GREENWAY CHAMBERS

GREENWAY CHAMBERS: SUPER SERIES

DEVELOPING AND IMPLEMENTING POLICIES AND PROCEDURES IN THE WORKPLACE

A PAPER PRESENTED AT GREENWAY CHAMBERS

ON 28 FEBRUARY 2018

INGMAR TAYLOR SC
AND
KELLIE EDWARDS

Greenway Chambers
Level 10, 99 Elizabeth Street
Sydney NSW 2000
DX 165 Sydney
T | 02 9151 2999

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1. This paper addresses three key issues:

    a. the need for workplace policies and/or procedures by reference to how (if at all) liability is created by statute, case law, or under contract;

    b. the proper content of policies and/or procedures and the extent to which they are informed by the nature of the business;

    c. how to make sure the walk fits the talk, including what happens when the walk is different from the talk and some discussion about the function of investigations;

    By reference to the three main subject areas requiring policies in the workplace, being:

    d. Work health and safety;

    e. Discrimination; and

    f. General employment matters, such as bullying and domestic violence.

2. We address each of these below.

NEED FOR POLICIES AND/OR PROCEDURES

3. There is a difference between the two terms ‘policy’ and ‘procedure’.

4. A policy is:

    Noun (*plural* **policies**)

1. a definite course of action adopted as expedient or from other considerations: a business policy.

2. a course or line of action adopted and pursued by a government, ruler, political party, or the like: the foreign policy of a country.

3. action or procedure conforming to, or considered with reference to, prudence or expediency: it was good policy to consent.

4. prudence, practical wisdom, or expediency.

5. sagacity; shrewdness.

6. rare government; polity.[1]

5. A procedure is:

Noun

1. the act or manner of proceeding in any action or process; conduct.

2. a particular course or mode of action.

3. mode of conducting legal, parliamentary, or other business, especially litigation and judicial proceedings.

4. Also, **medical procedure**. a surgical operation or other medical technique performed on part of the body for a diagnostic or therapeutic purpose. [2]

6. Certainly, there has been some merging in the modern use of the word 'policy' to mean something closer to 'procedure', but there is a difference between the two that is important to keep in mind in the context of the three main subject areas. In general, policies are broader and more general than procedures, whereas procedures are usually more precise. Policies tend to be broad statements of intention (e.g. to provide procedural fairness), whereas procedures can tend to be concrete and prescriptive (e.g. who will do what and in what timeframe). The latter is particularly useful for dealing with situations where prescription is key to ensuring compliance with statutory obligations (e.g. the use of Material Data Safety Sheets in the context of work health and safety legislation).

7. In the main, legislation concerning the three areas does not expressly require organisations to have policies and procedures. However, it is clear from the nature of the obligations contained in the legislation and/or the case law that they are seen as crucial to compliance with the law and a failure to have such policies and procedures can be considered evidence of breach and/or failure to make out a defence.

8. For lawyers, it is important to note that Rule 41.1 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (set out below)[3] creates a significant impetus

[1] From the online Macquarie Dictionary at https://www.macquariedictionary.com.au/features/word/search/?word=policy&search_word_type=Dictionary.
[2] From the online Macquarie Dictionary at https://www.macquariedictionary.com.au/features/word/search/?word=procedure&search_word_type=Dictionary.
[3] Noting the Barrister rule at 123 is in substantially the same terms.

to ensure that they have clear policies and procedures properly implemented in their own workplaces to minimise the risk of complaints relating to breaches of the rules that could result in a finding of unsatisfactory conduct or professional misconduct complaints.

> 42.1 A solicitor must not in the course of practice, engage in conduct, which constitutes:
>
> 42.1.1 discrimination,
>
> 42.1.2 sexual harassment, or
>
> 42.1.3 workplace bullying.

9. Finally, it is important to acknowledge that policies and procedures play a role not just in preventing breaches of the law but increasing productivity[4].

WORK HEALTH AND SAFETY

10. Every person (most commonly a corporation) conducting a business or undertaking in NSW (a **PCBU** in the parlance of the legislation) has a broad statutory obligation to ensure the health and safety of workers it engages and workers whose activities it influences or directs: *Work Health and Safety Act 2011* (NSW) (**WHS Act**).[5] The obligation extends to ensuring the health and safety as far as reasonably practicable of visitors and volunteers present where the business or undertaking is taking place. A failure to comply with the duty is a criminal offence. Serious breaches that give rise to a risk of serious injury or death carry a maximum penalty of $1.5m for a corporation.[6]

11. The WHS Act does not specify precisely how the duty is to be complied with. For example, there is no explicit express statutory obligation that every PCBU must have one or more policies that deal with health and safety. However given the duty is to ensure health and safety *so far as reasonably practicable*, a failure to have policies and procedures in place that address health and safety issues that arise in that business or undertaking may demonstrate, or assist in demonstrating, that there was a failure to take reasonably practicable steps to address a risk.

12. The nature and extent of the policies and procedures required depends on the nature of the business or undertaking. So much is clear from s18 of the WHS Act which defines what is '*reasonably practicable*':

> **What is *reasonably practicable* in ensuring health and safety**
>
> In this Act, ***reasonably practicable***, in relation to a duty to ensure health and safety, 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:

[4] Some of which is set out below in relation to the historical development of the bullying jurisdiction.
[5] See particularly the duties in sections 19-26 of the WHS Act.
[6] Section 32 of the WHS Act.

(a) he 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.

13. It follows that every PCBU has an obligation to assess hazards or risks and consider ways to address such hazards or risks. Implicitly the definition requires all PCBUs to adopt a policy which mandates at the least that: (a) before new tasks are undertaken a risk assessment is undertaken, and states (b) that to the extent risks are identified appropriate procedures to remove or reduce those risks need to be developed and communicated.

14. The WHS Act also places a duty on "*officers"* of a PCBU to exercise "*due diligence*" to ensure the PCBU complies with its duty to ensure health and safety as far as is reasonably practicable. A failure to comply with that duty is a criminal offence, and in the most serious of cases carries a maximum penalty of 5 years jail. "*Officer*" bears the same meaning as that expression in the *Corporations Act 2001* (Cth) and extends beyond company directors to include those senior managers who make, or participate in making, decisions that affect the whole, or a substantial part, of the business of the entity.

15. The obligation on officers to exercise *due diligence* requires them to take reasonable steps to ensure that the PCBU is conducting the business or undertaking in a manner that complies with its duty to ensure health and safety so far as reasonably practicable. The obligation includes, but not limited to the following.

a. Having up-to-date knowledge of WHS matters, which might be understood to mean:

i. acquiring up-to-date knowledge of the WHS Act, regulations and codes of practice;

ii. investigating current industry issues through conferences, seminars, information and awareness sessions, industry groups, newsletters;

iii. acquiring up-to-date knowledge of work health and safety management principles and practices;

iv. ensuring that work health and safety matters are considered at each corporation, club or association board meeting;

v. having an understanding of the business or undertaking and generally of the hazards and risks associated with it including:

1. developing a plan of the operation that identifies hazards in core activities,

2. ensuring that information is readily available to other officers and workers about procedures to ensure the safety of specific operations that pose health and safety risks in the workplace and

3. continuously improving the safety management system;

b. Ensuring the business has (and uses) appropriate resources and processes to eliminate or minimise safety risks from the work carried out, which may involve:

i. establishing and maintaining safe methods of work;

ii. implementing a safety management system;

iii. recruiting personnel with appropriate skills, including safety personnel;

iv. ensuring staffing levels are adequate for safety in operations;

v. giving safety personnel access to decision makers for urgent issues; and

vi. maintaining and upgrading infrastructure.

c. Ensuring that the business has appropriate processes to receive information about incidents, hazards and risks and responding in a timely manner to that information, which may involve:

i. employing a risk management process;

ii. having efficient, timely reporting systems;

iii. empowering workers to cease unsafe work and request better resources;

iv. establishing processes for considering/ responding to information about incidents, hazards and risks in a timely fashion; and

v. measuring against positive performance indicators to identify deficiencies (e.g. a percentage of issues actioned within agreed timeframe).

d. Ensuring the business has and implements processes to comply with any duty or obligation under WHS laws. These can include:

i. reporting notifiable incidents;

ii. **consulting** with workers;

iii. ensuring compliance with notices

iv. providing training and instruction to workers about WHS;

v. ensuring that **health and safety representatives** receive their entitlements to training

vi. undertaking a legal compliance audit of policies, procedures and practices; and

vii. testing policies, procedures and practices to verify compliance with safety management planning

e. Verifying the provision and use of the resources mentioned in steps a to d.

16. The above list and the examples demonstrate that for many businesses, and certainly larger businesses, there will be a need to have a suite of policies and procedures that ensure that there are appropriate processes in place to ensure that the officers have met their duty.

Drug and alcohol policies[7]

Introduction

17. Increasingly employers are introducing random drug testing using on-site testing devices. There are two primary testing modalities: testing a urine sample and testing a saliva (oral fluid) sample.

18. There is general agreement amongst unions, employees and employers that in industries that use heavy machinery it is appropriate, if not necessary, to implement a random drug-testing regime to identify workers who may create a risk to health and safety because of drug use. The dispute is not about whether to *have* a testing regime, but over *what modality* of testing to adopt.

19. Unions and employees usually prefer oral fluid testing. It is less personally intrusive to collect, and it is less likely to pick up drug use outside of work. The latter is a particular concern if the policy provides that an initial positive result ('non-negative' in the language of the drug-testers) will result in the employee being stood down and can lead to disciplinary action including potentially the loss of employment (as occurred in the *ferry master* case we discuss below).

[7] This section of the paper draws upon a paper titled 'Spit or piss – can employer's insist on urine over saliva testing?' written by Ingmar Taylor and Bilal Rauf of State Chambers for the NSW Industrial Relations Society Annual Conference in Leura on 23 May 2015 which they subsequently updated in light of further authority and re-presented with the title '*Drug Testing in the Workplace – A Storm in a Pee-Cup*' to the NSW Law Society on 13 October 2015.

20. Employers usually prefer urine testing. While it can fail to pick up very recent cannabis use, it is considered more likely to identify drug use and so more likely to identify those who might be impaired at work. Further, because it is more likely to identify drug use out of work it is considered more likely to deter employees from taking drugs that could affect them at work.

21. In many cases the employer can choose the modality of testing without being at risk of a tribunal finding that the method selected is not appropriate. Ordinarily an employer's direction to take a drug test pursuant to an established policy would be considered a reasonable direction, regardless of the modality.[8] However, where there is an enterprise agreement that provides the Fair Work Commission with a power to arbitrate disputes arising in the workplace, the Commission can determine whether a proposed policy that is in dispute is 'unjust or unreasonable'.[9] In the exercise of that power the Commission has both upheld[10] and rejected[11] union applications to prefer on-site oral fluid testing over urine-based testing.

Need for drug and alcohol policies

22. The impetus to introduce drug testing arises from health and safety obligations, discussed above.

23. The need to introduce drug testing in some industries is almost self-evident, while in others it is arguably unnecessary. As Commissioner Cambridge said in his recent decision in *Construction, Forestry, Mining and Energy Union v Port Kembla Coal Terminal Limited* [2015] FWC 2384, (at [57]):

> " … it would seem to be largely unnecessary to implement a workplace drug testing regime in the case of a call-centre. On the other hand, heavy and transport industries obviously require workplace drug testing."

DISCRIMINATION

24. There is no express requirement for organisations to adopt policies and procedures giving effect to the relevant legislation in this area. Indeed, where it has been argued that an organisation ought to have adopted model policies promulgated by the AHRC that has not been adopted by the Courts[12]. However, the nature of the defences available to employers to defend claims, means having a policy is a good first step towards proving that defence.

