UNSYSTEMATIC AND UNSETTLED: A MAP OF THE LEGAL DIMENSIONS OF WORKPLACE INVESTIGATIONS IN AUSTRALIA

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Investigations conducted by employers into allegations of employee misconduct can raise complex questions about the legal rights and obligations of the organisations and employees involved, though there has been limited scholarly attention given to this management practice. This article sets out the first detailed examination of key intersections between workplace investigations and Australian law. It shows that, while there is no legislation specifically directed at regulating workplace investigations in Australia, these processes take place within an intricate framework of regulation. It also reveals that the law intersecting with these workplace investigations is often complex, fragmented and unsettled. The article considers the practical implications of this unsystematic regulatory framework and suggests reform is required in at least one key area, being private security law.

I INTRODUCTION

When a complaint, or some evidence, of potential employee misconduct in the workplace emerges, one option available to Australian employers is to conduct an investigation.[1] The decision to do so might be wholly discretionary. Alternatively, the decision might be determined by a term in an enterprise agreement made under

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1 For discussion of other options available to Australian employers to deal with allegations of employee misconduct, see, eg, Liam Meagher and Jennifer Wyborn, 'Clearing the Minefield of Misconduct Laws for Public Service Managers', *The Sydney Morning Herald* (online, 30 June 2016) <https://www.smh.com.au/public-service/clearing-the-minefield-of-misconduct-laws-for-public-service-managers-20160629-gpurwx.html>; Aaron Goonrey, 'When Are Workplace Investigations Actually Worth It?', *HRM Online* (online, 15 November 2016) <http://www.hrmonline.com.au/section/legal/workplace-investigations-worth/>; Rijosh Shrestha, 'Dealing with Workplace Complaints: How to Avoid Formal Investigations', *Devine Law at Work* (Blog Post, 3 August 2016) <https://devinelaw.com.au/rijosh/dealing-with-workplace-complaints/>.

the *Fair Work Act 2009* (Cth) ('*FW Act*'),[2] or a policy or procedure that binds the employer.[3] There are various reasons why an employer might, at its discretion, initiate an investigation into alleged employee misconduct. Some reasons are quite straightforward, including to establish an evidentiary basis to take disciplinary action,[4] or mitigate legal risk.[5] Other reasons are less visible. Some media reports on employers' investigations into allegations of misconduct have, for example, highlighted instances in which employers have initiated investigations to address suspicions of wrongdoing by workers about which there is little evidence;[6] temporarily silenced a worker making a complaint by directing the worker to maintain confidentiality during the investigation;[7] confined complaints or grievances to the workplace to ensure they are resolved confidentially;[8] outsourced difficult decisions to an investigator;[9] or imposed pressure on employees to make admissions or resign.[10] These examples illustrate that investigations into

2 Part 2-4. See, eg, *Wilson v Leighton Contractors Pty Limited* [2014] FWC 5503.

3 See, eg, *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* (2014) 231 FCR 403 ('*Romero*'); *Gramotnev v Queensland University of Technology* [2015] QCA 127; *Zafiriou v Saint-Gobain Administration Pty Ltd* [2013] VSC 377.

4 'Procedural Fairness Hard to Prove without Investigation', *HR Daily* (online, 24 January 2011) <https://www.hrdaily.com.au/nl06_news_selected.php?selkey=1695>; Grevis Beard, Rose Bryant-Smith and Lisa Klug, *Workplace Investigations* (CCH Australia, 2nd ed, 2018) 11.

5 See, eg, 'What Is Workplace Investigation and Why You Should Care', *Griffin Legal* (Blog Post, 15 December 2014) <https://griffinlegal.com.au/what-is-workplace-investigation-and-why-you-should-care/>; 'David Jones Case: A Timely Reminder of Vicarious Liability for Sexual Harassment', *Holding Redlich* (Blog Post, 14 October 2010) <https://www.holdingredlich.com/blog/david-jones-case-a-timely-reminder-of-vicarious-liability-for-sexual-harassment>.

6 See, eg, Lucy McNally, 'Random Drug Tests Spark Claims of Homophobic Bullying at Newtown Police Station', *ABC News* (online, 9 October 2016) <http://www.abc.net.au/news/2016-10-09/allegations-of-homophobic-bullying-at-newtown-police-station/7916186>; Giri Sivaraman, 'Poor Workplace Investigations Can Leave Path of Destruction', *Brisbane Times* (online, 7 February 2017) <http://www.brisbanetimes.com.au/business/workplace-relations/poor-workplace-investigations-can-leave-path-of-destruction-20170207-gu7kmo.html>. See also *Guorgi v Transdev Queensland Pty Ltd* [2018] FWC 7314.

7 See, eg, *Moran v KDR Victoria Pty Ltd* [2018] FWC 6144, [6] (Gostencnik DP).

8 See, eg, Leonie Green, 'The Who, What and How of Workplace Investigations' (2018) *Australasian Law Management Journal* 1, 1–2; Nick Ruskin, 'Role of Lawyers in Workplace Investigations' (2014) 18(5) *Inhouse Counsel* 62, 63; Harriet Witchell, 'Keeping It under Wraps: Legal Professional Privilege' (Blog Post, 10 February 2016) <http://www.wiseworkplace.com.au/_blog/WISE_Blog/post/keeping-it-under-wraps-legal-professional-privilege>.

9 See, eg, *Pearson v Martin* [2015] VSC 696, [16] (Garde J) ('*Pearson*'). See also James Mattson and Mark Paul, 'Workplace Investigations: Time to Reform Our Thinking?' (Conference Paper, Australian Labour Law Association National Conference, 4–5 November 2016) 5 (copy on file with author). This approach has been criticised by courts and tribunals, which emphasise that organisational decision-makers should use the findings of a workplace investigation as an aid for their *own* independent decision-making: see, eg, *Francis v Patrick Stevedores Holdings Pty Ltd* [2014] FWC 7775, [290] (Sams DP).

10 Sivaraman (n 6). See, eg, Matthew Dunckley, 'Westpac Worker Subjected to Five Hour "Star Chamber" Wins Back Job', *The Age* (online, 2 December 2018) <https://www.theage.com.au/business/banking-and-finance/westpac-worker-subjected-to-five-hour-star-chamber-wins-back-job-20181202-p50jpg.html>; Adam Carey, 'No Water, No Loo for Yarra Trams Staff Grilled over Napoleon Poster, Court Hears', *The Age* (online, 10 May 2016) <http://www.theage.com.au/victoria/no-water-no-loo-for-yarra-trams-staff-grilled-over-napoleon-poster-court-hears-20160510-gorspx.html>; Anna Patty, 'Bunnings Manager Allegedly Bullied after Refusing to Terminate Team Members', *The Sydney Morning Herald* (online, 18 December 2016) <http://www.smh.com.au/business/workplace-relations/bunnings-manager-allegedly-bullied-after-refusing-to-terminate-team-members-20161215-gtc3xz.html>; Kate McClymont and Patrick

allegations of misconduct can be driven by objectives which can result in unfair treatment and/or outcomes for employees involved. In turn, this raises complex questions about the legal rights and obligations of organisations, and employees, involved in investigations of alleged misconduct.

Lawyers, courts and tribunals commonly refer to the processes that employers use to investigate allegations of employee misconduct as 'workplace investigations',[11] although the term is neither statutorily nor judicially defined. Only two Australian textbooks focus on investigations of employee misconduct. Each uses the term 'workplace investigation', which the authors define as predominantly involving an inquiry into allegations of misconduct.[12] There are, however, other contexts in which the term 'workplace investigation' is used by Australian employers, and others. Publicly available organisational policies and procedures show, for example, that some organisations use the term 'workplace investigation' to describe internal inquiries into a range of issues including health and safety incident inquires,[13] unsatisfactory performance processes,[14] and fraud and corruption inquiries.[15] Furthermore, agencies such as the Fair Work Ombudsman and Safe Work Australia use the term 'workplace investigation' to refer to investigations which they are empowered to conduct into possible statutory breaches by employers.[16] These investigations are, however, quite different to those that organisations undertake to inquire into allegations of employee misconduct. They also intersect very differently with the law, and give rise to

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Begley, 'Seven Boss Tim Worner, Amber Harrison and the Affair That Stopped a Nation', *The Age* (online, 23 December 2016) <http://www.theage.com.au/business/media-and-marketing/seven-boss-tim-worner-amber-harrison-and-the-affair-that-stopped-a-nation-20161223-gthcpk.html>.

11 See, eg, Jane Seymour, 'Effective and Efficient Workplace Investigations: Tips and Traps' (2014) 13(3) *Board Matters Newsletter* <http://www.governance.com.au/board-matters/fx-view-article.cfm?loadref=2&article_id=BF5EC901-ED28-2510-B4ECB715E47D3C49>, archived at <https://web.archive.org/web/20170215211037/http://www.governance.com.au/board-matters/fx-view-article.cfm?loadref=2&article_id=BF5EC901-ED28-2510-B4ECB715E47D3C49>; Katie Sweatman and Nick Ruskin, 'Gone Fishing: When and How to Conduct Workplace Investigations' (2012) 15(8) *Inhouse Counsel* 282, 282; Chris Molnar, 'Apprehended Conflicts of Interest in Employment Investigations and Decision-Making' (2015) 21(7) *Employment Law Bulletin* 91, 91; Jennifer Beck, 'Importance of Fair Workplace Investigations' (2012) 50(9) *Law Society Journal* 46.

12 Beard, Bryant-Smith and Klug (n 4) 9; Paula Hoctor and Michael Robertson, *Workplace Investigations: Principles and Practice* (LexisNexis, 2019) 4, 30–1. See also Louise Floyd et al, *Employment, Labour and Industrial Law in Australia* (Cambridge University Press, 2018) 231–6.

13 See, eg, Australian Federal Police, *AFP National Guideline on Investigating Workplace Incidents* (Guideline) <https://www.afp.gov.au/sites/default/files/PDF/IPS/AFP%20National%20Guideline%20on%20investigating%20workplace%20incidents.PDF>. See also John Makris and Kim Grady, 'Workplace Investigations under the Harmonised OHS Laws' (2011) 13 *Risk Management Today* 213.

14 See, eg, Department of Education and Training Victoria, *Guidelines for Managing Complaints, Misconduct and Unsatisfactory Performance in the VPS* (Guidelines, 6 July 2017) <http://www.education.vic.gov.au/hrweb/Documents/Complaints_Misconduct_and_Unsatisfactory-Performance_VPS.pdf>.

15 See, eg, University of Wollongong Australia, 'Fraud and Corruption Internal Reporting Procedure', *UOW Procedures* (Web Page, February 2014) <http://www.uow.edu.au/about/policy/procedures/UOW167124.html>.

16 See, eg, 'Workplace Investigations', *Fair Work Ombudsman* (Web Page) <https://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/workplace-investigations>; Makris and Grady (n 13).

distinct rights and obligations for those parties involved.[17] This article, therefore, uses the term 'workplace investigation', but confines its focus to the narrower category of investigations conducted by employers into the facts and circumstances surrounding allegations of employee misconduct.

There are key aspects of workplace investigations about which some information is known, based on an examination of case law, and the vast array of commentaries produced by legal practitioners and persons who work as 'investigators' within the 'workplace investigations' industry in Australia.[18] There are, for example, usually a range of parties involved when an employer conducts a workplace investigation, including organisational representatives, one or more employees, an investigator (who may be an employee of the organisation or an agent), and other stakeholders such as legal practitioners, union representatives or support persons. It is also clear that these processes are inquisitorial, focused on 'fact finding' or information gathering,[19] and conducted confidentially, wherever possible.[20] There is, however, much that is not known about workplace investigations.

