

# GREENING AUSTRALIAN WORKPLACES

## Workers and the environment

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The genesis of much environmental pollution including greenhouse gas emissions comes from the activity of workplaces. Restructuring existing workplaces and investing in energy efficient capital is an important part of finding solutions to global warming and other environmental problems. The United Nations Environment Programme ('UNEP') 2007 report, *Labour and the Environment: A Natural Synergy*,<sup>1</sup> provides important guidance in relation to how to engage workers in the process of transitioning to a carbon-lean economy. UNEP's recommendations are premised on the belief that worker involvement in the decision-making process by employers and company management should be central to the transition.

The UNEP report recommendations include the following. Firstly, encourage the use of enterprise bargaining to include 'green friendly' clauses in enterprise agreements that address the environmental impact of the workplace. Secondly, use existing occupational health and safety ('OHS') laws and expand the role of structures set up by these laws such as health and safety representatives to promote workplace environmental standards. Thirdly, use corporate social responsibility ('CSR') principles to complement the previous two measures. This article will examine these recommendations in the context of Australian law.

### Enterprise bargaining

There is an opportunity through the enterprise bargaining process for parties to negotiate initiatives in their workplaces that can have a long-term effect on their carbon output. The central focus of the process is the involvement of collective labour, most often represented by trade unions. There is also provision for other employee representatives to bargain on behalf of employees.<sup>2</sup> The process can be a strategic planning time between employers and their workforce based on cooperative workplace relations. This is supported by legislation.

The prime object of the *Fair Work Act 2009* (Cth) ('the Act') is to provide a balanced framework for cooperative and productive workplace relations.<sup>3</sup> The central mechanism through which to achieve cooperative workplace relations under the Act is enterprise bargaining. Key employer groups have long supported enterprise bargaining. It has the potential to 'promote a collaborative and constructive approach to agreement-making'.<sup>4</sup> In contrast to legislative intent, some studies show that enterprise

bargaining in Australia has not promoted cooperative or innovative workplace relations.<sup>5</sup> This may be due to the combatant nature of industrial relations. The consequence has been that the issues raised during enterprise bargaining are narrow and often do not fall outside traditional industrial concerns. Further, the content of enterprise agreements are subject to the Permitted Matters provisions of the Act.<sup>6</sup> Clauses that fall outside the scope of Permitted Matters in the Act are not legally enforceable. Many substantive green friendly clauses are likely to fall foul of these provisions; in particular the requirement that the 'matter pertain to the employment relationship'.<sup>7</sup>

### *Matters pertaining to the employment relationship*

The provision that governs much of the content in enterprise agreements is that Permitted Matters must 'pertain to the relationship between the employer and the employees that will be covered by the agreement'.<sup>8</sup> Under the current interpretation of this phrase, this is restricted to matters that directly impact upon the employment relationship.<sup>9</sup> Matters indirect or inconsequential are not deemed to be part of the employment relationship.<sup>10</sup> For example, the particular trading hours of a business was held not to pertain to the employment relationship no matter how much it impacted upon the working hours of the employees.<sup>11</sup> Business decisions that relate to financial investment and modes of production are also not considered to directly impact upon the employment relationship.<sup>12</sup> Clauses that oblige employers to introduce new capital equipment which are energy or water efficient or clauses that oblige the employer to meet a specific CO<sub>2</sub> target would be unenforceable as well, as they are not considered to have a direct impact on the employment relationship. The 'matters pertaining to the employment relationship' requirement was heavily criticised during the inquiry into the Fair Work Bill 2008 (Cth).<sup>13</sup> In spite of this criticism, the Government retained the rule and thus incorporated one hundred years of jurisprudence relating to the rule. This was rightly criticised, as the case law at times is 'confusing, uncertain and downright inconsistent'.<sup>14</sup>

Interestingly, the Government did make some explicit comments on the incorporation of clauses relating to environmental considerations. The Government recommended that environmental clauses could be enforceable if they were tied to an established employment or industrial concern such as bonuses or wages.<sup>15</sup> Examples included terms that required employees to participate in recycling strategies in the