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[8] *Briggs v AWH Pty Ltd* [2013] FWCFB 3316 at [8].
[9] The test of 'unjust or unreasonable' comes from *Australasian Federated Union of Locomotive Enginemen v State Rail Authority of NSW* (1984) 295 CAR 188 (usually referred to as the *XPT case*).
[10] *Endeavour Energy v CEPU* [2012] FWA 1809 (Upheld by Full Bench on appeal in [2012] FWAFB 4998; *MUA v DP World Brisbane* [2013] FWC 2394 (overturned on appeal [2014] FWCB 7889, but for reasons that were not related to whether urine testing was unjust or unreasonable).
[11] *CFMEU v HWE Mining Pty Ltd* [2011] FWA 8288; *Holcim (Australia) Pty Limited v Transport Workers' Union of New South Wales* [2010] NSWIRComm 1068*;* See too *Construction, Forestry, Mining and Energy Union v Port Kembla Coal Terminal Limited* [2015] FWC 2384 discussed in this paper.
[12] See *Johanson v Michael Blackledge Meats* (2001) 163 FLR 58.

25. There are two different tests for the defence at both state and Federal levels, requiring an employer to prove they:

    a. Took "*all reasonable steps*" to prevent a contravention of the relevant Act[13], or

    b. "took reasonable precautions and exercised due diligence to avoid the conduct"[14].

26. In relation to "all reasonable steps" it is well-established that not having a policy is likely to create problems for an employer seeking to rely upon the defence. In *Caton v Richmond Club Limited* [2003] NSWADT 202 ("*Caton*"), the ADT stated,

> 'It is not enough to wait for a complaint before appropriate action needs to be taken by managers/employers. An employer's obligation to prevent discrimination, harassment and victimisation does not begin at the time that a formal complaint is made...' [15]

27. In some cases, the failure to have a complaints handling policy may be seen as particularly problematic because employees do not know how to go about making a complaint[16], nor about what protections the company or legislation affords them. In particular, the anti-victimisation provisions (in both state and federal legislation) play a crucial role in supporting people to make complaints. Further, it is a truism for those who practice in the area, that the sooner a complaint is made, the better it is (assuming complaints are properly addressed) for both the organisation and the individual.

28. So, while such cases make it clear that a policy is not required, the kinds of things that have been held to allow this defence (including making it clear to staff that discrimination will not be tolerated and could result in disciplinary action, taking timely action in relation to all complaints etc.) require thought and a clear understanding of the tests for discrimination. Trying to undertake that kind of task in a high-pressure situation of a serious complaint is not conducive to doing so successfully. That is, it is preferable employers try to understand their obligations under the framework well prior to having to deal with any complaint.

GENERAL EMPLOYMENT MATTERS

Bullying/Adverse actions

Brief History

29. The impetus for a legislative approach to specifically address bullying in workplaces had its genesis in public discussions, which gained momentum in about 2006 when a young employee, Brodie Panlock, killed herself after being bullied at work. She had been subjected to continual physical and emotional abuse over significant period of

[13] As per ss: 53(3) of the Anti-Discrimination Act 1977 (NSW) ("NSW ADA"); 18A92) & 18E(2) of the *Racial Discrimination Act 1975 (Cth)* ("RDA"); 106(2) of the *Sex Discrimination Act 1984 (Cth) ("*SDA).
[14] As per ss: 57(2) of the ADA and s 123(2) of the DDA.
[15] *Caton*; [143].
[16] See for example *Asnicar v Mondo Consulting Pty Ltd* [2004] NSW ADT 143.

time (as was disclosed in the later court case). As a result of that case, the Victorian Government enacted Brodie's Law[17], which made serious bullying a criminal offence and provided a maximum penalty of 10 years' imprisonment. Shortly thereafter, the Australian Government convened a Standing Committee on Education and Employment's inquiring into bullying in Australian workplaces[18]. That report was delivered in 2012.

30. When the Standing Committee on Education and Employment ("Standing Committee") released its report, it noted the *"ongoing, nation-wide harmonisation process of work health and safety legislation"*[19], which was the only significant legislation covering bullying in Australia at that time[20]. The Terms of Reference required the Committee to look at:

    a. the prevalence of workplace bullying in Australia;

    b. the role of workplace cultures in preventing and responding to bullying;

    c. the adequacy of existing education and support services to prevent and respond to workplace bullying;

    d. scope for increased co-operation between government, community and other stakeholders;

    e. identification of regulatory or administrative "gaps";

    f. strategies to prevent workplace bullying; and

    g. strategies to evaluate the workplace bullying.[21]

31. The Standing Committee made a number of key recommendations including:

    a. The Commonwealth Government adopt a definition of bullying as being "repeated, unreasonable behaviour directed towards a worker or group of workers, that creates a risk to health and safety"[22];

    b. The Minister for Employment and Workplace Relations develop a trial mediation service for resolution of conflicts where there is a risk of bullying arising out of poor workplace behaviour, prioritizing small and medium enterprises, and where employers and workers jointly request use of the service in an effort to resolve the matter[23]; and

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[17] By extending the application of the stalking provisions in the *Crimes Act 1958 (Vic).*
[18] Kelly, C.: "Inquiry into workplace bullying "Report of the Standing Committee on Education and Employment" (2013) 26 AJLL 224-238.
[19] Standing Committee on Education and Employment, *Workplace Bullying: We Just Want it to Stop,* Parliament of the Commonwealth of Australia, October 2012, ix, Recommendation 1.
[20] Noting that both discrimination and harassment may also amount bullying albeit on a particular ground or attribute, such as race, sex, disability or age.
[21] Standing Committee on Education and Employment, *Workplace Bullying: We Just Want it to Stop,* Parliament of the Commonwealth of Australia, October 2012, xiii.
[22] Ibid ixx.
[23] Ibid Recommendation 13, xxii.

c. The Commonwealth Government implement arrangements that would allow an individual right of recourse for people who are targeted by workplace bullying to seek remedies through and adjudicative process[24].

32. The Standing Committee noted that

> Irrespective of form, mode, or context, bullying is characterised by an abuse of power, where vulnerable targets are 'pushed into positions from which they have no avenue of escape'. As such, bullying is part of a 'continuum of severity of the misuse of authority or actual power'. Importantly, the concept of a power imbalance is not limited to traditional worker-manager hierarchies.
>
> Bullying can be downwards (from superiors to subordinates), upwards (from subordinates to superiors) or horizontal (amongst co-workers**). Notions of power need to be viewed in a broad manner, rather than simple hierarchies**. Speaking specifically about upwards and horizontal bullying, Dr Sara Branch, a research fellow at Griffith University, observed:
>
> > The recognition of upwards and horizontal bullying emphasises that processes beyond formal power are at play and that bullying is not just conducted by managers. Power derived by a person's access to informal sources such as expertise and information can be used along with formal sources to gain sufficient power to bully others in the workplace.[25]

33. The Standing Committee set out data showing that 6.8% of Australian workers had been bullied at work in the six months prior to being surveyed, with 3.5 per cent experiencing bullying for longer than a six-month period, while noting submissions from the Productivity Commission indicated it could be over 15% during any six-month period[26].

34. What research there is on the prevalence of bullying in the legal profession in Australia, puts it at a much higher level than the general working community, ranging from around 20% of lawyers who have experienced bullying and some as high as 50% amongst female lawyers[27]. Mire and Owens address a number of factors said to contribute to the problem in the legal profession generally; as set out below.

a. Increased pressure on lawyers arising from the growth of large law firms ("commercialisation"), managerialism, expanding complexity of legal work and the nature of the services provided[28].

b. The perception that the problem arises from "a few bad apples" [29], thus treating bullying as a character flaw instead of a product of a system of work that may be problematic. They note,

> If a few bad apples were responsible, we would expect to see a limited number of cases emerging, as bad apples are, by their nature, anomalies. The existing evidence that bullying within the legal

[24] Ibid Recommendation 23, xxiv.
[25] Ibid 5-6 (citations omitted)
[26] Ibid 8-9 citing the Safe Work Australia, *Submission 74*, 14.
[27] Ibid 1036 and noting this is not limited to the last 6 months, as was the Standing Committee's Report.
[28] Ibid 1036 and 1047.
[29] Ibid 1039.

> profession is widespread suggests a systemic rather than isolated problem[30].

c. Judicial bullying, which creates an accepted context within which other bullying occurs in litigation[31].

d. The nature of the adversarial process itself may lead to greater acceptance of bullying type behaviour, along with the failure of senior lawyers not to sanction such behaviour as and when it occurs[32].

e. The normalisation of unreasonable expectations in some practice settings, including the requirement to be available at all hours on all days and noting the comments of a managing partner of Allens Arthur Robinson while describing why his firm had won a "best firm award" as follows:

> We don't run this place as a holiday camp. We expect our people to treat the client as if they were God and to put themselves out for clients. You don't say, 'Sorry I can't do it, I'm playing cricket on the weekend' ... You don't have a right to any free time[33].

f. The influence of organisational, or cultural structures in the profession, including billable hours, of contributing to structural inequities and systematic indirect discrimination.[34]

35. The above also illustrates how bullying conduct based on unreasonable expectations can become normalised in a profession.

36. The absence of a clear and agreed definition of bullying was highlighted as one of the difficulties in capturing accurate data about this extent of the problem in Australia[35]. Notwithstanding these difficulties, it was noted that the Productivity Commission had estimated that workplace bullying costs the Australian economy between $6 billion and $36 billion every year[36]. Those losses arose from[37]:

a. Reduced morale/disengagement;

b. Staff turnover/recruitment;

c. Sick leave and/or workers compensation claims;

d. Investigations;

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[30] Ibid 1039.
[31] Ibid 1140-1041.
[32] Ibid 1040.
[33] Ibid 1043.
[34] Ibid 1045-1046. Relating to working hours and family responsibilities.
[35] Ibid 9.
[36] Ibid 10, citing the Productivity Commission, *Benchmarking Business Regulation: Occupational Health and Safety*, March 2010.
[37] Ibid 10-12.

e. Legal action taken in relation to proceedings commenced because of bullying (including not just lawyers' fees but time taken to prepare evidence by employees); and

f. Reputational impact. The impact on employees is substantial and can be very serious, as Brodie's case demonstrates. The Standing Committee noted one submission in particular, where it was asserted that

> "one in two people who experience bullying also suffer an 'extreme version of stress-related complications including stomach ulcers, tachycardia, hair loss, dermatitis, panic attacks, [and] irritable bowel syndrome'" [38].

g. There is also medical research showing that bullying involving hostility harms not just the victim but (long term) the perpetrator.[39]

37. It was a result of this inquiry that the Fair Work Commission and the Fair Work Ombudsman were provided additional new roles and responsibilities and that changes were made to the Barrister and Solicitor Rules. Thus, there are now several different types of legislation covering bullying in Australia, including:

a. Criminal legislation in Victoria ("Brodie's Law", as set out above);

b. Workplace legislation under Part 6-4B of the FWA[40]; and

c. The Solicitor and Barrister Rules under the Legal Profession.

38. None of that legislation expressly requires policies and procedures, but the only way to manage the rights and responsibilities of the obligations contained therein is to ensure they are integrated with all human (and other) resource management practices, including policies and procedures.

Overview of Part 6-4B of the FWA

39. "Bullying" is defined in the FWA at section 789FD(1) as:

> When is a worker bullied at work?
>
> (1) A worker is bullied at work if:

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[38] Ibid at pages 13 citing Ms Grow, DTC, *Committee Hansard*, Canberra, 13 September 2012, p. 2.

[39] Not mentioned by the Standing committee - see Smith, T. W. & Allred, K, D.; "Blood Pressure Responses During Social Interaction in High and Low Cynically Hostile Males" (1989) 12 *Journal of Behavioral Medicine* 135 in which they discuss research linking behaviours including hostility, anger-proneness, resentment and mistrust to coronary artery disease

[40] Noting that prior to specific legislation being inserted into the FWA in relation to bullying, such conduct was, and remains, covered by work health and safety legislation.
See for example: *Inspector Gregory Maddaford v Graham Gerard Coleman* [2004] NSWIRComm 317 (3 November 2004) and example of bullying conduct against a 16-year-old labourer. WorkCover Authority of NSW prosecuted the company and two of its directors under the then sections 8 and 26 of the *Occupational Health and Safety Act 2000* (NSW) ("OHS Act"). The case went on appeal with the penalties awarded as against two of the individuals being increased from $1,000.00 to $9,000.00 and $12,000.00. The company was ordered to pay $24,000.00.