One important aspect of workplace investigations, which is yet to be given any scholarly attention, is how they interact with Australian law. There is no specific legislation directed at regulating workplace investigations in Australia. Workplace investigations, nevertheless, take place within a legal framework that often defines the rights and obligations of employees, organisations and their agents. With some limited exceptions,[21] most discussion of the legal dimensions of workplace investigations has been by lawyers and investigators. Their focus has, unsurprisingly, been limited to examining the standard of 'fairness' or 'reasonableness' required of employers during workplace investigations

17 See also Makris and Grady (n 13).

18 A detailed discussion of steps involved in a workplace investigation, written by investigators and lawyers, is provided in Hoctor and Robertson (n 12) 1–176.

19 *Lohse v Arthur [No 3]* (2009) 180 FCR 334, 359 [45] (Graham J). Merilyn Speiser, 'How to Manage a Workplace Investigation', *HR Daily Blog* (Blog Post, 30 May 2016) <http://community.hrdaily.com.au/profiles/blogs/how-to-manage-a-workplace-investigation>; Beard, Bryant-Smith and Klug (n 4) 12.

20 See, eg, *De Blasio v Melba Support Services Inc* [2014] FCCA 1893.

21 There has been some useful scholarly examination of discrete legal issues arising during workplace investigations, although the range of issues examined is limited. On procedural fairness during workplace investigations, see Allison Ballard and Patricia Easteal 'Procedural Fairness in Workplace Investigations: Potential Flaws and Proposals for Change' (2018) 43(3) *Alternative Law Journal* 177. On the common law contract and decision of *Bartlett v Australia & New Zealand Banking Group Ltd* (2016) 92 NSWLR 639 ('*Bartlett*'), see Richard Naughton, 'Termination of Employment and Workplace Investigations' (2016) 22(4) *Employment Law Bulletin* 186; Natalie Williams, '*Bartlett v Australia & New Zealand Banking Group Ltd* [2016] NSWSC 30 (7 March 2016)' (2016) 37(2) *Adelaide Law Review* 571. On the legal aspects of public sector workplace investigations, see also Louise Willans Floyd, 'Criminal Court Procedure and Public Employment Law: The High Court of Australia Decisions in *Patel v The Queen* (2012) and *Fingleton v The Queen* (2005)' (2013) 13(1) *Oxford University Commonwealth Law Journal* 253 ('Criminal Court Procedure and Public Employment Law'); Louise Floyd, 'Reforming Hong Kong Public Sector Employment Law after Lam Siu Po and Rowse: Some Useful Comparisons from Australian Law' (2009) 39(2) *Hong Kong Law Journal* 457 ('Reforming Hong Kong Public Sector Labour Law after Lam Siu Po and Rowse'); Max Spry, 'Natural Justice and Public Sector Misconduct Investigations' (Seminar Paper, Australian Institute of Administrative Law Seminar, 12 July 2007).

processes, as guided by the common law,[22] and non-binding decisions of the Fair Work Commission ('FWC') arising under the unfair dismissal jurisdiction of the *FW Act*.[23] While these discussions highlight one important legal dimension of workplace investigations, the ways in which these processes interact with the law are more complex and broad-ranging.

Accordingly, this article sets out the first detailed examination of key intersections between workplace investigations and Australian law. The article is divided into doctrinal categories of law where workplace investigations are relevant.[24] Part II examines the interaction between workplace investigations and employment law.[25] This section sets out an analysis of the legal dimensions of workplace investigations arising from the common law contract of employment, statutory job protections set out in the *FW Act*, the terms of enterprise agreements, anti-discrimination law, work health and safety law and public sector employment law. Part III examines the intersections between workplace investigations and other key areas of law. Specifically, this section examines intersections between workplace investigations, legal professional privilege and private security law. Part IV concludes that workplace investigations take place within an intricate framework of regulation and that the law intersecting with them is often complex, fragmented and unsystematic. Part IV then considers practical implications of this unsettled legal framework for organisations and employees and suggests that regulatory reform is required in at least one key area, being private security law.

II INTERSECTIONS BETWEEN WORKPLACE INVESTIGATIONS AND EMPLOYMENT LAW

A range of intersections exist between workplace investigations and employment law. These intersections arise under the common law contract of employment, statutory job protections set out in the *FW Act*, the terms of enterprise agreements, anti-discrimination law, work health and safety law and public-sector employment law. These are each discussed below.

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22 See, eg, Molnar (n 11) 91; Nicolas Ellery, 'Mental Health and Workplace Investigations: What Are Your Obligations?' (2018) 70(2) *Governance Directions* 82; Michael Baldwin and Claudia Lewin, 'High Court to Determine Employer's Duties During Workplace Investigations' (2017) 21(10) *Inhouse Counsel* 222.

23 See, eg, Beck (n 11); Grevis Beard and Rose Bryant-Smith, 'Delay Workplace Investigations at Your Peril' (2008) 82(9) *Law Institute Journal* 40.

24 It is acknowledged that doctrinal categories of law frequently intersect and overlap. For example, decisions under the general protections jurisdiction of the *FW Act* that examine workplace investigations may also discuss legal issues relating to the contract of employment, or the relevant terms of an enterprise agreement. The doctrinal categories of law, into which this article is arranged, nevertheless provide a useful framework by which to map the complex legal aspects of workplace investigations.

25 In this article, the term employment law is used to refer to the legal rules that apply to organisations and workers and includes the common law, labour law set out in the *FW Act*, work health and safety law and anti-discrimination law.

A The Common Law Contract of Employment

The contract of employment, which includes express and implied terms, is a central legal dimension of workplace investigations.[26] Workplace investigations intersect with the contract of employment in important ways, including with respect to whether an employer's duty of care applies during workplace investigations; whether an employer is required to act reasonably during a workplace investigation; and whether an employer is bound by any policies prescribing a workplace investigation process.

1 Duty of Care Owed by Employers During Workplace Investigations

An important legal dimension of workplace investigations, developed by the common law, is the scope of an employer's duty of care to employees during a workplace investigation. The common law implies a term in all employment contracts on employers to take reasonable care to provide a safe working environment.[27] This non-delegable duty exists concurrently in tort and contract,[28] although there are different means of establishing liability. If an employer's negligence is found to be the basis for an employee's illness or injury, the employee may sue for damages in either breach of contract or the tort of negligence, subject to any statutory limitations.[29]

In several decisions, courts have determined that employers do not owe a duty to provide a safe system of workplace investigation. In particular, courts have held that employers do not owe employees a duty of care when a complaint is made, throughout the employer's investigation into a complaint, and with respect to decision-making in response to a complaint.[30] The leading decision of *New South Wales v Paige* ('*Paige*') concerned an employee of the State of New South Wales who was a school principal alleged to have mishandled a complaint of sexual misconduct by another teacher. Among other things, Mr Paige claimed that his employer had breached the implied duty of care by failing to provide a safe system of investigation and decision-making as part of a disciplinary process prescribed by statute. Spigelman CJ stated that the duty to provide a safe system of investigation and decision-making was a 'novel' category of duty that required the

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26 See Andrew Stewart et al, *Creighton and Stewart's Labour Law* (Federation Press, 6th ed, 2016) chs 11, 17.

27 See, eg, *Tame v New South Wales* (2002) 211 CLR 317, 365 [140] (McHugh J); *Goldman Sachs JBWere Services Pty Ltd v Nikolich* [2007] FCAFC 120, [31] (Black CJ), [324] (Jessup J) ('*Nikolich*'); *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471, 475 [8] (Spigelman CJ), 519 [339] (Beazley JA); *Stubbe v Jensen* [1997] 2 VR 439, 443–4 (Winneke P); *Wright v TNT Management Pty Ltd* (1989) 15 NSWLR 679, 687–8 (McHugh JA), 697–8 (Clarke JA).

28 See, eg, *Matthews v Kuwait Bechtel Corporation* [1959] 2 QB 57, 65–7 (Sellers LJ); *Astley v Austrust Ltd* (1999) 197 CLR 1, 20–3 [44]–[48] (Gleeson CJ, McHugh, Gummow and Hayne JJ). See Jason Harris and Anil Hargovan, 'The Nature of the Corporate Employer's Duty of Care to Employees: Is It Co-extensive?' (2004) 32(5) *Australian Business Law Review* 367.

29 Accident compensation laws may, however, limit an employee's capacity to pursue some claims. See, eg, in Victoria, *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) s 39.

30 See, eg, *New South Wales v Paige* (2002) 60 NSWLR 371, 387–8 [78] (Spigelman CJ) ('*Paige*'); *O'Leary v Oolong Aboriginal Corporation Inc* [2004] NSWCA 7, [23] (Spigelman CJ) ('*O'Leary*'); *New South Wales v Rogerson* [2007] NSWCA 346, [2] (Handley AJA, McColl JA agreeing at [1], Hoeben J agreeing at [44]), [39] (Handley AJA) ('*Rogerson*').

Court to extend the concept of '"a system of work" to matters concerning the incidents of the contract of employment, such as the disciplinary procedures under consideration'.[31] Spigelman CJ considered the factors operating in favour, and against, extending the duty to encompass a safe system of investigation and decision-making.[32] Ultimately, his Honour declined to extend the duty on the basis that it could compromise the coherence between the law of employment and administrative law,[33] together with 'the element of incompatibility of duties [which were] so significant as to outweigh [other] considerations'.[34] Courts have subsequently applied the reasoning of Spigelman CJ in *Paige* to generally exclude a safe system of investigation and decision-making from the scope of an employer's duty to provide a safe system of work.[35] These decisions have referred to alternative legal mechanisms by which employees, who have been detrimentally affected by an employer's conduct during workplace investigation, may obtain a remedy, including statutory unfair dismissal protections.

There are, however, other decisions where courts have determined that employers breached their duty of care to employees because of specific acts, or omissions, during a workplace investigation. These decisions seek to reconcile the decision in *Paige* with the continued existence of the employer's general duty to provide and maintain a safe workplace, to take all reasonable precautions for each employee's safety whilst engaged in employment and not to expose the employee to foreseeable risks of damage or injury. In the decision of *Hayes v Queensland* ('*Hayes*'), for example, a Court of Appeal in the Supreme Court of Queensland held that an employer does not owe an employee a duty of care when a complaint is made against them, and throughout the investigation process, consistent with *Paige*.[36] Their Honours also held, however, that there was nothing in previous decisions that exempted the employer from discharging its general duty of care to employees suspected of misconduct by providing them with reasonable support following when the complaints were made against them and during the resulting workplace investigation.[37] Their Honours determined, based on the facts, that the employer had breached its duty of care to three employees. Their Honours reasoned that the employer had done so by failing to provide reasonable or adequate support from the time a complaint of misconduct was made and during the workplace investigation in circumstances where it was on notice that the employees were vulnerable and in a 'hostile workplace'.[38]

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31 *Paige* (2002) 60 NSWLR 371, 387–8 [78] (Spigelman CJ, Mason P agreeing at 416 [330], Giles JA agreeing at 419 [358]).

32 Ibid 389–91 [86]–[96].

33 Spigelman CJ referred to the need to ensure coherence between 'the law applicable to termination of employment, that is, the law of contract as modified by statute': ibid 395 [132].

34 Ibid 395 [131], 405 [182] (Spigelman CJ).

35 See, eg, *Rogerson* [2007] NSWCA 346, [2], [39] (Handley AJA, McColl JA agreeing at [1], Hoeben J agreeing at [44]); *Palmer v Queensland* [2015] QDC 63, [123] (McGill DCJ); *Govier v Unitingcare Community* [2016] QDC 56, [187] (Andrews SC DCJ).

