anti-Bullying Benchbook*, above n 173, at p 53.

¹⁹⁶ In *The Applicant v General Manager and Company C* [2014] FWC 3940, the Commissioner discussed the employer’s internal investigation into the claimant’s allegations of bullying, found a number of deficiencies in that process ([97]-[99]), but concluded ultimately that no bullying had occurred ([100]). In *Ms SB*, the Commission referred to an internal investigation conducted by a law firm. In this case the employer relied on legal professional privilege to withhold the full report of the investigation’s findings from the Commission, a matter that Hampton C did not find necessarily to rule on: *Ms SB* [2014] FWC 2104 at [98]-[101].

¹⁹⁷ Revised Explanatory Memorandum, Fair Work Amendment Bill 2013 at [123].

¹⁹⁸ Revised Explanatory Memorandum, Fair Work Amendment Bill 2013 at [121].

¹⁹⁹ *Anti-Bullying Benchbook*, above n 173, at p 52.

CONCLUSION

This working paper has profiled the main doctrinal interactions between organisational policies and Australian employment law. It has shown that organisational policies are relevant to employment rights and obligations in a number of different ways, and across several different areas of employment law. These include common law contract; work health and safety law; discrimination law and sexual harassment; and unfair dismissal, adverse action and bullying under the Fair Work Act 2009 (Cth). Organisational policies are relevant to a range of different legal questions in these areas of employment law, including whether a policy is contractually binding; whether it is part of a systematic management process to ensure the health and safety of workers and others proximate to the workplace; whether it indicates that an employer has taken reasonable precautions to prevent sexual harassment from occurring; whether breach of a policy by an employee provides a 'valid reason' to dismiss the employee; whether the employee's breach of policy was in fact the reason for the employer's decision-maker to take the 'adverse action'; and the impact of an anti-bullying policy on the issue of whether the Commission ought to grant an order to stop bullying. Across these different areas and issues it is clear that currently the interaction between organisational policies and Australian employment law is complex, ambiguous and unsettled and worthy of further exploration.

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