(a) while the worker is at work in a constitutionally-covered business:

(i) an individual; or

(ii) a group of individuals;

repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and

(b) that behaviour creates a risk to health and safety.

(2) To avoid doubt, subsection (1) does not apply to reasonable management action carried out in a reasonable manner.

(3) If a person conducts a business or undertaking (within the meaning of the Work Health and Safety Act 2011) and either:

(a) the person is:

(i) a constitutional corporation; or

(ii) the Commonwealth; or

(iii) a Commonwealth authority; or

(iv) a body corporate incorporated in a Territory; or

(b) the business or undertaking is conducted principally in a Territory or Commonwealth place;

then the business or undertaking is a constitutionally-covered business .

40. The legislation applies only to constitutionally covered businesses. That means it does not apply to unincorporated sole traders, (such as, for example, barristers, although it would apply to chambers' service company staff). It also does not apply to New South Wales public servants and local government employees[41]. It also does not apply to reasonable management action carried out in a reasonable manner.

41. In general, these provisions provide the means for a person who 'reasonably believes' they have been 'bullied at work' to apply to the FWC for an order to prevent continued bullying (or "anti-bullying orders")[42]. Section 789FE of the FWA requires the FWC to "start to deal" with applications promptly and within 14 days after the application is made. The FWC has the power to make orders stopping or preventing further bullying where it is satisfied that the applicant has been 'bullied at work' and that 'there is a risk that the worker will continue to be bullied'[43]. However, there is no jurisdiction to make such orders if there is no prospect of the bullying continuing either because the applicant has left the workplace, or the circumstances are such that no risk of bullying arises. The FWC will therefore dismiss the application if there is 'no reasonable prospect of success'[44]. If an order is made, breach of that order may result in civil

[41] *AB* [2014] FWC 6723 (Unreported, Commissioner Hampton, 30 September 2014).
[42] Section 789FC of the FWA.
[43] Section 789FF(1) of the FWA.
[44] *Obatoki v Mallee Track Health & Community Services* [2014] FWC 8828 (Unreported, Deputy President

penalties.[45] There is no power under these provisions to award damages or reinstatement, unless the claim may also be argued to be an unfair dismissal or adverse action claim.

42. In considering the terms of any order FWC must take into account:

    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.

43. In one of the first cases under the new provisions, Fair Work Commissioner Hampton considered the kinds of conduct that might amount to "bullying" within the definition set out in section 789FD(1)[46] and held as follows.

    a. In relation to the concept of individuals repeatedly behaving unreasonably, there is no specific number of incidents required – as long as there is more than one occurrence of unreasonable behaviour. The same specific behaviour does not have to be repeated, there may be a range of behaviours over time.

    b. The assessment of whether behaviour is unreasonable is objective, having regard to all the relevant circumstances applying at the time.

    c. Because the unreasonable behaviour must also create a risk to health and safety, there must be a causal link between the behaviour and the risk to health and safety. Although the behaviour does not have to be the only cause, it must be a substantial cause of the risk.

    d. A risk to health and safety is not confined to actual danger, but is satisfied by the mere possibility of danger to health and safety. However, the risk must be real and not simply conceptual

44. Commissioner Hampton also considered what might amount to reasonable management action, providing some guidance in this area as set out below.

Kovacic, 5 December 2014); *Re PK* [2015] FWC 562 (Unreported, Commissioner Hampton, 11 February
2015); *Jackson* [2015] FWC 402 (Unreported, Senior Deputy President Hamberger, 15 January 2015).

[45] As per section 789FG with the civil remedy provisions in Part 4-1 of the FWA.

[46] *Ms SB* [2014] FWC 2104 (12 May 2014) ("Ms SB").

a. The provision is not so much an “exclusion” from the definition of bullying, “but a qualification which reinforces that bullying conduct must of itself be unreasonable”.[47]

b. “Determining whether management action is reasonable requires an objective assessment in the context of the circumstances and knowledge of those involved at the time.”[48]

c. The consequences that flow from the management action taken, and the emotional state and psychological health of the worker involved, may be relevant.

d. The test is whether management action was reasonable, not whether it could have been undertaken in a manner that was more reasonable; nor whether the applicant perceived it to be unreasonable.

e. Management actions do not need to be perfect or ideal to be considered reasonable. However, they do need to be lawful and rational.

f. A course of action may be reasonable, even if particular steps are not.

45. In *Sharon Bowker*[49], the FWC considered the limits of the phrase “at work” and held that:

a. “[T]he 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 permitted by their employer… (such as being on a meal break or accessing social media while performing work)”; and

b. Being "at work" is not limited to the confines of a physical workplace, a worker will be "at work" at any time the worker performs work, regardless of his or her location or the time of day.

46. This is similar to the position under discrimination law (discussed below) and is an important factor to cover in any policies and procedures.

47. The FWC has made findings that:

a. Conduct including the following will amount to bullying:

i. belittling conduct,

ii. swearing, yelling and use of otherwise inappropriate language,

iii. daily interfering and undermining the applicants' work,

[47] *Ms SB* paragraph [47].
[48] *Ms SB* paragraph [49].
[49] *Sharon Bowker; Annette Coombe; Stephen Zwarts v DP World Melbourne Limited T/A DP World; Maritime Union of Australia, Victoria Branch and Others* [2014] FWCFB 9227.

iv. physical intimidation and slamming of objects on the applicants' desks,

v. attempts to incite the applicants to victimise other staff members and

vi. threats of violence;[50]

b. Deleting an employee as a friend on Facebook (along with other bullying behaviour) amounted to bullying;[51]

c. An isolated death threat was not bullying, but repeated staring, gossip (amounting to "*spreading misinformation or ill-will against others*") and that telling people to "*get fucked*" would be inconsistent with "*normal social interaction in the workplace*" and fell within the definition of bullying, if repeated was likely to be bullying;[52] and

d. A single altercation will not amount to bullying, although it may give rise to an adverse action.[53]

48. All of the above could be used as examples to illustrate bullying in a policy.

49. The types of orders that have been made include:

a. That the bully not have contact with the applicant alone;[54]

b. That the bully not comment on the applicant's clothes or appearance;[55]

c. That the bully not send any emails or texts to the applicant, except in an emergency;[56]

d. That the bully not to raise any work issues with the applicant without notifying the COO of the employer, or his subordinate, beforehand;[57]

e. That the employer "establish and implement appropriate anti-bullying policies, procedures and training, to (amongst other things) confirm appropriate future conduct and behaviour"; [58] and

f. Clarification of reporting arrangements.[59]

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[50] *CF v Company A* [2015] FWC 5272.
[51] *Mrs Rachel Roberts v VIEW Launceston Pty Ltd as a trustee for the VIEW Launceston Unit Trust T/A View Launceston; Ms Lisa Bird; Mr James Bird* [2015] FWC 6556 (23/09/2015).
[52] *Page* [2015] FWC 5955 (9 September 2015).
[53] *Harpreet Singh* [2015] FWC 5850 (28 August 2015).
[54] *Applicant v Respondent* (unreported, Fair Work Commission, SDP Drake, 10 September 2014).
[55] Ibid.
[56] Ibid.
[57] Ibid.
[58] *CF v Company A* [2015] FWC 5272.
[59] *CF v Company A* [2015] FWC 5272.

50. Parties may also apply for removal of the orders where they have had the desired effect.[60]

51. While a number of these matters have involved determinations where the parties are not identified (using the power to make confidentiality orders under s 593(3) and s594 of the FWA), this is not to be expected. As was noted by Commissioner Lewin in *Justin Corfield* [2014] FWC 4887 (21 July 2014), *"mere embarrassment, distress or damage" was not sufficient to displace "the presumption in favour of the open administration of justice".*

Incorporation of Bullying and/or Discrimination Policies into Contracts - Nikolich[61]

52. As discussed below workplace policies may be incorporated into contracts of employment by express words or by implication. While the FWA does not provide a remedy for bullying in the form of damages, conduct that breaches a policy intended to address bullying which has been incorporated into a contract of employment may give rise to a claim in damages for breach of contract. Indeed, that occurred in respect of Mr Nikolich's claim for breach of contract, which is discussed further below.

Domestic Violence

53. The Australian Law Reform Commission report on Family Violence and Commonwealth Laws – Improving Legal Frameworks published in November 2010 included the following conclusion:

> "Family violence is not simply a private or individual issue, but rather a systematic one arising from wider social, economic and cultural factors. Accordingly, effective measures to address family violence need to operate in both the private and public spheres."

54. The Victorian Royal Commission into Family Violence completed its report in March 2016. It stated that the establishment of the Royal Commission was "an acknowledgement of the seriousness with which the Victorian community has come to regard family violence and its consequences for individuals and families—it reflects our growing awareness of its scale, a recognition that existing policy responses have been insufficient to reduce the prevalence and severity of the violence, and the priority the community is prepared to accord it in order to address the problem".

55. Amongst other matters the Royal Commission report considered the role that workplaces can have in addressing the issues of family violence. It stated:

> Workplaces reflect the breadth and diversity of the community and offer an important opportunity to reach people who are affected by family violence, to provide support for them, and to help them take steps to secure their safety. They are also important sites for preventing and responding to family violence because the effects of violence reach into workplaces and because attitudes

[60] *Applicant* (2014) FWC 9184.
[61] *Nikolich v Goldman Sachs J B Were Services Pty Ltd* [2006] FCA 784 (23 June 2006) ("*Nikolich*").

> and cultures that prevail in workplaces can influence the level to which violence against women is supported or condoned.

56. The Royal Commission supported the introduction of workplace-based initiatives to prevent and respond to family violence:

> … including through the introduction in some workplaces of an entitlement to paid family violence leave and programs to help individual staff and managers recognise and respond to the signs that an employee might be experiencing violence at home. Such programs also offer an opportunity to build a respectful and gender-equitable workplace culture.

57. The Royal Commission recommended that the Victorian Government support moves to introduce a mandated entitlement to family violence leave in workplace relations laws and investigate options for using regulatory frameworks, such as those relating to occupational health and safety and equal opportunity, to support all Victorian employers in implementing best-practice family violence policies.

58. On 3 July 2017 Deputy President Gooley and Commissioner Spencer of the Fair Work Commission handed down a decision on a ACTU claim to include in all modern awards an entitlement to take paid family and domestic violence leave: [2017] FWCFB 3494. The Commission accepted that "family and domestic violence is a workplace issue which requires a workplace response"[62] and that the evidence established that "the circumstances faced by employees who experience family and domestic violence require a special response".[63] The Commission rejected the application for ten days paid leave, but the two Commission members expressed a preliminary view that there was a need for a "protective unpaid provision".[64]

59. Following that decision the Commission reconstituted the bench, with Ross J, President, now presiding, to hear further from the parties and to determine whether and in what form a model award term ought be settled upon permitting unpaid domestic and family violence leave.

60. On 13, 19 and 20 October 2017 the Commission constituted a conference of the parties to discuss the concept of a model term and progress was made towards a measure of agreement in relation to some aspects of a draft model unpaid family and domestic leave term.[65] In the event that the Full Bench adhered to the preliminary view expressed in the majority decision and determined that there should be a model unpaid family and domestic violence leave term then the conference parties proposed a particular model term (the terms of which are set out later in this paper when consider the content of policies that deal with domestic violence). All parties acknowledged that the proposed model term represented a significant compromise from their respective preferred positions. The model term attached included matters both agreed and not agreed. The agreed matters included:

    a. Definitions of 'family and domestic violence' and 'family';

[62] At [48].
[63] At [51].
[64] At [59].
[65] Statement [2017] FWC 5445.

b. The form of words to express when leave may be taken;

c. Notice requirements; and

d. Confidentiality requirements.