36 [2016] QCA 191, 3 [6]–[7] (McMurdo P), 28–9 [100] (Mullins J), 32–5 [113]–[125] (Dalton J).

37 *Hayes* [2016] QCA 191, 4 [7] (McMurdo P), 28–9 [100] (Mullins J), 35 [121] (Dalton J).

38 The employees were, however, ultimately unsuccessful. One employee failed to show that there was a breach of the duty in her circumstances. The three other employees failed to establish that their

Furthermore, in the decision of *Robinson v Queensland* ('*Robinson*'), Henry J determined that an employer's duty of care included a duty to investigate complaints of harassment.[39] Specifically, Henry J determined that the State, as employer, had breached its duty of care to Ms Robinson, including by failing to investigate her complaints of repeated mistreatment by a senior employee that caused her to suffer a 'reasonably foreseeable' psychiatric injury.[40] The Court did not seek to reconcile its reasoning with the decision of Spigelman CJ in *Paige*. This is, presumably, because the Court distinguished between the requirement on an employer to discharge its duty of care by investigating an employee's complaint of harassment from the 'extension' of that duty of care to its conduct during the investigation.

The decisions of *Hayes* and *Robinson* illustrate that there is a real question about what the ratio of *Paige* really is, particularly where a dispute does not arise in the context of termination of employment, or where a disciplinary process is not prescribed by statute. This question was recently the central focus of an application for special leave to appeal to the High Court of Australia from the decision of the Queensland Court of Appeal in *Govier v Uniting Church in Australia Property Trust (Q)* ('*Govier*').[41] Leave to appeal was initially granted,[42] and then revoked.[43] The common law on the scope of the duty of care owed by employers when considering, undertaking, and making decisions arising from workplace investigations is, therefore, fragmented and unsettled. One consequence of the state of the law is that employees seeking redress from unfair treatment during workplace investigations are unlikely to pursue claims that test the scope and limits of an employer's general duty of care when undertaking workplace investigations, if other avenues of redress are available.

2 A Requirement to Act Reasonably During Investigations?

Another legal dimension of workplace investigations, developed by the common law, relates to the standard of reasonableness (or fairness) to which private sector employers must adhere when conducting workplace investigations pursuant to express contractual terms. Contracts of employment frequently include express terms that require (or provide a discretion to) employers to conduct investigations before taking disciplinary action for misconduct. In *Bartlett*,[44] a New South Wales Court of Appeal was required to consider whether an employer was required to act reasonably when exercising an express contractual power to summarily dismiss an employee for serious misconduct. The Court examined the express contractual power and determined that it only allowed the employer to

psychiatric injuries had been caused by a breach of the duty. See ibid 12 [34], 15 [43], 16 [47], 23–4 [80], 24 [82] (McMurdo P), 29 [102] (Mullins J), 47 [177], 65 [267] (Dalton J).

39 [2017] QSC 165, [193].

40 Ibid [195].

41 [2017] QCA 12.

42 Transcript of Proceedings, *Govier v Unitingcare Community* [2017] HCATrans 183.

43 Transcript of Proceedings, *Govier v Uniting Church in Australia Property Trust (Q)* [2018] HCATrans 65.

44 *Bartlett* (2016) 92 NSWLR 639. This decision overturned *Bartlett v Australia and New Zealand Banking Group Ltd* [2014] NSWSC 1662.

summarily dismiss the employee if it established that serious misconduct had, in fact, occurred.[45] The Court also considered an alternate argument and observed that, when forming an opinion that misconduct had occurred, the employer was 'obliged to act reasonably, at least in the *Wednesbury* sense'.[46] Macfarlan JA observed that, in this case, the employer had limited the scope of its investigation into allegations of Mr Bartlett's misconduct in a manner that was 'unwarranted', and had not afforded Mr Bartlett procedural fairness, and consequently it had acted unreasonably when forming its opinion.[47] This decision can be seen as a decisive step towards recognising the application of the *Wednesbury* standard of reasonableness to the processes employers use to conduct workplace investigations pursuant to express contractual powers.

The standard of reasonableness (or fairness) to which private sector employers must adhere when conducting workplace investigations pursuant to discretionary contractual rights and powers has also been discussed by courts, although the law remains uncertain. Specifically, the Federal Court considered the ratio in *Bartlett* in the unreported decision of *Avenia v Railway & Transport Health Fund Ltd* ('*Avenia*'), in the context of a claim in which an employer exercised a discretionary contractual power to conduct a workplace investigation and take disciplinary action.[48] In the case, Dr Avenia argued that, according to the decision in *Bartlett*, his employer was required to exercise contractual powers that could adversely affect his employment, 'reasonably' and 'in accordance with the principles of procedural fairness'.[49] Lee J determined that the decision in *Bartlett* did not establish these 'broad propositions'.[50] His Honour observed that the reasoning of Macfarlan JA in *Bartlett*

> is best seen … as an application of the principle explained by Gummow J in *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd* … that 'where one party has an express power which will significantly affect the interests of the other party … the words of the contract are fairly readily construed … as requiring a reasonable as well as honest state of satisfaction', but this construction 'is best not seen at all as the implication of a further term'.[51]

Lee J also observed, however, that *Bartlett* brought into focus an issue not raised by Mr Avenia in his claim, being the 'continuing uncertain state of the law surrounding the implication of a duty of good faith in contractual performance or

45 *Bartlett* (2016) NSWLR 639, 648–9 [30]–[34] (Macfarlan JA).

46 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 233–4 (Lord Greene MR) ('*Wednesbury*'). See ibid 651–2 [49] (Macfarlan JA). Application of the *Wednesbury* standard invalidates a decision that is 'so unreasonable that no reasonable [decision-maker] could ever have come to it': *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661, 1671 [24] (Baroness Hale DPSC), quoting *Wednesbury* [1948] 1 KB 223, 233–4 (Lord Greene MR).

47 *Bartlett* (2016) 92 NSWLR 639, 652–3 [50]–[56] (Macfarlan JA), 663–4 [106]–[107] (Meagher JA). Simpson JA dissented on this point, finding that the requirement of reasonableness should be extended to clauses where termination can be exercised on notice. For a discussion of *Bartlett* and its significance see Naughton (n 21); Williams (n 21).

48 (2017) 272 IR 151.

49 Ibid 201 [198] (Lee J).

50 Ibid 202 [205].

51 Ibid 203 [207], quoting *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd* (1993) 45 FCR 84, 94 (Gummow J) (citations omitted).

in the exercise of discretionary contractual rights and powers in employment contracts'.[52] His Honour's comments refer to the decision of *Commonwealth Bank of Australia v Barker* ('*Barker*'),[53] in which the High Court left open the question of 'whether contractual powers and discretions may be limited by good faith and rationality requirements analogous to those applicable in the sphere of public law'.[54] In *Avenia*, Lee J stated that it was not necessary to decide this question, but made reference to comments of Edelman J in *Mineralogy Pty Ltd v Sino Iron Pty Ltd [No 6]* ('*Mineralogy*'),[55] that

> [i]n Australia, it might also be said that a unitary approach to 'reasonableness' implications concerning contractual discretions should also mirror the reasonableness requirement in judicial review which arises as a matter of statutory implication. In *Byrnes v Kendle*, Heydon and Crennan JJ said that the approach taken to statutory construction is 'matched' by that which is taken to contractual construction.
>
> Although there are good reasons why this English approach should be applied to permit an Australian implication of reasonableness in the exercise of a discretionary statutory or contractual power, I doubt whether there should be a general limitation upon an implied qualification of 'reasonableness' so that the obligation applies only to circumstances of irrationality or where the outcome of the exercise of the power is so unreasonable that no reasonable power holder could ever have acted in that way. Once again, the existence and content of the implication in any case will depend on the context.[56]

It is significant that Lee J raised these 'large questions' when the parties themselves had not done so.[57] In the absence of guidance from the High Court beyond its comments in *Barker*, there remains considerable uncertainty regarding whether, at common law, an employer is required to act reasonably when conducting a workplace investigation pursuant to a discretionary contractual power and/or where the statutory unfair dismissal jurisdiction does not apply.[58] Employees experiencing unfair treatment during workplace investigations are unlikely to pursue a similar claim where other options are available, given the unsettled state of the law and considerable uncertainty in outcome.

3 Compliance with Policies on Workplace Investigations

A third way that the contract of employment intersects with workplace investigations relates to the legal significance of employer policies about workplace investigations.[59] The legal interaction between policies and procedures and the contract of employment is itself complex, and has been the subject of

52 Ibid [208] (emphasis omitted).
53 (2014) 253 CLR 169.
54 *Avenia* (2017) 272 IR 151, 201 [199], quoting *Barker* (2014) 253 CLR 169, 195–6 [42] (French CJ, Bell and Keane JJ) (citations omitted). See also the discussion of Kiefel J: *Barker* (2014) 253 CLR 169, 212–13 [102]–[104].
55 (2015) 329 ALR 1, 161–2 [1011].
56 *Avenia* (2017) 272 IR 151, 204–5 [214], quoting *Mineralogy* (2015) 329 ALR 1, 162–3 [1014]–[1015] (citations omitted).
57 *Avenia* (2017) 272 IR 151, 205 [215].
58 Cf Carolyn Sappideen, Paul M O'Grady and Joellen Riley, *Macken's Law of Employment* (Lawbook, 8th ed, 2016) 185.
59 Beard, Bryant-Smith and Klug (n 4) 17.

scholarly attention.[60] Terms of policies and procedures can be incorporated into a contract of employment and, if so, will have contractual force.[61] If the terms of a policy or procedure about a workplace investigation are expressly incorporated into a contract of employment, the employer must carefully follow these terms. Failure to do so can amount to a breach of the contract of employment.[62]

It is not clear, however, whether an employee has any legal redress where an organisation fails to comply with an investigation process set out in a policy that is not deemed to be contractual or promissory. In recent cases, courts have observed that, in some circumstances, employees may be able to enforce terms prescribing a process for a workplace investigation, set out in a policy, in circumstances where an employer has sought to exclude the terms of the policy from the employment contract. Firstly, in the decision of *Romero v Farstad Shipping (Indian Pacific) Pty Ltd*, a Full Court of the Federal Court observed that even if a policy is not contractually binding, it might constitute 'actionable representations' where there is express reliance on its terms.[63] According to this reasoning, if an employer makes a statement about the process it will follow to conduct a workplace investigation, and this is relied on by employees to their detriment, those employees may have grounds to seek a remedy in contract. This type of claim has not, however, been successfully pursued in any decided case to date.[64] In addition, in a recent interlocutory decision of the Supreme Court of Victoria, an employee claimed that it was an 'implied term' of his employment contract that his employer, the State Revenue Office ('SRO'), would adhere to the process set out in its 'Managing Misconduct Policy May 2017' when conducting a workplace investigation into allegations that he had engaged in misconduct.[65] The SRO argued that this claim had no prospect of succeeding as the employment contract stated that the employer's policies and procedures were 'not incorporated as terms of [the] contract but [the employee] must nonetheless abide by them because they are lawful and reasonable directions'.[66] Significantly, McDonald J, rejected this submission and observed that

> [a] failure by the plaintiff to comply with SRO policies and procedures arguably constitutes a breach of the contract. This conclusion is not altered by reason of the policies and procedures not being incorporated into the contract. If there is an express contractual obligation upon the plaintiff to comply with SRO policies and procedures, he has a real prospect of establishing an implied term that his employer

60 Anna Chapman, John Howe and Susan Ainsworth, 'Organisational Policies and Australian Employment Law: A Preliminary Study of Interaction' (Working Paper No 53, Centre for Employment and Labour Relations Law, University of Melbourne, 2015).