61. Not agreed were a number of matters concerning the extent of the entitlement, including whether the entitlement arises on each occasion of violence, or is an entitlement that to a quantum of leave per annum, and what is that entitlement, and whether the entitlement accrues year to year.

62. Since then both the Greens and the Labor Party at a federal level have announced an intention to amend the Fair Work Act to introduce 10 days of paid family and domestic violence leave. On 5 February 2018 the Greens introduced a Bill to Parliament to give effect to its policy.[66]

DETERMINING THE CONTENT OF POLICIES

63. Policies and procedures must be part of a plan to manage workplace risks overall. In order to ensure policies and procedures are most effective, organisations must first:

a. Identify the risks (which should include an audit of the workplace);

b. Assess the nature and extent of the risks and determine the likelihood (probability), severity and the appropriateness of control measures (both actual and possible); and

c. Determine what steps can and should be taken to control the risks.

64. As is apparent from this list, there cannot be a 'one size fits all' approach. The policies and procedures appropriate to a small business will be different from a larger business and the nature of the work will have a fundamental impact on content with, for example, white-collar work being very difference from blue-collar workplaces.

65. Policies and procedures fall into the last category (i.e. steps to be taken), which must also include strategies to train staff to know and use the policies and procedures. Policies and procedures for these matters should be incorporated into any disciplinary procedures and they ought also be subject to regular review. This is particularly so, given legislation in this area is often subject to change, but it also the cases that policies and procedures need to change with the needs of each organisation.

66. Good policies and procedures will provide clarity and certainty to those using them about what to expect if they are faced with a workplace issue. In particular, they will provide clear:

a. definitions of key terms consistent with relevant legislation; and

[66] *Fair Work Amendment (Improving National Employment Standards) Bill*.

b. guidance as to both individuals and the organisations as to what to expect from the other and options for resolving issues as they arise.

67. Having said that, they ought be flexible enough to allow methods of resolution to be tailored particular situations.

68. Finally, organisations ought also consider whether the obligations contained in policies and procedures, should form some part of employee's contracts of employment (noting the seniority of individual employees and the position will impact the nature and extent of the term).

69. Care needs to be taken in drafting procedures that address matters involving grievance handling and the investigation of workplace complaints to ensure that they are either not contractually binding and/or to ensure they are not drafted in highly prescriptive manner but allow flexibility to be altered to fit the needs of a particular case. If this is not done it opens up the potential for a recalcitrant alleged perpetrator to refuse to accept an outcome or even participate in the process due to an asserted contractual right to require the detailed procedure to be applied. The more detailed a procedure is, the more likely that a business will not comply with some aspect of it and by so doing open up the potential for arguments that it cannot enforce the outcome.

Work Health and Safety

70. Earlier it was noted that in order to comply with the statutory duty in the WHS Act to ensure health and safety so far as is reasonably practicable prudent businesses will have policies that require assessment of risks and develop procedures to ensure that those risks are addressed.

71. For certain specific types of high risk work there is a statutory obligation to have a particular type of procedure, known as a safe work method statement. The *Work Health and Safety Regulation 2011* requires safe work method statements to be developed in respect of:

a. Electrical work on energised electrical equipment;[67] and

b. "High risk construction work".[68]

72. High-risk construction work is defined[69] to mean construction work of particular types, including work that involves a risk of a person falling more than 2 metres and at a workplace where in which there is any movement of powered mobile plant.

73. SafeWork NSW, the NSW regulator, has published Codes of Practice in respect of various types of high-risk work.

74. Codes of Practice are statutorily recognised guides to be used by businesses. They do not replace the general duties created by the WHS Act, such that mere compliance

[67] Clause 161.
[68] Clauses 299 and 302.
[69] In clause 291.

with them will not necessarily be sufficient. The Act does not mandate that they must be followed, however SafeWork NSW Inspectors will refer to Codes of Practice when issuing improvement or prohibition notices. Further, a Code of Practice is admissible in court proceedings and may be relied upon by the Court as evidence of what is known about a hazard, risk or control, and to determine what is reasonably practicable. There are a large number of Codes available on the SafeWork NSW website dealing with such matters as:

a. Confined spaces;

b. Construction work;

c. Demolition work;

d. First aid in the workplace;

e. Hazardous manual tasks; and

f. Managing electrical risks in the workplace;

75. One Code of Practice is of particular use in the context of this paper. Titled *How to manage work health and safety risks* it provides a template for a policy on dealing with health and safety risks, including:

Discrimination

76. Both the Anti-Discrimination Board of NSW ("ADB)[70] and the AHRC[71] provide some excellent guidance on what ought be included in policies, as well as how to avoid discrimination[72] and harassment[73] in the workplace. The ADB in particular provides some model policies, which may be modified depending to meet the needs of each particular business.

77. Good policies will:

a. ensure there are clear definitions of relevant terms, including:

i. the grounds of discrimination (i.e. age, disability, race and sex as well as all subcategories thereof),

ii. the definitions of discrimination, harassment, vilification and victimisation and

iii. the areas in which such conduct is prohibited; and

[70] See at <http://www.antidiscrimination.justice.nsw.gov.au/Pages/adb1_publications/sample.aspx>.
[71] https://www.humanrights.gov.au/quick-guide/12076.
[72] See "Tookits, guidelines and other resources", document by AHRC at <https://www.humanrights.gov.au/employers/toolkits-guidelines-and-other-resources>.
[73] See "Effectively preventing and responding to sexual harassment: A Code of Practice for Employers 2008", document by AHRC at < http://www.humanrights.gov.au/our-work/sex-discrimination/publications/effectively-preventing-and-responding-sexual-harassment-0>.

b. ensure the rights and responsibilities of employees, their managers and the organisation are set out including how to make complaints and what might be done to resolve complaints;

c. provide guidance as to where additional material of assistance may be found; and

d. that state discrimination laws are also covered.

78. In relation to the latter, it is often the case that state laws provide additional grounds (such as religious freedoms covered in Queensland[74] but not New South Wales), or more favourable grounds of discrimination (such as "physical features" or "political belief or activity"[75]).

General Employment Matters

Bullying/Adverse actions

79. SafeWork Australia similarly provides some useful online materials aimed at assisting employers to satisfy their obligations under bullying legislation, including appropriate content to policies and procedures[76]

Domestic Violence

80. Guidance in respect of domestic violence policy terms can be found from a number of sources.

81. First, clauses dealing with domestic violence on a paid and unpaid basis can be found in a large number of enterprise agreements, which are available from the Fair Work Commission website.

82. Second, government at local, State and Federal level have policies that can be readily accessed on-line.

83. Third, many large employers have such policies. The Victorian Royal Commission into Family Violence heard evidence from employers who, through their association with the White Ribbon Foundation and other initiatives, have introduced family violence leave policies into their workplaces. Ms Katherine Paroz, Human Resources Advisor at Telstra Corporation, gave evidence that Telstra's family violence leave policy had received a very positive response in that organisation's workplace. She noted that, with 33,000 employees, Telstra thought it highly likely that some of its staff would be experiencing family violence. Accordingly, Telstra introduced a policy providing for 10 days of paid, dedicated family violence leave for permanent employees and 10 days of

[74] See "Guide for Preventing and Responding to Workplace Bullying May 2016" by Safe Work Australian at <https://www.safeworkaustralia.gov.au/system/files/documents/1702/guide-preventing-responding-workplace-bullying.pdf>.
[75] As per ss6(j) and 6(k) respectively of the *Equal Opportunity Act 2010 (Vic).*
[76] As per ss6(j) and 6(k) respectively of the *Equal Opportunity Act 2010 (Vic).*

unpaid family violence leave for casual employees in order to support staff and ensure that the business does not lose talented employees unnecessarily.

84. Evidence taken by the Fair Work Commission in the case brought by the ACTU for paid domestic violence leave included the following expert evidence:

> "The PWC estimate the cost to productivity may be high as to include higher leave rates (7-10 days) than have been found in practice. A survey conducted by the Gendered Violence Research Network (UNSW) in 2015 of 102 employees who had domestic violence clauses in their enterprise agreement found that the average paid domestic violence leave taken in the past 12 months was 43 hours, with a range of between 8-202 hours. Per incident, where time off was requested, most employees took two – three days or less off work. According to Telstra, the inclusion of 10 days paid domestic violence leave in their Enterprise Agreement 2015-2018 has not opened the floodgates as 22 out of a workforce of 32,000 have accessed leave in six months taking an average of 2.3 days."[77]

85. The White Ribbon Foundation has a workplace accreditation program, which it says has reached 600,000 employees nationally at a 145 workplaces. The program assesses workplace policies to see if they include clauses which:

a. define violence against women in all its forms;

b. encourage all employees to take appropriate action when an issue of violence occurs or is suspected;

c. set out the process for action when an issue of violence occurs or is suspected;

d. place violence against women in a broader context that recognises that violence occurs due to inequality in power relationships between men and women;

e. make clear why violence against women is a workplace issue, irrespective of where it occurs;

f. make clear the consequences for perpetrating violence, whether directed to women in the workplace or where workplace resources are used to perpetuate violence against women outside of work.

86. Examples of how that can be done include relevant provisions in:

a. Code of Conduct.

b. Procedures in the event of a breach of the Code of Conduct.

c. Bullying and Harassment Policy and Procedures.

d. Violence in the Workplace Policy.

e. Recruitment and Selection Process.

[77] *Re Family and Domestic Leave Clause* [2017] FWCFB 3494 at [64].

f. Diversity Policy.

g. Promotions Policy.

h. Pregnancy and/or Adoption Policy.

i. Entitlements that demonstrate commitment to equity and diversity

87. The Fair Work Commission is currently considering how to draft an entitlement to unpaid family and domestic violence leave. To that end it published a discussion paper on 15 September 2017.[78] The paper discusses a number of issues including:

a. The definition of 'family and domestic violence' (including whether it is necessary to have a definition);

b. Whether there is a need to identify the purpose for which the leave is taken, beyond that the employee seeks the leave as a result of such violence;

c. Who should be entitled to take the leave (including whether the perpetrator of the violence should be entitled to access the leave);

d. Whether casual employees should be entitled to access such leave;

e. Whether the entitlement should be capped in any year, and whether it should accrue from year to year;

f. How to deal with privacy concerns that arise given that an employee's experience of family violence is personal information, which the employee may be reluctant to disclose.

88. Following publication of that discussion paper and conferences with the parties which were described above the Commission published a model term containing agreed and not agree matters. While it did not contain settled content in respect of the extent of the entitlement, those matters that were agreed may be useful in drafting an appropriate policy. They were:

> **1. Definitions (Agreed)**
>
> Family and domestic violence means violent, threatening or other abusive behaviour by a family member of an employee that seeks to coerce or control the employee, and which causes them harm or to be fearful.
>
> Family member means:
>
> (a) A spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the employee;
>
> (b) A child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the employee;

[78] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am20151-paper-150917.pdf

(c) A person related to the employee according to Aboriginal or Torres Strait Islander kinship rules;

In this clause a spouse or de facto partner includes a former spouse or de facto partner.

3. Taking Unpaid Leave

An employee experiencing family or domestic violence may access unpaid leave if it is necessary to deal with the impact of the family and domestic violence and it is impractical for the employee to do so outside their ordinary hours of work.

Note 1: The entitlement to take unpaid leave only applies to an employee subjected to family and domestic violence.

Note 2: The reasons for which an employee may take leave include making arrangements for their safety or the safety of a family member (including relocation), attending urgent court hearings, or accessing police services.

4. Notice and evidence requirements

Notice

4.1 An employee must give their employer notice of the taking of leave under this clause by the employee.

4.2 The notice:

(a) must be given to the employer as soon as practicable (which may be a time after the leave has started); and

(b) must advise the employer of the period, or expected period, of the leave.

Evidence

4.3 An employee who has given their employer notice of the taking of leave under this clause must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken for a purpose specified in clause 3.

Note: Depending on the circumstances such evidence may include a document issued by the police service, a court or family violence support service, or a statutory declaration.

5. Confidentiality

5.1 Employers must take steps to ensure information concerning any notice given or evidence provided under clause 4 is treated confidentially, as far as it is reasonably practicable to do so.

5.2 Nothing in this clause prevents an employer from disclosing information provided by an employee if the disclosure is required by an Australian law or is necessary to protect the life, health or safety of the employee or another person.

Note: Information concerning an employee's experience of family and domestic violence is sensitive and if mishandled can have adverse consequences for the

employee. Employers should consult with such employees regarding the handling of this information.

6. Compliance

An employee is not entitled to take leave under this clause unless the employee complies with this clause.

89. Another source of information when drafting an appropriate policy is the Bill introduced by the Greens to amend the Fair Work Act to provide a right to paid and unpaid domestic and family violence leave.[79] Amongst other matters it would seek to specify a series of *eligible family and domestic violence leave activities* for which 10 days paid leave could be taken per year, namely:

a. receiving counselling or otherwise attending an appointment with a person who provides support to survivors of family or domestic violence;

b. receiving medical attention;

c. receiving legal advice;

d. attending legal proceedings;

e. relocating or making other safety arrangements;

f. any other activity associated with an experience of family or domestic violence.

90. In addition the Bill contains a potential right to take up to 2 days unpaid leave without being referable to such an activity on each occasion when an employee experiences family or domestic violence.

WHAT CASE LAW SAYS ABOUT POLICIES AND PROCEDURES – THE DISCONNECT BETWEEN PEOPLE AND POLICIES

91. There are two main ways in which employers incur liability relevant to policies and procedures, being where there are discrepancies between:

a. The policy/procedures and the law; and/or

b. What the policies/procedures say and whether they are followed in practice.

92. Below, we set out some of the relevant case law addressing the above matters.

Work Health and Safety

93. Work health and safety prosecutions invariably arise from a risk that gave rise to a serious injury or death.

[79] *Fair Work Amendment (Improving National Employment Standards) Bill*.

94. In almost every proven case there was either a failure to identify a risk, or the risk had been identified and addressed on paper but the policy or procedure had not been brought to the attention of the workers.

95. It can be accepted as a general proposition that policies will be of limited utility if they are not known to the workforce. That is certainly the case in respect of safe work policies and procedures. It is not good enough to have a folder of policies and procedures. They must be communicated by instruction and training, by daily tool-box talks that address particular risks or changes to the nature of the work, and by supervision to ensure that the workforce is in fact complying with them.

96. The facts of *Attorney-General (NSW) v Tho Services* (2016) 264 IR 171 provides a stark example of the need to relay safe work procedures. Alex Thomas, a 15-year-old year 10 high school student, undertook a day of work experience at Tho Services. He was assigned to undertake welding tasks. He was given safety equipment, including a welding mask. However he was not instructed that he must have the visor of the welding mask down at all times when welding. He was initially shown how to do the work and was observed doing it safely with the visor down. The welding mask in question did not automatically lighten when not welding and was sufficiently dark that he could not see through it when not welding. For that reason the boy had lifted the visor up and continued to weld with it up until an afternoon shift worker noticed it and stopped him. He had by that time welded for much of the day with the visor up, causing serious permanent eye damage.

97. The primary failure by the business was a failure to provide the boy with any information, instruction or demonstration in how to use the welding helmet provided, or inform him of the risk to his eyes if he did not follow the instruction. The business had induction training, including visitor induction, but had not provided it to the boy. That in turn was due to a failure by the business to instruct or train the relevant supervisor on steps required to induct and instruct work experience students. There was no documented information or instructions provided to workshop managers for the verbal handover of work experience students to the relevant supervisor.

Drug and alcohol policies[80]

98. The following analysis of the approach taken by the Fair Work Commission to failures to comply with 'zero-tolerance' drug and alcohol polices provide a good example of why it is useful (as well as appropriate) for employers to have clearly stated policies that address matters of behaviour and to communicate them clearly, so that disciplinary action can then be taken if they are breached..

[80] This section of the paper draws upon a paper titled 'Spit or piss – can employer's insist on urine over saliva testing?' written by Ingmar Taylor and Bilal Rauf of State Chambers for the NSW Industrial Relations Society Annual Conference in Leura on 23 May 2015 which they subsequently updated in light of further authority and re-presented with the title '*Drug Testing in the Workplace – A Storm in a Pee-Cup*' to the NSW Law Society on 13 October 2015.

Harbour City Ferries Pty Ltd v Toms [2014] FWCFB 6249

99. This decision involved an appeal of a first instance decision of the Fair Work Commission. It highlights some of the considerations that arise if there is a breach of a policy which is already in place.

100. A ferry master had agreed to fill a vacant shift in July 2013, despite having smoked marijuana 16 hours earlier to relieve pain in his shoulder. He was required to submit a urine sample after crashing his vessel into a wharf. He returned a positive test to marijuana. The employer had a zero-tolerance policy.

101. At first instance, Deputy President Lawrence found that the termination of a ferry master's employment was unfair. In particular, it was found that while the company had a valid reason to terminate the employment, other factors such as the lack of any evidence of impairment and poor future employment prospects rendered the dismissal unfair.

102. Deputy President Lawrence noted the following factors in finding that the dismissal was unfair:

a. The Applicant had 17 years satisfactory service with the Respondent and its predecessor;

b. The evidence was consistent with the employees' account that he had smoked one marijuana cigarette because of the pain in his shoulder;

c. There was no evidence the Applicant was a drug user. He had been tested previously three times in his career and each test had been negative;

d. There is no evidence that the positive drug test is proof of impairment;

e. There is no evidence of a link between the drug test and the accident and there had been similar incidents with other ferries;

f. The accident caused little damage; a post was tilted. There was no harm occasioned to passengers;

g. The employee was not rostered to work on 25 July. He was attempting to help the Respondent by covering the shift;

h. The employee reported the incident in an appropriate manner and within a reasonable time-frame;

i. The employee was open and co-operative with the investigation and, when confronted with a positive drug test, admitted his fault;

j. The dismissal had a serious impact on the employee. He had not found alternative work and his skills and qualifications would not translate easily to other employers and industries; and

k. There were a number of sanctions short of dismissal, contained in the discipline procedure which could have been implemented in response to the employee's breach of policy.

103. On appeal, a Full Bench reversed the first instance decision and upheld the decision of the employer terminating the employment of the captain. It found that the mitigating factors relied upon by DP Lawrence had not addressed "*the core issue*" namely "*the serious misconduct which led to the dismissal*". That serious misconduct was the ferry master's "*deliberate disobedience*" of a significant policy by a senior employee. They held the ferry master's decision to accept a shift while aware of the likelihood of being in breach of the Policy provided not only a valid reason for the dismissal but, given that it was a knowing act, was so serious as to outweigh the mitigating factors that DP Lawrence had relied upon to find the dismissal to be harsh.

104. The reasoning of the Full Bench is revealed at [27]:

> [27] The fact is that Harbour City required its policy complied with without discussion or variation. As an employer charged with public safety it does not want to have a discussion following an accident as to whether or not the level of drug use of one of its captains was a factor. It does not want to listen to the uninformed in the broadcasting or other communications industry talk about drug tests establishing impairment. It does not need to have a discussion with any relevant insurer, litigant or passenger's legal representative about those issues. What it wants is obedience to the policy. Harbour City never wants to have to have the discussion.

105. The decision of the Full Bench was appealed to the Federal Court on the basis that it contained a jurisdictional error. The challenge was rejected on grounds that did not require the Court to consider the merits of the ferry master's application.[81]

Other cases involving 'zero tolerance' policies

106. The willingness of the Commission to uphold the employer's 'zero tolerance' policy in the *ferry master case* reflected the approach taken in an earlier decision *Dowling v Atwood Oceanics Pacific Limited* [2011] FWA 1934. In that case, the tribunal found that the termination of an assistant engineer's employment was not unfair in circumstances where the employee had returned a positive test result for alcohol contrary to a strict 'zero tolerance' policy.

107. In reaching its decision in *Dowling*, the Commission found:

> [71] Considering the Drug and Alcohol Policy on its terms I accept that the presence of drugs or alcohol in any detectable amount in an employee's body when reporting to work, while working or while on Atwood business will constitute a breach of the policy.
>
> [72] The policy does not require that the employee be under the influence, in the ordinary meaning of those words, of for example alcohol for the employee to have breached the policy.

[81] *Christopher Toms v Harbour City Ferries Pty Limited and Fair Work Commission* [2015] FCAFC 35

> [73] The policy is as the Respondent describes it a zero-tolerance policy concerning any detectable amount of alcohol or drugs in an employee's body.
>
> [74] As the Respondent argues this zero-tolerance policy is not subject to arbitrary or subjective assessment. It is capable of consistent and uniform application. It is also easily understood by employees.
>
> [75] I accept the Respondent's submission that the Respondents Drug and Alcohol Policy clearly provides that the Respondent can use urine testing to detect alcohol and that such testing of an employee can occur at any time during paid work and may be random testing without prior warning. Further I accept the policy provides that if a detectable amount of alcohol is found in an employee's body this will amount to a breach of the policy and such a breach can result in the termination of employment.
>
> [76] Considering the nature of the industry in which the Respondent operates, including the types of hazards and the potentially extreme consequences of accidents and considering the regulatory impost on the Respondent and also the Applicants particular employment I find that this Drug and Alcohol Policy is reasonable in all the circumstances.

108. In *Hafer v Ensign Australia* [2016] FWC 990 Commissioner Platt considered competing drug tests in circumstances of a zero-tolerance policy. The applicant had been employed for four years as a derrick hand on an off-shore oil rig in the Moomba gas fields. Like Mr Toms in the *ferry master case* he was called to work with short notice to replace another rostered crew member and was selected for a routine random drug test on his first morning. The on-site urine test returned a non-negative sample for methamphetamine and cannabis use, and the sample was confirmed as positive in a laboratory. He was stood down and returned to Adelaide where attended a different laboratory where he was tested a second time. The second test was negative, but also identified very low creatine levels in the urine which led that laboratory to suggest the sample may have been diluted (which can occur if a person drinks large amounts of water) and recommended retesting, which was not done. Expert evidence was led by the company as to the reliability of the first test was accepted by the Commissioner. On that basis Mr Hafer was found to have breached the employer's 'zero tolerance' policy and his application was dismissed. As in the *ferry master case* that decision was made notwithstanding the absence of any evidence of impairment at the time that Mr Hafer attended work.

109. In *Farstad Shipping (Indian Pacific) Pty Ltd v Rust* [2017] FWCFB 4738 a Full Bench overturned a decision at first instance that had found the dismissal of a captain of a ship to be harsh, after he was dismissed for attending work with a blood alcohol reading of 0.047, contrary to a 'zero-tolerance' policy. The Commissioner at first instance had considered the dismissal harsh in circumstances where the 61yr old Captain had drunk alcohol the night before he was tested. He was the sole income earner for his family. He had an exemplary health and safety record and had been taking antidepressant medication as a result of a prior workplace incident. The Full Bench, in overturning the first instance decision, relied upon findings that the captain had knowingly breached the company policy because he failed to self-report to the company that he had consumed alcohol the night before and may not be fit for duty. The fact that he held a

senior position responsible for the safety of a ship and responsible for ensuring policies were implemented was also relevant.

Conclusion re drug and alcohol policies

110. The *ferry master case* and the cases that followed it demonstrate that once a drug and alcohol testing regime is in place the question of whether an employee can be fairly dismissed for a 'positive' drug sample is one that falls to be determined not on considerations of whether the modality of testing is fair or appropriate but rather by reference to the policy. If the policy is a 'zero-tolerance' policy then a knowing breach may well be sufficient to give rise to a fair dismissal regardless of whether the employee was in fact impaired while at work.

Discrimination/General Employment

Implementation is Crucial

111. The occasions on which employers have been successful in relying upon the existence of a policy to make good a defence to a claim of discrimination are few and far between and highlight the difficulty in relying upon the defence if there is no policy, or if there is a policy that has not been properly implemented.