61 Mark Irving, *The Contract of Employment* (LexisNexis, 2012) ch 5.3.

62 *Nikolich* [2007] FCAFC 120, [120]–[127] (Marshall J). See *Romero* (2014) 231 FCR 403, 431–2 [95] (The Court). See also ibid chs 5.3–5.4.

63 (2014) 231 FCR 403, 420 [54] (The Court). The Court did observe that there may be difficulties inherent in this type of claim, namely the need to prove additional elements such as reliance.

64 This argument was raised by the applicant in proceedings culminating in *Riverwood International Australia Pty Ltd v McCormick* (2000) 177 ALR 193, however, the Court determined that it was not necessary to address this argument: at 199 [36] (Lindgren J). See also *Romero* (2014) 231 FCR 403, 420 [54] (The Court).

65 *Tucker v Victoria* [2018] VSC 389, [6]–[7] (McDonald J) ('*Tucker*').

66 Ibid [8] (McDonald J).

> is also subject to a contractual obligation to comply with all SRO policies and procedures.[67]

His Honour's reasoning highlights an issue regarding the compatibility of express contractual terms which, on the one hand, state that an employer's policies and procedures have no contractual force but, on the other hand, include directions mandating that employees comply with their terms. These decisions illustrate that the enforceability of terms set out in an employer's workplace investigation policy is complex and unsettled. Employees seeking to challenge employers' adherence to their policies during investigations also face significant uncertainty in outcome in this area.

B Statutory Job Protections under the *FW Act*

Employment law also includes a number of statutory protections for employees that inform the legal dimensions of workplace investigations. Key protections under the *FW Act* relate to unfair dismissal, adverse action and anti-bullying.

1 Unfair Dismissal

One key protection under the *FW Act* that intersects with workplace investigations is the unfair dismissal jurisdiction. The *FW Act* (or its predecessor) has provided employees with protection against unfair dismissal since the 1990s.[68] Part 3-2 of the *FW Act* currently sets out these provisions. This part provides employees who meet prescribed criteria with the right to lodge a claim with the FWC where they regard their dismissal as unfair. The test applied by the FWC to determine whether a dismissal was unfair is set out in section 385 of the *FW Act*. This section provides that, for a dismissal to be lawful, it must not have been 'harsh, unjust or unreasonable'. Section 387 sets out the criteria that the FWC must consider in determining whether a dismissal was 'harsh, unjust or unreasonable'. Among other things, the FWC must consider whether there was a 'valid reason for the dismissal related to the person's capacity or conduct'.[69] Under this section, the FWC must also consider procedural factors, including whether the employee was 'notified of [the] reason [for the dismissal]',[70] given the opportunity to respond to any reason '[that] related to their capacity or conduct',[71] and was not unreasonably refused access to a support person to assist at any discussions related to dismissal.[72] In addition, the FWC can consider two enterprise-specific factors, being the size of the organisation and whether the absence of HR specialists or expertise would

67 Ibid [10].

68 See, eg, Anna Chapman, 'Protections in Relation to Dismissal: From the Workplace Relations Act to the *Fair Work Act*' (2009) 32(3) *University of New South Wales Law Journal* 746 ('Protections in Relation to Dismissal'); Anna Chapman, 'Unfair Dismissal Law and Work Choices: From Safety Net Standard to Legal Privilege' (2006) 16(2) *Economic and Labour Relations Review* 237, 238; Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work* (Oxford University Press, 2nd ed, 2011) [9.31]; Stewart et al (n 26) 771.

69 *FW Act* s 387(a).

70 Ibid s 387(b).

71 Ibid s 387(c).

72 Ibid s 387(d).

be likely to impact on the procedures followed in the dismissal.[73] Finally, the FWC must take into account any other matters that it considers relevant.[74] Part 3-2 also sets out exclusions from the prohibition against unfair dismissal for dismissals by small businesses that followed the Small Business Code,[75] or that constituted a 'genuine redundancy'.[76] If the FWC determines that an employee has been unfairly dismissed under part 3-2, it may order the employee be reinstated,[77] or if reinstatement is not appropriate, compensation in accordance with section 392.[78]

The FWC examines employers' workplace investigations in many decisions made under part 3-2. Employers often refer to the processes, and findings, of workplace investigations to demonstrate that there was a 'valid reason' for dismissing an employee,[79] or that the dismissal was consistent with the procedural factors set out in section 387.[80] Also, in some decisions, the FWC has determined that the process used by an employer to conduct a workplace investigation was so flawed that it rendered the sanction of dismissal unfair.[81] Decisions of the FWC under part 3-2 are usually factually specific and do not bind the FWC with respect to future decisions. Commentaries from lawyers and workplace investigators indicate, however, that the unfair dismissal jurisdiction is an influential source on which they may base advice to employers regarding how to conduct workplace investigations.[82]

Despite being an influential source of guidance for organisations and their advisors, decisions under part 3-2 often set out inconsistent views regarding employers' obligations during workplace investigations. In *Kirkbright v K&S Freighters Pty Ltd* ('*Kirkbright*'),[83] for example, an employee was dismissed after admitting to management that he had sent freight without a consignment note, contrary to work practices. Commissioner Bisset determined that the workplace investigation 'left much to be desired',[84] including because the employee had not been given the allegations in writing and an opportunity to respond to those allegations in writing or verbally on a future date.[85] On this basis, the FWC determined that while there was a valid reason for the dismissal, it was nevertheless 'harsh' and made an order for compensation in favour of the employee. On the other hand, in *Cowan v Sargeant Transport Pty Ltd* ('*Cowan*'),[86] the same Commissioner determined that a principal flaw of the organisation's workplace investigation was that no one 'sat with [Mr Cowan] and explained to him the

73 Ibid ss 387(f), 387(g).
74 Ibid s 387(h).
75 Ibid s 388.
76 Ibid s 389.
77 Ibid ss 390, 391.
78 Ibid ss 390, 392. See also Marc Felman, 'Remedies on Termination of Employment' (2007) 81(4) *Law Institute Journal* 46.
79 See, eg, *Vujica v TNT Australia Pty Ltd* [2014] FWC 4790, [6] ('*Vujica*') (Sams DP).
80 See, eg, *Harley v Rosecrest Asset Pty Ltd* [2011] FWA 3922, [9] (McCarthy DP).
81 See, eg, *Duncan v Bluescope Steel Ltd* [2013] FWC 8142.
82 See, eg, 'Procedural Fairness Hard to Prove without Workplace Investigation' (n 4).
83 [2016] FWC 1555.
84 Ibid [98].
85 Ibid [100].
86 [2014] FWC 5330.

allegations'.[87] In this decision, Commissioner Bisset reasoned that written allegations were only required if arranging a meeting with the employee (at which the investigator could explain the allegations) was too difficult.[88] These decisions reflect a broader inconsistency and unsystematic development of reasoning in this jurisdiction, which is significant given that employers (and their advisors) refer to, and rely on, these decisions when discussing best practice.[89]

2 Adverse Action

Workplace investigations also intersect with the 'general protections' provisions set out in part 3-1 of the *FW Act*. Anti-victimisation protections for trade unionists have existed in Commonwealth labour legislation since 1904.[90] In the 1990s, these protections were extended to non-unionists and independent contractors.[91] Provisions prohibiting dismissal on discriminatory grounds have also existed in Commonwealth labour legislation since the 1990s. The *FW Act* rationalised, and in some cases expanded, these protections in part 3-1 of the *FW Act*, which commenced operation in 2009.[92]

One of the main protections set out under part 3-1 of the *FW Act* is that certain persons (including employers) are prohibited from taking 'adverse action' against certain other persons (including employees and independent contractors) for a prohibited reason.[93] Three prohibited reasons for 'adverse action' are included in part 3-1: because a person exercises a 'workplace right';[94] where a person is or is not a union member or has or has not engaged in industrial activities;[95] and because

87 Ibid [56].

88 Ibid [57].

89 This is apparent from the significant number of commentaries from firms of lawyers and investigators, which report on the outcomes of unfair dismissal claims.

90 Kathleen Love, 'Union Victimisation, the Reverse Onus and the Causal Link: The Development of Principles Prior to the *Fair Work Act*' (Working Paper No 52, Centre for Employment and Labour Relations Law, University of Melbourne, November 2014), 10–14.

91 Ibid 15.

92 Chapman, 'Protections in Relation to Dismissal' (n 68) 751. See also Beth Gaze, Anna Chapman and Adriana Orifici, 'Evaluating the Adverse Action Provisions of the *Fair Work Act*: Equality Thwarted?' in John Howe, Anna Chapman and Ingrid Landau (eds), *The Evolving Project of Labour Law: Foundations, Development and Future Research Directions* (Federation Press, 2017) 88; Victoria Lambroupoulos, 'The General Protections and Adverse Action: Four Years On' in Mark Rinaldi, Victoria Lambropoulos and Rohan Millar (eds), *Fair Work Legislation 2013* (Thomson Reuters, 2013) 13.

93 'Adverse action' includes dismissal, injuring an employee in their employment, altering the position of an employee to their prejudice and discriminating between the employee and other employees of the employer: *FW Act* s 342.

94 Ibid ss 340(1)(a), (1)(b). For a discussion of this ground see Elizabeth Shi, 'Adverse Action Protection for the Right to Complain or Inquire in s 341 of the *Fair Work Act*' (2017) 30(3) *Australian Journal of Labour Law* 294.

95 *FW Act* s 346. The term 'workplace right' is broadly defined. A 'workplace right' includes being 'entitled to the benefit of, or [having] a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body': at s 341(1)(a). It also includes being 'able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument' and being 'able to make a complaint or inquiry … to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument [or, where] the person is an employee – in relation to [their] employment': at ss 341(1)(b)–(c).

of one or more protected grounds of discrimination.[96] A number of exceptions apply, which deem conduct that would otherwise constitute 'adverse action' to be lawful.[97] There are several key aspects of the protection against adverse action under part 3-1. First, there must be a 'causal link' between the adverse action and one of the prohibited reasons.[98] This means that the adverse action must have been because of one or more of the prohibited reasons. Second, the prohibited reason need only be one reason why the organisation took the adverse action.[99] Third, there is a shifting onus of proof.[100] Fourth, the prohibited reason needs to be an 'operative or immediate reason' for the adverse action, but does not need to be the 'sole or dominant reason'.[101] All protections set out in part 3-1 are civil remedy provisions.[102]

The general protections jurisdiction has introduced an important legal dimension, which impacts on all workplace investigations. Specifically, courts have determined that initiating a workplace investigation can constitute adverse action, even if the investigation is commenced in good faith. In the decision of *Jones v Queensland Tertiary Admissions Centre Ltd [No 2]* ('*Jones*'),[103] for example, Collier J accepted that commencing a workplace investigation could constitute 'adverse action' in some circumstances.[104] Her Honour observed that

> [w]hile an investigation into allegations of bullying may be appropriate and indeed warranted in the circumstances of an individual case, this does not mean that the employee will not be 'injured' or their position altered to their prejudice by the investigation. I do not agree that, as a general proposition, amenability to a disciplinary investigation is a 'normal' incident of employment, even if the investigation is commenced in good faith and on a proper prima facie evidentiary basis.[105]

Despite this general finding, her Honour accepted the employer's evidence that the adverse action (as pleaded) was not for a prohibited reason in the specific

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96 Ibid s 351. These grounds are race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin. For a detailed discussion of this ground see Anna Chapman, 'Judicial Method and the Interpretation of Industrial Discrimination' (2015) 28(1) *Australian Journal of Labour Law* 1.

97 *FW Act* ss 342(3), (4), 351(2)(a)–(c).