112. In *D -v- Berkeley Challenge Pty Ltd* [2001] NSWADT 92 ("*Berkeley*"), there was an allegation of sexual harassment made by a cleaner against the head cleaner in the school. The Tribunal held that while the school had an anti-discrimination policy in place, it failed to take appropriate action once the allegation of sexual harassment was made. The Tribunal's comments are instructive.

> *'It is not enough for an employer seeking to rely on the s53(3) defence to merely show that it had in existence a policy discouraging sexual harassment. The s53(3) defence makes clear that to escape liability the employer took all reasonable steps to prevent the employee from contravening the Act (our emphasis).* ***Having a policy, however commendable, that is not implemented falls a long way short of establishing that all reasonable steps were taken. In the absence of any reasonable steps to discourage sexual harassment in the Lewisham workplace, other than the formal existence of a policy that was not implemented we conclude that the Respondent cannot rely on the s53(3) defence****.* [82]"[Emphasis added.]

113. *Vance v State Rail Authority* [2004] FMCA 240 ("Vance") is an example of a successful defence in reliance upon a properly implemented policy. In that case, the applicant had a visual disability. She complained of indirect discrimination on the ground of disability when she had been unable to board a train because the guard had closed the doors, without warning, while she was attempting to board the train. In this context, the Applicant argued that STA had imposed a requirement or condition that:

[82] *Berkeley*; [96].

> "*…in order to travel on the 11.50am train on 8 August 2002 operated by the Respondent any intending passenger at Leumeah Station had to enter the train doors promptly which may close without warning*.[83]"

114. In many ways that pleading was destined to fail, given STA's evidence that its policy and training required the guard to ensure all passengers were clear of the doors before closing doors and signalling to the driver to proceed. STA's evidence was preferred and so Raphael FM the Respondent was not vicariously liable under s 123 for the conduct of its employees[84].

115. Likewise, in *McAlister v SEQ Aboriginal Corporation & Anor* [2002] FMCA (6 June 2002) ("*SEQ*"), Rimmer FM set out the precise bases upon which the defence had been made out in that case (as set out below) making it clear that implementation of policies is likely to be persuasive.

> 144. *In this matter I find the evidence established that* ***the Aboriginal Legal Service did take all reasonable steps to prevent the sexual harassment complained of****. They are a reasonably small operation funded by ATSIC to provide predominantly Aboriginal legal services for South East Queensland. They do not have unlimited resources.* ***The evidence*** *I find has* ***satisfied me that they have covered their clear expectation of employees in relation to sexual harassment and discrimination with their employees, including Mr Lamb in a number of ways:***
>
> * *They had established an appropriate complaint handling process;*
>
> * *They had their Senior Field Officer, Mr Ricky Hazard,* ***orally inform all Field Officers that sexual harassment would not be tolerated*** *under any circumstances and severe action would be taken against an employee who sexually harassed a client, co-worker or customer;*
>
> * *They had run and* ***had employees attend relevant workshops****, which provided staff with information about sexual harassment and discrimination obligations.*
>
> *145. They had done more than this in the case of Mr Lamb because of the earlier complaint they had received 12 months prior to this sexual harassment. Specifically, for Mr Lamb, the Aboriginal Legal Service provided evidence, which importantly Mr Lamb accepted, that they had:*
>
> - *Promptly investigated the earlier complaint made by Ms Patricia Lassere;*
>
> - *While taking into account as they were required to do as a fair and just employer, Mr Lamb's strenuous denials of that complaint,* ***gave him what I accept amounted to a very clear warning that future complaints of this nature against him would be treated seriously and may lead to his dismissal from their employment****;*

[83] *Vance;* [2].
[84] *Vance;* [55].

- *Pointed out to **him their requirement that he have another nominated female present in all interviews with women**. Albeit that this requirement may have presented Mr Lamb with practical difficulties in the day-to-day operation of his job, it should have raised Mr Lamb's consciousness about the level of their concern that he not sexually harass or discriminate their clients or potential clients;*

- ***investigated this complaint by Ms McAlister** (and others) taking the expensive step of establishing a Grievance Board.;*

- *Ultimately they **dismissed him** from their employment.*

146. *Clearly all the above steps taken by the Aboriginal Legal Service were appropriately and specifically targeted at sexual harassment generally or specifically for Mr Lamb, after an initial complaint was raised.*

147. Whilst I accept that they could have perhaps done more, that is not the test set out in s.106(2), it is simply that the employer must take all reasonable steps to prevent the harassment complained of from occurring. They do not have to take every step possible to ensure that it does not occur.

148. Accordingly, I find the Aboriginal Legal Service have established that they have a defence under s.106(2) and they are vicariously liable for the conduct of Mr Lamb, their employee at the time of the harassment occurring.[85]" [Emphasis added.]

Impact of size of organisation

116. In SEQ, Rimmer FM also noted that any determination of what is "reasonable" will be different depending upon the resources of the organisation and thus the size of the respondent organisation, as set out below.

> "*Care needs to be taken when considering the meaning of the expression "taking reasonable steps to prevent sexual harassment occurring". The Sex Discrimination Act expects all employers to adopt preventative measures. **This defence has been interpreted in Australia as requiring the employer to take some steps, the precise nature of which will be different according to the circumstances of the employer. Thus large corporations will be expected to do more than smaller businesses in order to be held to have acted reasonably. I note, however, that reasonableness applies to the kind of steps actually taken and not to whether it was reasonable to take steps in the first place.** [86]*" [Emphasis added.]

117. This approach has been adopted in various later cases, such as *Johanson v Blackledge* (2001) 163 FLR 58 ("*Blackledge*"), in which Judge Driver said (in determining that the respondent in that case was a very small employer and reiterating the words of Rimmer FM),

> *"…it would be unrealistic to expect all employers, regardless of size, to adhere to a common standard of preventative measures. This defence has been interpreted in Australia as requiring the employer or principal to take some steps, the precise nature of which will be different according to the circumstances of the employer. Thus, large corporations will be expected to do*

[85] *SEQ*; [144]-[148].
[86] *SEQ*; [143].

> *more than small businesses in order to be held to have acted reasonably. I note, however, that the reasonableness factor applies to the nature of the steps actually taken and not to determine whether it was reasonable not to have taken steps in the first place.* [87]"

118. For a large company, the requirements are likely to be more onerous, given their access to resources. In such cases, 'all reasonable steps' would require not only a policy, but also training of staff and managers[88]. Likewise communication of policies to senior management, and a process acceptance of responsibility by that management for promulgating the policies and for advising on remedial action to be taken (Evans v Lee & Anor [1996] HREOCA 8; (1996) EOC 92-822, where the Respondent was a bank).

Relevance of the Culture of an Organisation

119. Whether the business is large or small, each business has its own culture. In that regard, the Courts have been clear that organisations wishing to maintain an informal culture, '*where a friendly and informal atmosphere often exists'*, ought consider a clear policy statement so that such an atmosphere is not open to abuse[89]. Indeed, employers have successfully used discrimination policies designed to address a lack of gender diversity in the workplace to justify taking a hard line on sexual harassment, as demonstrated by recent decisions of the FWC, including one which upheld the decision to sack an employee who sent pornographic material well outside of work-time to work mates (some of whom complained)[90]. In that case, the employer is quoted in Workplace Express as saying,

> *"The company has recently been pro-active in recruiting women to the waterfront through its innovative and market leading 'women as wharfies' program and is proud of the growing ratio of female employment within its teams.*
>
> *"There are company policies in place to create an environment for all employees that is free from harassment, and as such, while terminations are difficult at any time, the company will not tolerate obstructions to this workplace freedom.* [91]"

120. That employer was using its policies to encourage women to take up stevedoring roles, with its Port Botany workforce and had been successful in doing so, having 32 women employed in the traditionally male dominated area (up from 4 since 2014)[92].

Investigations

121. There are a myriad of issues that arise in respect of investigations, some of which are highlighted below.

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[87] *Blackledge*; 81, [101].
[88] As per *Caton*.
[89] *Bevacqua v Klinkert & Ors (No 1)* (1993) EOC 92-515.
[90] *Luke Colwell v Sydney International Container Terminals Pty Limited* [2018] FWC 174 (9 February 2018) ("*Colwell*").
[91] "Social media post had sufficient nexus with workplace: FWC"; Workplace Express.
[92] IBID.

a. **Confidentiality** – often policies state that complaints will be kept confidential, in reality that means "as between the parties/witnesses". Organisations ought take a measured approach to how they describe their approach to keeping complaints confidential. While certainly confidentiality should apply in general, it cannot apply as between complainants and perpetrators and sometime witnesses, if procedural fairness is to be accorded the perpetrator.

b. **What to do about an Informal Complaint?** Organisations may sometimes be confronted with an "informal complaint", where a person makes a complaint but says they do not wish to be identified and/or says they do not want any action taken. In this regard, the organisation ought conduct a risk assessment both with regard to the likely risk of psychiatric damage to the person making the complaint if the behaviour continues (as required under WHS laws where this is a risk of injury to mental health from treatment at work) and also the risk of the person to whom the complaint has been made, being prosecuted if the behaviour continues[93]. In that context, organisations ought consider whether its policies make it clear to employees that all complaints will be addressed noting its potential liabilities. Further, the policies ought make clear that there are victimisation provisions in both state and federal legislation prohibiting victimising employees from making complaints.

c. **Is it inconsistent with policies to turn a blind eye?** In *Colwell* (discussed above) Commissioner McKenna held that the employer was right to investigate the sending on a pornographic video to workmates outside of working hours, even though a formal complaint had not been made. That was because their policies supported that action. Likewise, in *Romero* (discussed below) the Full Court of the Federal Court held that once an organisation decides to conduct an investigation, it ought properly follow its policy.

d. **Inconsistent Rights**? Can an employee sue where they have suffered psychiatric damage from a poor investigation? This issue will be clarified by the High Court once it hears the appeal arising from the leave application in *Govier v Uniting Care* [2017] HCATrans 183 (September 2017). In this case, the plaintiff made a complaint about the behaviour of another employee (including an assault on her by that employee) and went on sick leave. That other employee then made allegations about the first employee. The employer determined it would investigate both matters and directed the first employee to attend an interview (on two separate occasions, including the day after the incident) with an appointed investigator. The plaintiff was too unwell to attend the interviews at the times scheduled and provided medical certificates to that effect. Thereafter, the employer made findings and sent letters to that employee advising, amongst other things, that her complaint had not been substantiated

[93] See for example, s 105 of the SDA, which states an individual who

> "*causes, instructs, induces, aids or permits another person to do an act that is unlawful…"*

will also be liable under discrimination law.

and that adverse findings had been made against her. The findings were made in the absence of any further information from the first employee due to her inability to attend interviews with the investigator because of her illness. As a result of receiving the letter, the plaintiff suffered further psychiatric injury because of the tone and content of that communication. The plaintiff's employment came to an end shortly thereafter. This appeal will clarify the extent to which (if at all) employers have a duty of care to employees involved in workplace investigations undertaken into disciplinary or conduct allegations. In addition, it will examine whether there are inconsistent statutory rights or obligations, and clarify the application of the principles in *Paige* and also in *Sullivan v Moody* (2001) 207 CLR 562.

e. **Incorporation of Policies and Procedures into Contracts of Employment**. In *Nikolich*[94] (discussed further below), the Applicant was able to bring a case for breach of contract in respect of a poorly addressed complaint workplace leading to psychiatric injury, on the basis that the employer's policies were terms of his contract. Similarly in *Romero*[95] (also discussed below).

Importance of Definitions - What Conduct is 'in the Workplace'

122. One area that is often not covered by policies but ought to be, is the extent to which legislation purporting to regulate relations between employees at work, covers interaction between employees at places other than the workplace and other than during ordinary business hours. The short answer (as demonstrated by the case law below) is that all employees ought be put on notice that any of their interactions with other employees outside of working times or premises is likely to be considered part of the workplace within the meaning of the FWC and discrimination laws. That is because employment requires good working relationships. Good working relationships can be undermined by conduct that has not occurred at work or in the course of work and amounts to unfavourable treatment, including (but not limited to): offence, humiliation or intimidation. As such there are good reasons for workplaces to address this issue to protect productivity and performance[96].