98 For a discussion of the causal link see, eg, Adriana Orifici '*CFMEU v Endeavour Coal*: Severing Workplace Rights from their Organisational Impact?' (2016) 29(3) *Australian Journal of Labour Law* 327.

99 *FW Act* s 360.

100 Ibid s 361. The shifting onus means that where an applicant establishes that there was adverse action and one of the prohibited reasons applies, the onus of proof shifts to the organisation to prove that the adverse action was not taken for a prohibited reason. For academic discussion of the shifting onus see, Anna Chapman, Beth Gaze and Kathleen Love, 'The Reverse Onus of Proof Then and Now: The Barclay Case and the History of the *Fair Work Act*'s Union Victimisation and Freedom of Association Provisions' (2014) 37(2) *University of New South Wales Law Journal* 471; Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 236–41.

101 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212, 221 [30] (Gray and Bromberg JJ).

102 *FW Act* ss 545–6, 570.

103 (2010) 186 FCR 22.

104 Ibid 46 [81].

105 Ibid 47 [82] (emphasis omitted).

circumstances of the case.[106] This judgment was subsequently applied by Murphy J in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd [No 3]* ('*Visy*').[107] Murphy J determined that commencing a workplace investigation 'brought in good faith' could constitute 'adverse action', as it 'may nevertheless give rise to a deterioration in the employment advantages enjoyed by the employee'.[108] Murphy J went on to observe, however, that

> [i]t is important to remember that while an investigation may constitute adverse action, it is only unlawful if the investigation is carried out for a prohibited reason. An employer has not acted unlawfully where the reason for the investigation is other than a prohibited reason.[109]

These decisions mean that whenever an employer commences a workplace investigation, even in good faith, it may engage in 'adverse action' under part 3-1.[110] If the employee can identify a prohibited ground, which the employee asserts was the reason for the 'adverse action', then the burden of proof shifts to the employer to demonstrate that it did not commence the workplace investigation for a reason including the prohibited reason.[111] As noted above, the range of prohibited grounds protected under part 3-1 are broad, particularly those set out in section 341. Accordingly, each time that an employer commences a workplace investigation, it is exposed to a potential claim under part 3-1, which will succeed unless the employer is able to present cogent and comprehensive evidence to discharge the shifting onus of proof under section 361.[112] Employers' workplace investigations processes are, therefore, likely to be shaped by producing evidence to defend potential future claims under part 3-1, as well as fact-finding. The intersection between workplace investigations and part 3-1 of the *FW Act*, therefore, imposes a complex legal dimension that informs the rights and obligations of affected employers and employees.

3 Anti-Bullying

The anti-bullying jurisdiction under the *FW Act* commenced in 2014. It also augments the legal dimensions of workplace investigations.[113] Under part 6-4B, a

106 Ibid 47 [84].
107 (2013) FCR 70, 91 [97], 92–3 [101]–[103].
108 Ibid 91 [97].
109 Ibid 91 [104]. This judgment was subsequently applied in *United Firefighters Union of Australia v Easy* [2013] FCA 763, [251] (Ross J).
110 Note, in *Bartolo v Doutta Galla Aged Services Ltd [No 2]* [2015] FCCA 345, Whelan J considered *Visy* and observed 'the circumstances in which an investigation initiated by the employer can constitute adverse action will depend on the particular circumstances of the case': at [133].
111 *FW Act* s 361. For a detailed discussion of the jurisdiction, see, eg, Rodney Worth and Joan Squelch, 'Stop the Bullying: The Anti-Bullying Provisions in the *Fair Work Act* and Restoring the Employment Relationship' (2015) 38(3) *University of New South Wales Law Journal* 1015.
112 See, eg, *Keenan v Cummins South Pacific Pty Ltd* (2018) 283 IR 31, where Wilson J accepted that a workplace investigation that 'orchestrated reputational injury' was adverse action for the purposes of the *FW Act*: at 104 [289]–[291].
113 *FW Act* ss 789FA–FL.

'worker',[114] in a 'constitutionally-covered business'[115] who 'reasonably believes that [they have] been bullied at work' can apply to the FWC for an order to stop bullying.[116] The FWC has noted that a reasonable belief is one that is genuinely held and 'objectively speaking, there must be something to support it or some other rational basis for the holding of the belief and it is not irrational or absurd'.[117] Under part 6-4B, a worker is 'bullied' if an individual or group of individuals 'repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member' and 'that behaviour creates a risk to health and safety'.[118] The test for 'unreasonable behaviour' is objective, being what 'a reasonable person, having regard to the circumstances, may consider to be unreasonable'.[119] Notably, 'reasonable management action carried out in a reasonable manner' does not constitute bullying.[120] To determine the 'reasonableness' of the action, the FWC will make 'an objective assessment of the action in the context of the circumstances and knowledge of those involved at the time'.[121] The specific 'attributes and circumstances' of the situation including the emotional state and psychological health of the worker involved may also be relevant.[122] The FWC has emphasised that the test relates to whether the management action was reasonable, not whether it could have been 'more reasonable' or 'more acceptable'.[123] In addition, for the FWC to make an order to stop bullying, it must be satisfied that there is a risk that while the worker is at work, they will continue to be bullied by the relevant person or group.[124] If an organisation responds to an application by taking measures to address the behaviour that has prompted the application, the FWC might determine that there is no ongoing risk of bullying. If the FWC is satisfied that bullying has taken place, the FWC can also make 'any order it considers appropriate' to prevent the worker from being bullied at work by a person or group of persons.[125] Orders are generally tailored to the specific circumstances of the worker and organisation.[126]

Workplace investigations arise in three key ways in decisions under part 6-4B. Firstly, the FWC has examined whether commencing, or refusing to commence, a workplace investigation constitutes 'bullying'. In this context, the FWC has determined that a workplace investigation will constitute 'reasonable management action' if it is taken in a reasonable manner.[127] On the other hand, an employer may

114 A 'worker' is defined by reference to the *Work Health and Safety Act 2011* (Cth) to include an employee: at s 7. See also *FW Act* s 789FC(2).
115 *FW Act* s 789FD(1)(a).
116 Ibid s 789FC(1).
117 *Mac v Bank of Queensland Limited* [2015] FWC 774, [79] (Hatcher V-P).
118 *FW Act* s 789FD(1).
119 *Re SB* (2014) 244 IR 127, 136 [43] (Commissioner Hampton).
120 *FW Act* s 789FD(2).
121 *Re SB* (2014) 244 IR 127, 137 [49] (Commissioner Hampton).
122 Ibid 137 [50] (Commissioner Hampton).
123 Ibid 137 [51] (Commissioner Hampton).
124 *FW Act* s 789FF(1). For a critique see Amber Sharp, 'Workplace Bullying: Are Stop Bullying Orders Really the Answer?' (2014) (1) *Law Society of NSW Journal* 82.
125 *FW Act* s 789FF(1). The FWC cannot make orders requiring payment of a pecuniary amount.
126 See, eg, Fair Work Commission, *Applicant v Respondent* (PR548852, 21 March 2014).
127 See *Re SB* (2014) 244 IR 127, 136 [46], 140 [79] (Commissioner Hampton).

engage in bullying by 'conducting an investigation in a grossly unfair manner',[128] as part of a pattern of unreasonable conduct, or by refusing to commence a workplace investigation.[129] In *Willis v Gibson*, the FWC determined, for example, that conducting an investigation into allegations of misconduct in an unfair manner could be unreasonable conduct by an employer.[130] In addition, the FWC has, in some cases, ordered that employers commence workplace investigations to stop further bullying. The FWC has, for example, made orders that require employers to prepare and deploy workplace investigation procedures and/or training.[131] Third, the FWC has, in other cases, issued interim orders preventing employers from finalising workplace investigations (and imposing disciplinary sanctions) until the FWC has considered an affected employee's application for an order to stop bullying.[132] In *Bayly*, for example, Ms Bayly made claims including that the making of misconduct allegations, and the process adopted by her employer to investigate those allegations, were part of a 'pattern of unreasonable conduct towards her'.[133] Commissioner Hampton determined that Ms Bayly's application had '*prima facie* merit'[134] and, therefore, it was necessary to issue an interim order to prevent her employer from 'taking any further steps to finalise' a workplace investigation into allegations of misconduct by the employee, or impose any disciplinary action in connection with the investigation, until FWC had heard her application for an order to stop bullying.[135] Employees are therefore presented with various, and often novel, possibilities to exercise legal rights to seek redress for unreasonable treatment during workplace investigations under part 6-4B, although doing so often requires testing the limits of this developing jurisdiction.

C Enterprise Agreements

Workplace investigations also intersect with the terms of enterprise agreements made under the *FW Act*. Enterprise agreements set terms and conditions of employment for employees for a period of up to four years.[136] The *FW Act* prescribes how bargaining begins, proceeds and ends.[137] It also sets out the process by which the FWC may approve an enterprise agreement.[138] The *FW Act* also sets out rules regarding the content of enterprise agreements. A term included in an enterprise agreement must be a 'mandatory term' or about a 'permitted

128 Ibid [105] (Commissioner Hampton).
129 See, eg, *Watts* [2018] FWC 1455.
130 [2015] FWC 1131.
131 See, eg, *Bowker v DP World Melbourne Ltd* [2015] FWC 7312.
132 See, eg, *Bayly* [2017] FWC 1886. Cf *Subramanian* [2017] FWC 3492, [132] (Commissioner Hunt).
133 [2017] FWC 1886, [40] (Commissioner Hampton).
134 Ibid [43].
135 Ibid [49]. An application under part 6-4B cannot be made by an employee whose employment has ended: see s 789FF. See, eg, *Shaw v Australia and New Zealand Banking Group Limited* [2014] FWC 3408.
136 *FW Act* s 186(5)(b). For a detailed examination on the development of the rules regarding agreement making see Carolyn Sutherland, 'Making the "BOOT" Fit: Reforms to Agreement-Making from Work Choices to Fair Work' in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009) 99.
137 *FW Act* pt 2-4.
138 Ibid pt 2-4 div 4.

matter'.[139] Mandatory terms must be included in all enterprise agreements. Among other things, it is mandatory for an enterprise agreement to include a term providing for a procedure for settling disputes about matters arising under the agreement.[140] Permitted matters are set out in section 172(1). To the extent that a term is not about a permitted matter, it has no effect and is not enforceable.[141] If a party to an enterprise agreement contravenes its terms, another party to that enterprise agreement (and other prescribed persons) can apply to the court for remedies.[142] Among other things, the court can impose a monetary penalty, award of compensation, or injunctive relief for breach of a term of an enterprise agreement.[143]

Terms that set out the process an employer will follow during a workplace investigation are often included in enterprise agreements. These terms are about 'permitted matters', but are not mandatory. The content of terms, which describe a process for conducting a workplace investigation, varies. Some terms confer discretion on an employer to conduct a workplace investigation if required,[144] some terms describe circumstances in which a workplace investigation is mandatory without setting out a detailed procedure,[145] and other terms describe circumstances in which a workplace investigation is mandatory and also a detailed set of steps that the employer must follow to conduct the investigation.[146] Other enterprise agreements incorporate, or refer to, a policy or procedure that prescribes a workplace investigation process.[147] An array of intricate, legally-binding arrangements for conducting workplace investigations are, therefore, set out in the terms of many enterprise agreements. These often define the rights and obligations of affected employers and employees.

Decisions resulting from disputes about enterprise agreement terms, which prescribe investigation processes, are often complex and uncertain. This, more broadly, reflects the fact that the terms of enterprise agreements are usually drafted by non-lawyers and can lack 'precision and clarity'.[148] In *Halici v KDR Victoria Pty Ltd [No 3]* ('*Halici*'),[149] for example, Mr Halici claimed, among other things,

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139 Ibid pt 2-4 div 5, ss 186, 172(1)(a); *Re Rural City of Murray Bridge Nursing Employees* (2005) 142 IR 289, 307 [47]–[48] (The Commission). A 'permitted matter' includes any matter that pertains to the employment relationship between the employer and employees who will be covered by the enterprise agreement. Whether a term pertains to the employment relationship is contextually specific. It depends on the form of the clause, its content and effect, as well as its precise construction and the circumstances surrounding the particular employment relationship.

140 *FW Act* s 186(6).

141 Ibid s 253(1)(a).

142 Ibid ss 50, 539(2) item 4.

143 Ibid s 546. Parties to enterprise agreements can also seek to enforce the terms of the agreement through invoking the dispute resolution process under the agreement. These applications are made to the FWC.

144 See, eg, *Greenpeace Australia Pacific Ltd Enterprise Agreement 2010* cl 54.14.

145 See, eg, *Southern Plumbing Enterprise Agreement 2016–2019* cl 25.1(b).

146 See, eg, *State Library Victoria Enterprise Partnership Agreement 2016* cl 29.8.

147 See, eg, *Yarra Trams Bargaining Agreement 2009* cl 23. See also *Australian Rail, Tram & Bus Industry Union v KDR Victoria Pty Ltd* [2014] FCAFC 24.

148 *Transport Workers' Union of Australia v Linfox Australia Pty Ltd* (2014) 318 ALR 54, [29] (Tracey J). See also Carolyn Sutherland, 'The Problem of Uncertainty: An Empirical Analysis of Indeterminate Language and Ambiguous Provisions in Enterprise Agreements' (2016) 44(1) *Federal Law Review* 111.

149 [2017] FCCA 764 (O'Sullivan J).

that his employer had breached terms of an enterprise agreement, which covered and applied to his employment,[150] by failing to conduct a workplace investigation in accordance with its 'disciplinary policy'. In a previous, related decision, Jessup J determined that the enterprise agreement did require the employer to investigate allegations of misconduct 'in accordance with a clearly identified document, the disciplinary policy'.[151] In *Halici*, O'Sullivan J was, therefore, required to consider whether the terms of the disciplinary policy set out obligations, which were enforceable, including as terms incorporated into the enterprise agreement. Ultimately, O'Sullivan J determined that the relevant terms of the disciplinary policy did not impose enforceable obligations.[152] This decision sets out competing interpretations of the employer's obligations with respect to conducting a workplace investigation under the disciplinary policy. O'Sullivan J observed that the employee 'presented as having an unwavering conviction that he had been wronged'[153] by his employer, and it is clear that the parties maintained conflicting, and divergent, interpretations of the employer's obligations with respect to the process for conducting a workplace investigation. This decision indicates that including a term in an enterprise agreement, which prescribes a process for conducting a workplace investigation, can produce uncertainty, with respect to the rights and obligations of affected parties.

D Anti-discrimination Law

All Australian jurisdictions have adopted legislation that prohibits discrimination on the basis of attributes such as sex, race or disability,[154] although the legislation is not uniform. Protections under anti-discrimination laws apply in employment and other contexts. Anti-discrimination laws prohibit unlawful direct and indirect discrimination including by employers and their employees. Under some anti-discrimination statutes, unlawful discrimination also includes sexual harassment,[155] and disability harassment.[156] Under anti-discrimination laws,

150 *FW Act* s 51.

151 *Australian Rail, Tram and Bus Industry Union v KDR Victoria Pty Ltd* [2014] FCAFC 24, [9].

152 *Halici* [2017] FCCA 764, [145]. Cf *Nikolich* [2007] FCAFC 120, [311] (Jessup J).

153 *Halici* [2017] FCCA 764, [167].

154 *Age Discrimination Act 2004* (Cth) ('*ADA*'); *Disability Discrimination Act 1992* (Cth) ('*DDA*'); *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ('*HREOC Act*'); *Sex Discrimination Act 1984* (Cth) ('*SDA*'); *Racial Discrimination Act* 1975 (Cth) ('*RDA*'); *Discrimination Act 1991* (ACT) s 7(1)(a) ('*DA* (ACT)'); *Anti-Discrimination Act 1977* (NSW) s 24 ('*ADA* (NSW)'); *Anti-Discrimination Act 1992* (NT) s 19(1)(f) ('*ADA* (NT)'); *Anti-Discrimination Act 1991* (Qld) s 7(a) ('*ADA* (Qld)'); *Equal Opportunity Act 1984* (SA) s 29(2) ('*EOA* (SA)'); *Anti-Discrimination Act 1998* (Tas) s 16(g) ('*ADA* (Tas)'); *Equal Opportunity Act 2010* (Vic) s 6(o) ('*EOA* (Vic)'); *Equal Opportunity Act 1984* (WA) s 8 ('*EOA* (WA)'). These protections are not uniform and grounds of discrimination vary in each jurisdiction. The complex framework of discrimination protections in Australia has been the subject of detailed scholarly discussion. See, eg, Anne Hewitt, 'Navigating the Maze of Australia's Complex Discrimination Legislation: A Case Study of Belief Discrimination' (2011) 24(1) *Australian Journal of Labour Law* 24, 24–44; Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 301–2.

155 *SDA* s 28A; *DA* (ACT) ss 58–64; *ADA* (NT) s 22; *ADA* (NSW) ss 22A–22J; *ADA* (Qld) ss 118–120; *EOA* (SA) s 87; *ADA* (Tas) s 17; *EOA* (WA) ss 24–6; *EOA* (Vic) ss 92–102.

156 Under the *DDA*, disability harassment in the context of employment is unlawful: at s 35.

employers can be vicariously liable for unlawful conduct by employees or agents.[157] An employer can argue that it took 'all reasonable steps' to prevent the unlawful conduct as a defence to a claim of vicarious liability.[158] Anti-discrimination statues also prohibit persons, including employers, from inciting, causing, instructing, inducing, aiding or permitting another to commit an act of unlawful conduct.[159] Anti-discrimination laws set out mechanisms by which complaints of unlawful conduct can be filed, conciliated and determined. In most instances, complainants bear the onus of establishing that unlawful discrimination or sexual harassment occurred.[160] If a claim is successful, the complainant may seek orders, including for compensation for economic and non-economic loss.[161]

Workplace investigations interact with anti-discrimination laws in three key ways. Firstly, employers refer to the processes, and outcomes, of workplace investigations conducted in response to complaints of unlawful discrimination as part of a defence to a claim of vicarious liability.[162] In some instances, courts and tribunals have recognised workplace investigations as part of an employer's process of taking 'all reasonable steps' to prevent unlawful discrimination.[163] Secondly, the Federal Court has determined that an inadequate investigation can constitute unlawful discrimination, in certain circumstances. Specifically, in *Poniatowska v Hickinbotham* ('*Poniatowska*'), Ms Poniatowska claimed that her employer had discriminated against her because, by reason of her sex, she was treated less favourably than a male person in the same or not materially different circumstances would have been treated when she made complaints of sexual harassment by two other employees.[164] Mansfield J held that the employer's conduct amounted to sex discrimination.[165] In considering whether Ms Poniatowska had been treated less favourably than the employer would have treated a male person in the same or not materially different circumstances, Mansfield J stated that

> [s]he complained. Instead of her complaints being addressed sympathetically, they were treated dismissively … The legitimate complainant was, as I have found, then identified as a person who it was desirable to terminate because she had confronted [the employer] with her complaints.[166]

Significantly, Mansfield J determined that, in the circumstances, the employer's failure to carry out satisfactory investigations into Ms Poniatowska's complaints formed part of the discriminatory conduct.[167] Thirdly, some courts and

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157 *SDA* s 106; *RDA* ss 18A, 18E; *DDA* s 123; *EOA* (Vic) s 102.

158 *SDA* s 106; *RDA* s 18A. See also 'reasonable precautions': *ADA* s 57; *DDA* s 123. In the case of the *DDA*, the employer must show it also exercised 'due diligence': at ss 123(2), (4).

159 *SDA* s 105; *RDA* s 17; *DDA* ss 43, 122.

160 For a detailed discussion of the onus of proof on applicants see generally Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31(4) *Sydney Law Review* 579.

161 *HREOC Act* s 46PO(4).

162 See, eg, *Coyne v P & O Ports* [2000] VCAT 657. Note, however, that the tribunal determined in this case that the steps taken by the employer were insufficient to discharge its vicarious liability.

163 *McAlister v SEQ Aboriginal Corporation* [2002] FMCA 109, [144]–[148] (Rimmer FM).

164 [2009] FCA 680.

165 Ibid [315].

166 Ibid [313].

167 Ibid [311]. A general damages award of $90,000 was made in this case.

tribunals have considered the impact of a deficient workplace investigation when quantifying the amount of damages awarded in successful claims under anti-discrimination laws. In *McCauley v Club Resort Holdings Pty Ltd [No 2]* ('*McCauley*'), for example, the Queensland Civil and Administrative Tribunal determined that an employer's 'bungled' workplace investigation into a complaint of sexual harassment had exacerbated the complainant's psychiatric injury.[168] Member Gordon determined that the inadequacy of the employer's workplace investigation was relevant to the issue of 'causation' and, ultimately, the amount awarded to the employee in compensation.[169] Decisions under anti-discrimination law, therefore, reveal a tension between an expectation that employers use workplace investigations as a tool to prevent unlawful discrimination, and critique of workplace investigations as processes that can potentially contribute to a course of discriminatory conduct. Anti-discrimination law provides a mechanism by which employees can, in some circumstances, seek redress for unfair treatment during a workplace investigation, although it is apparent that the law in this area remains fragmented and underdeveloped.

E Work Health and Safety Law

Like anti-discrimination statutes, work health and safety laws apply in employment, and also other work relationships. Since January 2012, all States and Territories have adopted the Model Work Health and Safety Bill 2011 (Cth) excluding Victoria and Western Australia.[170] These statutes are collectively described as the harmonised *Work Health and Safety Acts* ('*WHS Acts*').[171] The *WHS Acts* impose a primary duty of care on a person conducting a business or undertaking ('PCBU') to 'ensure, so far as is reasonably practicable, the health and safety of workers engaged … by the person; and workers whose activities in carrying out work are influenced or directed by the person'.[172] This duty is owed to workers while they are at work in the business or undertaking. In addition to the primary duty of care, PCBUs owe a primary duty to other persons to 'ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out' by the business or undertaking.[173] This duty extends to visitors, volunteers and others who are at or near the work site. The *WHS Acts* also provide examples of the steps that PCBUs must take to discharge

168 [2013] QCAT 243, [2]–[3] (Member Gordon).

169 Ibid [279].

170 The Western Australian government announced it would develop a modernised work health and safety act based on the national model Work Health and Safety Act on 12 July 2017. Public consultation ended on 31 August 2018: 'Modernising Work Health and Safety Laws in WA' *Government of Western Australia* (Web Page, 27 September 2018) <https://www.commerce.wa.gov.au/publications/modernising-work-health-and-safety-laws-wa>.

171 The *Occupational Health and Safety Act 2004* (Vic) sets out substantively similar obligations to the *WHS Acts*. For an examination of the *WHS Acts* see Stewart et al (n 26) 536–601; Sappideen, O'Grady and Riley (n 58) 283–312.

172 *WHS Acts* s 19(1). Workers are defined in s 7(1) of the *WHS Acts* as any persons who carry out work 'in any capacity' for a PCBU.