Under the FWA

123. As noted above, in *Colwell* Commissioner McKenna rejected an unfair dismissal claim, made by an employee who had sent a pornographic video to facebook friends, some of whom included his workmates, leading to an informal complaint. However, the case also raised issues about whether the conduct could be regulated by workplace policies,

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[94] *Goldman Sachs JBWere Services Pty Limited v Nikolich* [2007] FCAFC 120 (7 August 2007); (2007) 163 FCR 62 ("*Nikolich Appeal*") as constituted by Black CJ and Marshall J in the majority, Jessup J in dissent.

[95] See *Romero v Farstad Shipping (Indian Pacific Pty Ltd (No 3) (2016) 264 IR 288 ("Romero Damages")* and upheld on appeal *Romero v Farstad Shipping (Indian Pacific Pty Ltd (No 3)* [2017] FCAFC 102 ("*Romero Appeal*")

[96] Productivity Commission, *Benchmarking Business Regulation: Occupational Health and Safety*, March 2010 as quoted by the Standing Committee on Education and Employment, *Workplace Bullying: We Just Want it to Stop,* Parliament of the Commonwealth of Australia, October 2012 and referred to *above.*

given it concerned the sending of a video, well outside of work time, using a personal computer and sending it to facebook friends. In that context, Commissioner McKenna held,

> *"What was put as what I accept is a real, contestable issue regarding the dismissal is that this was out-of-work conduct, not involving any work-related facilities, and involving the applicant and employees of the respondent who had self-selected to be Facebook friends – and in relation to conduct among whom the applicant has forcefully submitted is no proper business of the employer under the terms of its policies or otherwise.* ***Here, however, there was nothing to indicate that there was anything other the cornerstone of the employment relationship, which led to the applicant having 20 work colleagues as his Facebook friends and sending the video to 19 of them by Messenger. Employment by the respondent of the applicant and the 19 employees is the relevant nexus here, it appears, and their being Facebook friends stemmed only from the employment. Approached another way, if there was any nexus other than that those individuals were all employees of the respondent, there was no evidence of it.*** *The applicant selected those to whom to send the video by Messenger, including 19 of the 20 individuals who were both employees of the respondent and Facebook friends; as noted earlier, it was conceded in the proceedings that this could not have been a mishap of inadvertently hitting a "send all" or equivalent. A female employee of the respondent made plain to the applicant her comments about the video in the Messenger commentary that then went between them – and, it may be noted, in that commentary she drew a connection with work in her responses to him.*[97]" [Emphasis added.]

Under Discrimination Laws

124. What is considered "the workplace" in the context of, for example, the SDA is set out below.

> *28(6) It is unlawful for a workplace participant to sexually harass another workplace participant at a place that is a workplace of both of those persons.*
>
> *S 28(7)"…a place at which a workplace participant works or otherwise carries out functions* ***in connection with*** *being a workplace participant."* [Emphasis added.]

125. The leading case in determining the meaning to apply to the phrase: "*in connection with being a workplace participant*[98] is the decision of the Full Court[99] of the Federal Court in *Vegara v Ewin* (2014) 223 FCR 151 ("*Vegara*"). *Vegara* upheld a finding at first instance[100] that the respondent had engaged in five different instances of sexual harassment. One of those instances occurred at a hotel (as set out below), thus raising the issue about whether it was "*in connection with being a workplace participant*" within the meaning of s 28B of the SDA.

> *"On Wednesday, 13 May 2009, at the end of the working day, the appellant turned off the lights in the office which he shared with the respondent, walked behind her, and tried in the dark to touch her hand so as to turn her computer off, stating that she should finish work. He told the respondent that he would*

[97] *Colwell*; [79].
[98] It ought be noted that there are some differences between the ADA, the SDA, the RDA and the DDA. However, in the main this case law applies.
[99] As constituted by North, Pagone and White JJ.
[100] Decision of Bromberg J *Vegara v Ewin* (2013) 238 IR 118.

> *turn the light back on only if she agreed to come to talk to him, as he wished to tell her something. The respondent agreed and they went to the Waterside Hotel.*
>
> *At the hotel, the appellant sexually propositioned the respondent in very explicit and crude terms, and proposed that they have an affair. The respondent refused. Outside the hotel and on the way to Southern Cross Train Station, the appellant tried to kiss the respondent. The Judge characterised the appellant's conduct in the LLA office in terms of s 28A(1)(b) and the remaining conduct in terms of both s 28A(1)(a) and (b).*[101]"

126. Justices North and Pagone held that the interaction at the hotel was to deal with what had commenced at the workplace, and as such the conduct was "in connection with" being workplace participants.

> "*The facts, as found, however were that Ms Ewin did not go to the Waterside Hotel in acceptance of Mr Vergara's sexual advances but, on the contrary, because she wanted to deal with what she had repeatedly sought to discourage. The evidence of the commencement of the series of events made clear that Mr Vergara was seeking to have Ms Ewin change her reaction to him: it was not the continuation of a mutual relationship but the continuation of his attempts to importune her in the knowledge of her unwillingness to participate in the conduct he sought from her. In that regard his Honour had the benefit of hearing the whole of the evidence and of the impression, which that evidence would have made upon him. It being open to his Honour to find, and there being no challenge to the facts found, that going to the Waterside Hotel was triggered by a need to deal with the resumption of Mr Vergara's unwanted sexual advances, it was open for his Honour to hold that the function of both at that place was to deal with what had commenced at the workplace*. [102]"

127. That is, the majority appears to have determined it was "in connection with being a workplace participant" because it was a continuation of the conversation, which started at work, about their ongoing working relationship. That is, the conversation in which the applicant was rejecting the respondent's sexual advances only arose because they had an ongoing working relationship. It could not be other than in connection with being a workplace participant. Put another way, if there was no workplace relationship, the applicant would not have had to engage with the respondent at all, she could have ignored him. Implicit this analysis, is an acknowledgement that the legislation seeks to prevent those in a position of power at work from using that power against subordinates (implied or express) in furtherance of their own sexual gratification.

128. In dissent, Justice White held that the interaction at the hotel was not in connection with the applicant being a workplace participant because the interaction was not required, expected or authorised by their employment, and so they were not carrying out any aspect of the bundle of responsibilities, duties and activities of their employment. In particular, White J put his view as follows.

> *In my respectful opinion, it cannot reasonably be concluded that on the night of 13 May 2009 the appellant was carrying out any function at the Waterside Hotel in connection with his contract work or in connection with his being a contract worker.* ***He was there solely to importune the respondent for sexual favours.*** *It seems to be implicit in [229] of the judge's reasons that the appellant's sole "function" at the hotel was his sexual pursuit of the respondent.*

[101] *Vegara*; 154, [10(a)].
[102] *Vegara*; [128].

> ***It cannot be said that, by accompanying the respondent to the hotel, the appellant was complying with an implicit direction from the respondent in her capacity as his superior.***
>
> *In my respectful opinion, the judge focused inappropriately on the connection between the events in the Waterside Hotel and the events at the LLA office and did not identify, as required by s 28B(6) and the definition of "workplace", any function being carried out by each of the appellant and the respondent in connection with their being workplace participants*[103]. [Emphasis added.]

129. This analysis of the legislation would, if adopted, severely limit its operation. The dissenting judgment did not refer to the principle that legislation that is beneficial in nature should be given a wide reading. On its face, this analysis would appear to allow supervisors to avoid prosecution where they put on evidence that they had engaged in the conduct purely for sexual favours and not for any reason connected with work. The analysis also failed to have regard to the historical genesis of the legislation, which demonstrates that it is aimed at protecting people from sexual exploitation and loss arising from an abuse of power. Implicit in the first instance judgment was not just that the supervisor in this case wanted sexual favours, but that his actions contained an inherent threat to the applicant's ongoing employment, both because she might have to leave to avoid the unwelcome conduct and/or she would have to acquiesce to such attentions or suffer the consequences of rejecting them (including disciplinary action to termination) if she stayed.

Terms Incorporated into Contract

130. It is important to remember that what goes into policies, may, depending upon how they are expressed, form part of each employee's contract of employment.

131. In Nikolich, the applicant made a complaint of bullying against his former supervisor. In that case, a psychiatric injury was caused by the mismanagement of the complaint[104]. As Justice Wilcox put it:

> [281] The issues concerning harassment, directly related to Mr Sutherland's conduct, overlap other issues of health and safety, raised also by the conduct of Ms Jowett, Mr Heath and others. I agree with the description of the situation offered in the applicant's submissions:
>
> > 'The failure to provide a secure and safe workplace left the Applicant festering in an environment of harassment and intimidation for an extremely lengthy period of time. No doubt that was exacerbated by the fact that no one in the Respondent's management team or Human Resources area took any steps to intervene to determine the veracity of the Applicant's complaint, other than by asking Mr Sutherland himself. The onset of the Applicant's psychological symptoms and the development of those symptoms over time occurred as a direct result of the Respondent's breach in this regard.'

[103] *Vegara*; [86]-[87].
[104] Noting that after the changes made to NSW law as a result of tort law reform, there can be no claims of a similar kind made to Mr Nikolich for general damages – unless there is an adverse action or discrimination claim.

132. A key issue in that case was whether the employer's policies concerning complaints handling were a term of Mr Nikolich's contract of employment. When Mr Nikolich accepted employment with Goldman Sachs JB Were Services Pty Limited, he signed and returned a copy of the letter containing his offer of employment. That letter stated, in part

> ***General Instructions***
>
> *From time to time the Company has issued and will in the future issue office memoranda and instructions with which it will expect you to comply as applicable. If you have any queries at any time about which memoranda and instructions apply to you, you should raise that question with me or with Colin.*
>
> ***Separation***
>
> *Our employment commitments are long term and the Company will endeavour to provide every opportunity for you to be effective in your role.*[105]

133. Mr Nikolich was further provided with several of Goldman Sachs' policy documents, including one called *'Working With Us'* ('WWU') before he started work. One of the statements in that document (which Mr Nikolich was not asked to sign[106]) was that his employer would,

> "…*take every practicable step to provide and maintain a safe and healthy work environment for all people*[107]"

134. Goldman Sachs argued that WWU was intended to bind employees but not Goldman Sachs as Mr Nikolich's employer, since the policy was merely a manifestation of the right of an employer to issue lawful and reasonable directions to its employees. However, Justice Wilcox noted that many of the promises made in WWU constituted "routine employee entitlements" that would normally be binding upon an employer as part of a contract of employment.[108] His Honour also observed that Mr Nikolich had received a copy of *Working With Us* along with his offer of employment and was required to become familiar with its contents.[109]

135. Most critically perhaps was the fact that all the employees and managers of Goldman Sachs gave evidence that they regarded it as binding on themselves,[110] and further, that it was common for disciplinary action to be taken in relation to a failure to adhere to the policies.[111] In this context, Wilcox J held that the policies formed a part of the contract of employment[112] and that they were breached by the employer[113] in respect

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[105] Nikolich v Goldman Sachs J B Were Services Pty Ltd [2006] FCA 784 (23 June 2006); [213].
[106] *Nikolich* [6].
[107] In *Goldman Sachs JBWere Services Pty Limited v Nikolich* [2007] FCAFC 120 (7 August 2007); (2007) 163 FCR 62 ("*Nikolich Appeal*"); [25].
[108] *Nikolich* [223].
[109] *Nikolich* [246].
[110] *Nikolich* [229], [230] and [231].
[111] *Nikolich* [229].
[112] *Nikolich* [246] - [247].
[113] *Nikolich* [289].

of the health and safety obligations[114], harassment[115] and the grievance procedures[116] found in the WWU document. On appeal, the Full Bench[117] reinstated all the orders made by Justice Wilcox and (in the main) dismissed the balance of the appeal, except in relation to two terms. However, because the Full Bench[118] agreed with Justice Wilcox that the terms of the WWU document in relation to health and safety ("OHS") were terms of the contract, Mr Nikolich remained successful overall. In coming to this finding Chief Justice Black stated,

> *"The difficulty is that the statement in issue [being the OHS part of WWU] is not explicitly contractual in its language and could be seen as merely aspirational. It appears in a document of mixed content and purposes and, although these include contractual purposes, at least the primary repository of the employment contract is unambiguously elsewhere. The context is, however, decisive. In the context of WWU as a whole**, if the statement that the firm "will take every practicable step to provide and maintain a safe and healthy work environment for all people" were no more than an aspirational representation, imposing no obligation on the maker, it would be seen as an exercise in hypocrisy. The statement is a reflection of, and is central to, WWU's expression of the "culture" of the firm and its approach to its staff, and its aspirations about the approach its employees will take to each other**. The language used, taken in the context as a whole, points to the statement embodying a contractual obligation and the trial judge was correct in holding that it was a term of the contract.*
>
> *This conclusion is supported by the broad equivalence of the content of the statement with an employer's common law duty of care to an employee, to commonly imposed statutory duties and to the term that the law will imply in a contract of employment.*[119]" [Emphasis added.]