173 Ibid s 19(2). See Barry Sherriff, 'Revisiting the Compliance Standard of "Reasonably Practicable" in the Model Work Health and Safety Act' (2011) 39 *Australian Business Law Review* 52, 52–4.

their primary duties. This includes PCBUs providing and maintaining 'a work environment without risks to health and safety' and 'information, training, instruction or supervision necessary to protect all persons from risks to their health and safety'.[174] The *WHS Acts* impose other duties that supplement the primary duty of care under section 19.[175] In addition, Model regulations and Codes of Practice augment the *WHS Acts*. The Codes of Practice are not legally binding but provide guidance on how PCBUs can discharge their duties under the *WHS Acts*.

PCBUs must comply with the primary duties, and additional duties under sections 20–26 of the *WHS Acts*, so far as is 'reasonably practicable'. Section 18 of the *WHS Acts* defines 'reasonably practicable' as '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'. Section 18 also lists matters that are relevant to determining if a step was 'reasonably practicable'. There are various mechanisms, under *WHS Acts*, which are intended to enable enterprises to address risks to health and safety. The *WHS Acts* facilitate the appointment of health and safety representatives and committees to address risks to health and safety.[176] Health and safety representatives also have the power to issue Provisional Improvement Notices ('PINs') if they reasonably believe a person (including a PCBU) is contravening the *WHS Acts* or has, and is likely to continue to, contravene the *WHS Acts*.[177] A PCBU may also be prosecuted for breach of the *WHS Acts*.[178]

The *WHS Acts* add an additional legal dimension to workplace investigations. Firstly, the *WHS Acts* reflect an employer's common law duty of care, which is discussed above. The general duty on employers, under section 19, is expressed to be 'without limitation'.[179] Accordingly, the unsettled state of the common law, regarding whether an employer is required to provide a safe system of investigation and decision as part of its duty to provide a safe system of work, also impacts on interpretations of an employer's duty under section 19.[180] In addition, a 'reasonably practicable' step by a PCBU to ensure health and safety might be to conduct a workplace investigation into an issue, which presents a risk to health and safety at work. In the context of workplace bullying, which is characterised as a health and safety issue, Safe Work Australia has stated that a PCBU should 'always' undertake a workplace investigation into any complaint 'of a serious or complex nature'.[181] The law in this area is underdeveloped. While it is yet to be

174 *WHS Acts* ss 19(3)(a), 19(3)(f).
175 Ibid ss 20–6.
176 Ibid ss 60–9, 75–82.
177 Ibid s 90(1).
178 Ibid s 230. For an examination of enforcement and compliance mechanisms under the *WHS Acts* see Elizabeth Bluff and Richard Johnstone, 'Supporting and Enforcing Compliance with Australia's Harmonised WHS Laws' (2017) 30(1) *Australian Journal of Labour Law* 30.
179 *Kirk v Industrial Court of NSW* (2010) 239 CLR 531.
180 This issue is yet to be judicially considered.
181 Safe Work Australia, *Guide for Preventing and Responding to Workplace Bullying* (May 2016) 22. This is also reflected in Codes of Practice regarding workplace bullying made under the *WHS Acts* in some States and Territories. See, eg, *Work Health and Safety (Preventing and Responding to Bullying) Code of Practice 2012 (No 1)* (ACT) (NI2012–219, 22 July 2012).

tested in a prosecution under the *WHS Acts*, it is possible that an employer's refusal to, or unreasonable delay in, conducting a workplace investigation could constitute a breach of the primary duty. There is also potential for health and safety representatives to issue PINs in relation to this conduct in order to protect employees subjected to unreasonable treatment during workplace investigations. The interaction between an employer's primary duty under the *WHS Acts* and approach to workplace investigations is, therefore, unsettled.

F Public Sector Employment Law

Workplace investigations conducted by public sector employers feature additional legal dimensions. Many aspects of public sector employment law in Australia are the same as private sector employment law. In particular, the common law contract of employment underpins the employment relationship and imposes express and implied terms,[182] enterprise agreements and modern awards frequently set out terms and conditions of employment,[183] and other specific and general statutes govern employment relations.[184] There are, however, distinctive aspects to the regulation of employment in the public sector. Firstly, direct statutory control of employment conditions via specific legislation is more common in the public sector. At Commonwealth level, Australian public service employment law is governed by the *Public Service Act 1999* (Cth) ('*PS Act*'). Prior to the *PS Act*, employment law was governed by the *Public Service Act 1922* (Cth), which set out in prescriptive terms employees' rights and duties.[185] Under the *PS Act*, however, core principles and protections are set out in legislation and responsibility for employment is devolved to department level.[186] With respect to discipline, for example, the *PS Act* sets out four core values, reflected in a code of conduct, which are enforced through a framework of disciplinary processes.[187] Public sector employees have a right of internal review with respect to any disciplinary action (up to dismissal).[188] They can also make a claim of unfair dismissal to the FWC. Furthermore, the *Public Service Commissioner's Directions 2016* and manuals prepared by the government inform departmental disciplinary procedures.[189] Considered together, these instruments and documents form key aspects of the framework of rules that govern workplace investigations in the public sector.

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182 Some public servants are statutorily classified as 'officers'. Nevertheless, almost all public servants are now regarded as employees. See *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44.

183 The extent to which awards and enterprise agreement, as opposed to direct statutory control, regulates employment varies across different parts of the public sector.

184 Phillipa Weeks, 'The Reshaping of Australian Public Service Employment Law' in Marilyn Pittard and Phillipa Weeks (eds), *Public Sector Employment in the Twenty-First Century* (ANU E Press, 2007) 11.

185 Paul Vermeesch, 'Misconduct in the Australian Public Service' (Legal Briefing, Australian Government Solicitor, 15 October 2014) 3 <http://www.ags.gov.au/publications/legal-briefing/br104.pdf>.

186 Stewart et al (n 26) 269–70.

187 *Public Service Act 1999* (Cth) s 29 ('*PS Act*').

188 See, eg, *PS Act* s 33; *Public Service Regulations 1999* (Cth) pt 5; *Public Administration Act 2004* (Vic) s 64; *Public Administration (Review of Actions) Regulations 2015* (Vic) ss 6–10 ('*PA(RA) Regs*'). Notably, decisions resulting in termination of employment are excluded by these statutes.

189 *PS Act* s 15(4); *Australian Public Service Commissioner's Directions 2016* (Cth) pt 5.

Administrative law also applies to public sector bodies, including when they are exercising employment functions on behalf of the Commonwealth. Among other things, this means procedural fairness applies to decision-making during a disciplinary process.[190] The principles of procedural fairness are 'flexible',[191] but generally impose two requirements, being the fair hearing rule and the rule against bias.[192] The hearing rule requires that a decision-maker provide a person with information on the case against them and the opportunity to respond. The rule against bias requires that the decision-maker not be affected by actual or perceived bias. The operation of the principles of procedural fairness also adds a dimension of formality and legality to public sector disciplinary processes.

Public sector workplace investigations, therefore, have additional, often complex, legal dimensions, which have been given only limited scholarly attention.[193] First, if statutory procedures for a workplace investigation are not followed, this can constitute a breach of administrative law, which could result in the decision being set aside on judicial review as invalid.[194] Second, workplace investigations processes in the public sector must afford employees procedural fairness. Under the *PS Act*, and those regulations and instruments made under it, the disciplinary process does not exhaustively set out procedural fairness requirements.[195] Rather, what is required to satisfy the principles of procedural fairness is contextually specific.[196] Third, the rights and obligations of parties involved in a public sector workplace investigation are dispersed across numerous instruments, which must be reconciled and (in the case of public sector employees within States and Territories) assessed for their compatibility. The interlocutory decision of *Tucker v Victoria*, discussed above, provides an illustration of the complex exercise that parties can be required to undertake, when seeking to identify (and reconcile) the rules that apply to public sector employers and employees during a workplace investigation.[197] The way in which regulation of public sector disciplinary processes under federal and state legislation, and enterprise agreements, interacts has developed in an unsystematic manner, which has produced a meshwork of competing rights and obligations.[198] The reasoning in decisions of courts and tribunals that are required to consider regulation of workplace investigations conducted in the public sector exposes its complexity, and the challenges involved in navigating statutory rights and obligations that those who conduct, or participate in, public sector workplace investigations necessarily encounter.

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190 See, eg, *PS Act* s 15(4)(b); *PA(RA) Regs* reg 6(2)(a).

191 *Kioa v West* (1985) 159 CLR 550, 563 (Gibbs CJ).

192 See *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 490–1 (Gleeson CJ).

193 Floyd, 'Criminal Court Procedure and Public Employment Law' (n 21); Floyd, 'Reforming Hong Kong Public Sector Labour Law after Lam Siu Po and Rowse' (n 21); Spry (n 21).

194 If the workplace investigation results in dismissal, this issue will be considered by the FWC. The issue for the FWC is whether the failure to follow the statutory procedure means the dismissal is 'harsh, unjust or unreasonable': *FW Act* s 385(b).

195 Vermeesch (n 185) 23. See, eg, *Australian Public Service Commissioner's Directions 2016* (Cth) pt 5.

196 See, eg, *Lohse v Arthur [No 3]* (2009) 180 FCR 33.

197 *Tucker* [2018] VSC 389.

198 There are some decisions in which courts have been required to examine this issue. See, eg, ibid.

III INTERSECTIONS BETWEEN WORKPLACE INVESTIGATIONS AND OTHER LAWS

Workplace investigations also intersect with other fields of law. Key areas relate to legal professional privilege and private security law. An examination of these legal dimensions is set out below.

A Legal Professional Privilege

The law on legal professional privilege, which is regulated by the common law and statute,[199] adds an additional legal dimension to workplace investigations. Legal professional privilege protects certain communications between a lawyer and a client from being disclosed. It operates when a communication has been created for the 'dominant purpose' of seeking or providing legal advice, or for use in legal proceedings.[200] Legal professional privilege can be claimed over documents or other types of communications, such as voice recordings. The purpose of legal professional privilege is to encourage full disclosure of information between a client and their lawyer.[201] The 'dominant purpose' of a communication is a question of fact that must be determined objectively, rather than by considering the subjective view of the person who made the communication.[202] In this context, 'dominant' has been defined to mean 'the ruling, prevailing, paramount or most influential purpose'.[203] While there may be several secondary purposes to a document, there can only be one dominant purpose. Legal professional privilege can also cover confidential communications between a lawyer or client (initiated at their lawyer's direction) and a third party, which was made for the 'dominant purpose' of the legal adviser providing advice to the client, even in the absence of contemplated or actual litigation. This privilege operates even though the third party is not an agent of the client or lawyer for the purpose of the communication.[204] There are a number of exceptions to legal professional privilege. One notable exception is where privilege is waived. Under the *Evidence Act 1995* (Cth) ('*Evidence Act*'), a client will waive privilege if they have acted in a way that is inconsistent with maintaining confidentiality over that communication.[205] This includes circumstances where the client knowingly and voluntarily discloses the substance of the evidence to another person or the substance of the evidence has been disclosed with the express or implied consent

199 *Evidence Act 1995* (Cth) ss 117–126 ('*Evidence Act*'), which uses the term 'client legal privilege'. See also *Evidence Acts* in each state and territory.

200 *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49, 64 [35] (Gleeson CJ, Gaudron and Gummow JJ); *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 552 [9] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

201 *Waterford v Commonwealth* (1986) 163 CLR 54, 62 (Mason and Wilson JJ).

202 *AWB Ltd v Honourable Terence Rhoderic Hudson Cole* (2006) 152 FCR 382, 412 [110] (Young J) ('*AWB*').

203 Ibid 411 [105], quoting *Federal Commissioner of Taxation v Pratt Holdings Pty Ltd* (2005) 225 ALR 266, 279–80 [30] (Kenny J).

204 *Pratt Holdings Pty Limited v Commissioner of Taxation* (2004) 136 FCR 357, 367–8 [41] (Finn J), 370 [52] (Merkel J), 386 [105] (Stone J).

205 *Evidence Act* s 122(1).

of the client.[206] A waiver of privilege extends to any related communication that will enable a proper understanding of the communication over which privilege has been waived.[207]

Workplace investigations are developing the law of legal professional privilege in several novel ways. Most notably, employees are increasingly challenging instances where employers have engaged lawyers to conduct workplace investigations.[208] These legal challenges have led to uncertainty, regarding whether engaging a lawyer to conduct a workplace investigation will mean any investigation report produced is protected by legal professional privilege. In *Bartolo v Doutta Galla Aged Services Ltd*, for example, Whelan J determined that the work involved in conducting a workplace investigation was not work for which being a lawyer was required, and so engaging a lawyer for the purpose of conducting a workplace investigation would not automatically invoke legal professional privilege.[209] In addition, in the decision of *King*, the City of Darwin argued that a workplace investigation report, which it had engaged its lawyers to prepare in relation to allegations of bullying by three of its employees was protected by legal professional privilege.[210] Commissioner Wilson ordered that the employer produce an 'unredacted' version of the workplace investigation report, on the basis that the employer had

> not put forward with any particularity the legal advisory purpose held by commencement of the investigation report; together with the fact that no anti-bullying application was made to the Commission until well after the report had been completed [which] leads to the conclusion that the dominant purpose of the investigation was not to obtain legal advice or legal services in relation to a proceeding. From what is before the Commission, it seems unlikely that this was even its primary or substantial purpose. What is evident from the material before the Commission is that the dominant purpose of the investigation was to inquire into [the] complaints; to test if its Code had been breached and if so, to hold the transgressors to account.[211]

These decisions indicate employers struggle to maintain legal professional privilege over documents produced during workplace investigations, which are commissioned before the commencement of litigation. This has significant implications for employees seeking to access documents by challenging the scope of protection afforded to employers by legal professional privilege.

In addition, employers sometimes refer to investigation findings in decisions to discipline employees while concurrently seeking to maintain privilege over those reports in which findings are set out. It is unclear whether the law on waiver of legal professional privilege permits, or indeed should permit, employers to do

206 Ibid s 122(3).

207 Ibid s 126. The principles relating to waiver of legal professional privilege were recently articulated in the decision of *Krok v Federal Commissioner of Taxation* [2015] FCA 51.

208 Beard, Bryant-Smith and Klug (n 4) 103–4; Hoctor and Robertson (n 12) 183–4.

209 *Bartolo v Doutta Galla Aged Services Ltd* [2014] FCCA 1517, [77].

210 *King* [2018] FWC 6006, [8] (Commissioner Wilson).

211 Ibid [16].

so.[212] In the decision of *Kirkman v DP World Melbourne Ltd* ('*Kirkman*'),[213] for example, an organisation referred to findings in an investigation report (over which it claimed legal professional privilege) during a meeting with, and correspondence to, the employee alleged to have engaged in misconduct. The employee then applied to the FWC to access the report, on the basis that the employer had implicitly waived privilege over the document. Kovacic DP accepted the employer had used the investigation report to identify those allegations which the investigator had found proven, and give the employee the opportunity to respond to them. Kovacic DP determined that the employer had not obtained a 'forensic advantage' by doing so, nor had it intended to waive privilege over the report.[214] In this context, Kovacic DP held that privilege had not been waived. The reasoning in *Kirkman* reveals that the common law principles regarding waiver of legal professional privilege in the context of an investigation report provides decision-makers with considerable latitude to contextualise employers' stated reasons for disclosing key aspects of legally privileged investigation reports. The area is one in which legal challenges by employees are consistently arising, and the common law requires further development.

B Private Security Laws

Workplace investigations also potentially intersect with some laws that apply to the private security industry in Australia and some persons who conduct workplace investigations. In each State and Territory, legislation establishes a licensing and registration scheme for the private security industry.[215] State and Territory-based legislation regulating the private security industry was introduced as early as the 1950s, and has been the subject of two significant waves of reform, first in the 1990s and then in the 2000s.[216] In Victoria, for example, the *Private Security Act 2004* (Vic) ('*Private Security Act*') sets out requirements for two

212 Rani John and Angela Ha, 'Internal Investigations and Legal Professional Privilege: Don't Get Caught in the Grey Zone' 66(5) *Governance Directions* 288. See also Ruskin (n 8).

213 [2016] FWC 605. For a detailed discussion of this decision, see Paula Hoctor and Aoife Sweeney, 'Tips for Claiming Legal Professional Privilege: Over Investigation Reports' (2016) (22) *Law Society of NSW Journal* 92.

214 *Kirkman* [2016] FWC 605, [43].

215 *Security Industry Act 2003* (ACT); *Security Industry Regulation 2003* (ACT); *Security Industry Act 1997* (NSW); *Security Industry Regulation 2016* (NSW); *Private Security Act 1995* (NT); *Private Security (Crowd Controllers) Regulations 1996* (NT); *Private Security (Miscellaneous Matters) Regulations 2006* (NT); *Private Security (Security Firms) Regulations 1998* (NT); *Private Security (Security Officers) Regulations 1998* (NT); *Security Providers Act 1993* (Qld); *Security Providers (Crowd Control Code of Practice) Regulation 2008* (Qld); *Security Providers Regulation 2008* (Qld); *Security Providers (Security Firm Code of Practice) Regulation 2008* (Qld); *Security Providers (Security Officer – Licensed Premises – Code of Practice) Regulation* 2008 (Qld); *Security and Investigation Industry Act 1995* (SA); *Security and Investigation Industry Regulations 2011* (SA); *Security and Investigations Agents Act 2002* (Tas); *Security and Investigations Agents Regulations 2015* (Tas); *Private Security Act 2004* (Vic) ('*Private Security Act*'); *Private Security Regulations 2005* (Vic) ('*PS Regulations*'); *Security and Related Activities (Control) Act 1996* (WA); *Security and Related Activities (Control) Regulations 1997* (WA). See Beard, Bryant-Smith and Klug (n 4) 105–7.

216 For a detailed overview of the evolution of private security laws in Australia see Tim Prenzler and Rick Sarre, 'The Evolution of Security Industry Regulation in Australia: A Critique' (2012) 1(1) *International Journal for Crime, Justice and Social Democracy* 38, 39–46.

classes of activities. The first class of activities, for which a licence is required, applies to investigators, bodyguards, crowd controllers, security guards and security trainers. The second class of activities, for which registration is required, applies to security equipment installers and security advisors. Under the *Private Security Act*, an 'investigator' includes 'any person who on behalf of any other person, is employed or retained…to obtain and furnish information as to the personal character or actions of any person or as to the character or nature of the business or occupation of any person…'.[217] The *Private Security Act* also sets out quite broad exceptions and exemptions, with respect to employees who meet the definition of an 'investigator'. The *Private Security Act* provides, for example, that it does not apply to a range of persons including police officers,[218] certain public sector Commonwealth and State public sector employees,[219] Australian lawyers 'acting in the ordinary course of [their] legal practice …';[220] who, acting in the course of their ordinary duties, are required to do 'inquiry work'.[221] There are, however, few exclusions under the *Private Security Act* for contractors engaged to conduct investigations on behalf of a principal. This means it is very likely that there are investigators of employee misconduct who meet the definition of an 'investigator' under the *Private Security Act* and are not excluded from its scope under one or more prescribed exceptions.

Despite the implications of private security laws on investigators and firms, there has been a dearth of scholarly attention given to this issue. There is little commentary on the implications of private security laws for those who conduct workplace investigations,[222] nor has it been judicially considered. In the meantime, private security laws pose significant consequences for persons who are bound by them. A person who is required, for example, to hold a licence under the *Private Security Act* will commit an offence if [they undertake] an investigation while unlicensed.[223] If a firm holds out to another that the person can conduct the investigation in these circumstances, the firm may also commit an offence.[224] It remains unclear whether workplace investigators are required to act in accordance with private security laws in each jurisdiction, which presents uncertainty for organisations and investigators. It is also unclear whether employees, who are involved in investigations, may rely on private security laws to challenge the

217 *Private Security Act* s 3.
218 Ibid s 4(a).
219 Ibid s 4(c).
220 Ibid s 4(e).
221 Ibid s 4(h)(i). 'Inquiry work' is not defined in s 4 or any other provision of the *Private Security Act*.
222 Some legal practitioners and investigators have commented on the *Private Security Act*. See Mary-Jane Ierodiaconou, 'Private Agents: Before Engaging a Workplace Investigator, Make Sure They Are Lawfully Permitted to Conduct the Investigation' (2015) 89(7) *Law Institute Journal* 46; Harriet Stacey, 'Addressing the Shortcomings of Workplace Investigations: A Response to Josh Bornstein's Call for Reform' (Paper, CEO WISE Workplace, June 2014) <http://www.corruptionprevention.net/assets/Uploads/Addressing-the-shortcomings-of-workplace-investigations.pdf>, archived at <https://web.archive.org/web/20150310224421/http://www.corruptionprevention.net/assets/Uploads/Addressing-the-shortcomings-of-workplace-investigations.pdf>.
223 *Private Security Act* s 5.
224 Ibid ss 5–6.

process, or the validity of any outcome, of a workplace investigation. In general, the seemingly incidental regulation of workplace investigations by private security laws produces a range of unsatisfactory implications for affected parties. The licensing system, for example, is designed to regulate the security industry and therefore unlikely to provide those engaging an investigator with any assurance of their capacity to perform the work. In addition, the range of exceptions and exclusions set out in these statutes seems to incidentally favour investigators who are Australian lawyers and/or who are employed by the organisation for whom they are performing the workplace investigation. The regulation of workplace investigators under private security laws is, therefore, an area in need of a focused policy response, and regulatory reform.

IV CONCLUSION

This article sets out a detailed study of intersections between workplace investigations and key areas of Australian law. It shows that, while there is no legislation specifically directed at workplace investigations in Australia, workplace investigations take place within an intricate framework of regulation. It also shows that the legal dimensions of workplace investigations are often complex and unsettled. One consequence of legal complexity in this area is that it is likely to be challenging for employers and employees involved in workplace investigations to navigate these rules, understand their legal obligations and/or assert their legal rights. The nuanced distinction, for example, developed under the common law with respect to a safe system of work and a safe system of workplace investigation may only be discernible to parties who are able to access specialist legal advice.

In addition, this article has revealed that key legal principles, which apply to workplace investigations, are underdeveloped. Some of these principles can be pivotal to shaping how organisations conduct workplace investigations. The question, for example, of whether an employer is required to act 'reasonably' or in 'good faith' when exercising a discretionary contractual right or power to discipline or dismiss an employee remains unresolved. For affected employees, whose circumstances mean they cannot rely on protections such as the unfair dismissal jurisdiction of the *FW Act* to seek redress, the common law leaves open the central, practical question of the standard of treatment to which they are legally entitled.

This map of the legal dimensions of workplace investigations has also shown that the law that impacts on workplace investigations is fragmented and has developed unsystematically. A consequence of the unsystematic development of relevant laws is that some are unsuitable, or ill-equipped, to regulate the area. Private security laws, for example, are specifically directed at regulating the private security industry and the licencing regime seems ill-equipped to provide any assurance that a licensed workplace investigator is qualified to perform the work. An effort to systematise and prioritise the regulation of workplace investigations by private security laws would, therefore, be welcomed. The form

any future regulation might take, as well as an examination of the actual effects of legal regulation on the behaviours of actors involved in workplace investigations also calls for detailed examination.