136. This was put even more strongly by Marshall J who stated,

> *"[C]ounsel for Goldman submitted that his Honour erred in regarding the language in WWU as promissory because the terms which Wilcox J found to be incorporated into the contract of employment were "not sufficiently certain...too vague and general or otherwise inherently unsuited to become terms of a contractual nature". No authority is cited to support this proposition. As Wilcox J said at [223] the logical consequence of such a submission is that WWU is "misleading" or a "cruel hoax".**[120]**"*

137. In this context, the severe delay in dealing with the complaint was also determinative for the Full Bench. Again, as Chief Justice Black put it:

> "***As I read his Honour's reasons at [137] to [152] and especially at [274] to [276], the substance of his criticism was directed to delay in taking any appropriate steps to alleviate what was evidently, for Mr Nikolich , a very unhealthy work environment.*** *His Honour found that it was known to the appellant that Mr Nikolich was continuing to work in a small office managed by*

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[114] *Nikolich* [274] - [276].
[115] *Nikolich* [281].
[116] *Nikolich* [289].
[117] In *Goldman Sachs JBWere Services Pty Limited v Nikolich* [2007] FCAFC 120 (7 August 2007); (2007) 163 FCR 62 ("*Nikolich Appeal*") as constituted by Black CJ and Marshall J in the majority, Jessup J in dissent.
[118] Jessup J agreeing with Black CJ and Marshall J in relation to this issue at [329] but ultimately disagreeing as to breach of this term.
[119] *Nikolich Appeal*; [30]-[31].
[120] *Nikolich Appeal* [134] (emphasis added).

a person with whom he had come into serious conflict, whose actions he had found extremely intimidating and threatening and with whom he was no longer on speaking terms. These findings were amply supported and were not challenged on appeal. In these circumstances his Honour was plainly correct is concluding that delay in attending to the problems about which Mr Nikolich had complained was unacceptable and in breach of the obligation to "take every practicable step to provide and maintain a safe and healthy work environment."

The findings reported in the article in the Australian Financial Review **of a link between workplace stress and health problems could come as no surprise to anyone with significant management experience and surely not to a human resources manager. Certainly there was no suggestion in the evidence of Ms Jowett that such a link was novel and beyond the reasonable contemplation of a human resources manager dealing with a complaint about a manager accused of "insults and abuse" and who was said to have caused "a considerable degree of anxiety, stress and discomfort."**

The appellant's criticisms of his Honour's observations about the steps that might have been taken by the firm should be considered in the context of his conclusion that the way Mr Nikolich was treated by Mr Sutherland, and the lack of support from the firm in handling his complaints, were at the heart of the breach. However, there are more specific answers**. In relation to the criticism that Mr Sutherland's reallocation decision was not found by his Honour to be inappropriate, the answer is that the judge was not concerned with the rights or wrongs of that decision as such but with the firm's failure to deal promptly and adequately with the complaint about the decision and about the harassment that followed it.** Likewise, the fact that it might have been impossible to reconcile Mr Nikolich and his manager does not bear upon the failure to act promptly to try to sort out the problem.

It was said that the trial judge ignored the fact that Mr Sutherland ceased to be Mr Nikolich's manager in late October 2003. Again**, the answer is that this had nothing to do with the essence of the complaint, which was delay from a period commencing in early August.**[121]**"** [Emphasis added.]

138. The Full Court of the Federal Court held that the grievance procedure was not incorporated as a term. In contrast, on the facts in *Romero*[122], the applicant was successful in arguing that the company's Workplace Harassment and Discrimination Policy (the Policy) was incorporated into her contract of employment (after appeals)[123]. In particular, the Full Court held that the Company had breached the policy by[124]:

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[121] *Nikolich Appeal*; [48]-[51]. See also Marshall J at [157] in which he states that Goldman Sachs *"took too long having regard to Mr Nikolich 's delicate mental state at the time he made his complaint"* (emphasis added).

[122] See *Romero v Farstad Shipping (Indian Pacific Pty Ltd (No 3) (2016) 264 IR 288 ("Romero Damages")* and upheld on appeal *Romero v Farstad Shipping (Indian Pacific Pty Ltd (No 3)* [2017] FCAFC 102 ("*Romero Appeal*")

[123] See first instance rejection of her claim of sexual harassment and breach of contract by Marshall J in *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* [2014] FCA 439 ("*Romero First Instance").* On appeal: *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* (2014) 231 FCR 403; 247 IR 315 ("*Romero Appeal 2014*") as per Allsop CJ, Rares and McKerracher JJ. The Full determining that the Policy formed part of Ms Romero's contract of employment, that Farstad had not complied with it, and that it had, thereby, breached the contract and remitting it for decision on damages.

[124] *Romero Appeal 2014*; referred to in *Romeo Damages*; 295-296, [10]-[11].

a. conducting a formal investigation when there had been no request (as required under the policy) by the applicant to do so; and

b. once it commenced the investigation by failing to "*carefully and systematically investigate the allegations*", specifically:

   i. the "brief and skeletal allegations" were not were not capable of being put to Captain Martin and were not put to him;

   ii. other potential witnesses were not interviewed; and

   iii. despite Captain Martin mentioning that he had made notes on 21 December 2011, they were not requested by the company at the earliest opportunity (and were later destroyed by Captain Martin before the Company did ask for them).

139. In those circumstances, the matter was remitted for hearing on damages. Ms Romero had, in the meantime, settled a workers compensation claim and so was precluded from bringing a claim for general damages[125] (noting that in NSW such damages would not be available). In that context she argued,

> "*… that it must have been in the contemplation of the parties to her contract of employment that, if the obligations imposed on Farstad by the Policy were not fulfilled, she would have wasted the costs incurred in studying for her Masters certificate and would incur further costs in retraining for another career.* [126]"

140. Thus, seeking to bring her claim within the test set out in *European Bank*[127] where an injured party may,

> "*recover such damages as arise naturally, that is, according to the usual course of things, from the breach of contract, or such damages as may reasonably be supposed to have been in the contemplation of both parties concerned at the time they made the contract as the probable result of the breach.* [128]"

141. In this context, the judge held that the damage for which the applicant sought compensation (being complete change in career), was not compensable as it was not:

> "*…in contemplation that a (or any) breach of the Policy might lead to an employee suffering loss or damage by having to embark on an entirely new career….*
>
> *The authorities to which I have referred would, arguably, support a claim by Ms Romero for damages occasioned by her unwillingness to render further service to Farstad. That would have made it necessary for her to obtain alternative employment. Each of Ms Romero's heads of damage (which I have set out at [16]) were predicated upon Ms Romero losing confidence not only in Farstad but also, it appears, in all maritime industry employers. This broader reluctance was not explained. Had Ms Romero changed employers but remained in the maritime industry, her training towards a Master's certificate would not have been thrown away. The loss of wages during that training would not have been*

[125] *Romero Damages*; 297, [17].
[126] *Romero Damages*; 298, [20].
[127] *European Bank Ltd v Evans* (2010) 240 CLR 432 ("*European Bank*").
[128] *European Bank*; 438.

in vain. It would have been unnecessary for her to study for a law degree or undertake pre-admission practical legal training. Each head of damage has arisen only because Ms Romero has chosen to embark on a completely different career. [129]"

142. In those circumstances she was awarded nominal damages only ($100.00)[130]. Further, the judge found that the terms breached were not sufficiently important to amount to a repudiation of the contract[131]. A finding that was not overturned on appeal[132].

Domestic Violence

143. As with all policies, policies that deal with domestic violence are only as good as their communication, which starts with leadership accepting their importance and ensuring they are properly communicated, and that staff, including management, are properly trained.

144. The White Ribbon Foundation Workplace Accreditation Program includes criterion that address implementation of policies, to ensure that managers and staff are aware of and understand the policies and procedures relevant to preventing violence against women. It identifies the importance of clearly articulating confidentiality requirements so staff feel comfortable coming forward with an issue, or can refer it through appropriate channels. Appropriate steps include:

a. Formal Internal Communication Strategy relating to the communication of HR policy and procedure;

b. Staff (including volunteers where relevant) know how to access support services;

c. Policies given to new employees;

d. Newsletters;

e. All staff communication from senior management; and

f. Staff meeting updates.

145. The Foundation places emphasis on mandatory training for all supervisors and key senior managers. It states that the training should cover the following matters:

a. an explanation of what is violence against women;

b. the extent of violence against women in Australia

[129] *Romero Damages*; 300, [27]-[28].
[130] *Romero Damages*; 300, [30].
[131] *Romero Damages*; 300, [30].
[132] *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* [2014] FCAFC 102 ("*Romero Damages Appeal")* as per Allsop CJ, Rares J, McKerracher J; [68].

c. explore how/why violence against women occurs, including exploration of violence- supportive attitudes and beliefs;

d. the issue of sexist language within the workplace and its impact;

e. how and why sexually explicit jokes are inappropriate in the workplace;

f. the possible indicators of violence;

g. how to raise the issue of violence against women;

h. information on where to go if you are a victim of violence at home or in the workplace;

i. the importance of respecting people's privacy in the workplace;

j. the organisation's approach to preventing and responding to violence against women inside and outside the ;

k. Strategies to respond to bullying, sexist, harassing, disrespectful and derogatory behaviours;

l. how to make a workplace safety plan;

m. how to approach the issue with a staff member;

n. referral to assistance for counselling, advice and other information about support services;

o. confidentiality requirements so that the situation is only made known to those relevant for the provision of safety and other support;

p. in methods of conflict and complaint/grievance resolution; and

q. an explanation of what staff can do following the training to 'live' the White Ribbon message.

CONCLUSION

146. While not mandated by legislation, it is important for businesses to have policies and procedures that address:

a. Work health and safety;

b. Discrimination; and

c. General employment matters, such as bullying and domestic violence.

147. The absence of policies that address these issues will almost certainly make it difficult to defend any subsequent legal proceedings brought in respect of conduct that could have been proscribed by such a policy.

148. The policies need to be drafted having regard to the particular risks that arise in that workplace and how they are best removed or reduced as far as is reasonably practicable.

149. Policies are of little or no utility if not properly communicated to the workforce and regularly reviewed.

150. Care should be taken to draft policies having given thought to the extent to which they are intended to also amount to contractual obligations. When mandating inappropriate behaviour it is appropriate to be clear and specific, as this will assist an employer who wishes to take disciplinary action if the policy is breached. On the other hand, care should be taken not to be overly prescriptive in respect of the procedure to be adopted to investigate complaints and/or deal with grievances, permitting sufficient flexibility to permit the business to address a matter in an appropriate way that suits the issue at hand.

INGMAR TAYLOR SC

KELLIE EDWARDS

Greenway Chambers
Level 10, 99 Elizabeth Street
Sydney NSW 2000
DX 165 Sydney
T | 02 9151 2999

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