### REFERENCES

1. United Nations Environment Programme, *Labour and the Environment: A Natural Synergy* (2007) <unep.org/labour\_environment/PDFs/UNEP-labour-env-synergy.pdf> at 26 April 2009.
2. *Fair Work Act 2009* (Cth) s 176.
3. *Fair Work Act 2009* (Cth) s 3. This was also the principal object of the previous Act, *Workplace Relations Act 1996* (Cth) s 3.
4. Greig Gailey, 'Productivity the new focus', *The Age* (Melbourne), 31 March 2009. The Business Council of Australia commissioned three influential reports from 1989 to 1993. See Industrial Relations Study Commission, 'Enterprise-based bargaining units, a better way of working', (1989). For a critique of the reports see John O'Brien, 'McKinsey, Hilmer and the BCA: The "New Management" Model of Labour Market' (1994) 36(4) *Journal of Industrial Relations* 468–490.
5. Research has shown that enterprise bargaining has been used in a narrow way in Australia, even in areas where the content is legally permitted under the relevant industrial relations law. See Chris Briggs and John Buchanan, 'Australian Labour Market Deregulation: A Critical Assessment,' Research Paper 21, Commonwealth, (1999–2000) 3; Richard Mitchell, 'Enterprise Bargaining: What has it got to do with Workplace Partnerships?' (Centre for Employment and Labour Relations Law, The University of Melbourne, 2004).
6. *Fair Work Act 2009* (Cth) s 172(1).
7. *Fair Work Act 2009* (Cth) s 172(1)(a).
8. *Fair Work Act 2009* (Cth) s 172(1)(a).
9. Breen Creighton and Andrew Stewart, *Labour Law* (4th ed, 2005) [4.26–4.31].
10. *Ibid* [4.30].
11. *R v Kelly; Ex Parte Victoria* (1950) 81 CLR 64.
12. Creighton and Stewart, above n 9 [4.29].
13. *Standing Committee on Education, Employment and Workplace Relations*, The Senate, *Fair Work Bill [Provisions]* (2009) [4.55–4.60].

workplace, or to take all reasonable steps to comply with an employer's CO<sub>2</sub> reduction target, or that made a bonus payable to employees conditional upon meeting a reduction target. This is to ensure that the clauses do not offend the 'matters pertaining' rule.

There is a danger that the 'matters pertaining' rule will result in unequal outcomes for workers because of the way it has been interpreted in the past. Often, clauses which impose obligations on workers have been more readily recognised as being 'matters pertaining to the employment relationship' than reciprocal clauses which impose obligations on employers. Unsurprisingly, much of the litigation where clauses have fallen foul of the rule have been instances of employer obligation rather than employee obligation.<sup>16</sup> The issue may arise, for example, if employee bonuses are tied to the company meeting its CO<sub>2</sub> emissions target. For the company to meet this target, it may be necessary to impose reciprocal obligations on the employer to implement procedures or install capital equipment. This view may be logical in general commercial contracts. However, in industrial relations law the 'matters pertaining to the employment relationship' jurisprudence remains an obstacle.

It is disappointing that the Government did not take the opportunity to remove this obstacle by repealing the 'matters pertaining' rule. The difficulties associated with this rule may deter parties from negotiating innovative green friendly provisions.

#### *Matters pertaining to the relationship between the employer and the employee organisation*

There may, however, be scope for employers and workers to bargain for green friendly clauses through the 'matters pertaining to the relationship between employers and employee organisations' requirement.<sup>17</sup> This is a new legislative provision. The Act does not expressly set out the type of matters that would be included under this provision however, the Government has suggested that, for a term to fall within the ambit of this provision, it must relate to the employee organisation's legitimate role in representing employees.

It is generally understood that an employee organisation's legitimate role is to further the industrial interests of its members. The parameters of the role differ according to the industry in which the union or employee organisation is active. There have been limitations discussed in case law as was shown in the case of *Master Builders' Association of NSW v Australian Building and Construction Employees and BLF*<sup>18</sup>. The Builders Labourers Federation was deregistered for acting outside its legitimate role, including acting as a town planning authority where it undermined planning decisions of local councils. It is beyond the scope of this article to discuss the legitimate role of trade unions or employee organisations in detail. Suffice to say, that employee organisations bargaining for certain green friendly clauses must ensure that they are permitted to so under their internal rules and objects. Further, employee organisations are subject to the *Fair Work (Registered Organisations) Act 2009* (Cth) which outlines the standards to be met by registered organisations in

relation to rules, financial reporting, elections, conduct of officers and other matters.

Trade union or employee organisation consultation clauses that relate to decisions which would otherwise be considered to be indirect and thus not pertaining employment relationship could be permitted under this clause as long as they are strictly confined to consultation.<sup>19</sup> This would mean that clauses that require consultation on issues relating to production or other capital equipment will be permitted as it relates to the process and not the substance of the decision.<sup>20</sup> Therefore if substantive 'green friendly' provisions in enterprise agreements remain unenforceable, a consultation right that requires on-going consultation with employees on matters to do with climate change or wider environmental issues will at least allow for flexibility in relation to decision-making while engaging employees in the process.

#### **Occupational Health and Safety and the environment**

There are areas of common concern between the environment and occupational health and safety.<sup>21</sup> Workplace production and activity can pollute the environment and simultaneously cause significant health hazard to workers and the community at large.<sup>22</sup> In the early years of the industrial revolution in the United Kingdom this was common.<sup>23</sup> The UNEP report proposes that, at policy level, '...[e]nvironmental contributors to workers' health need to be considered in parallel with workplace health issues.'<sup>24</sup> Concerns relating to workers' health should also be an essential focus of climate adaptation policies and programmes.<sup>25</sup>

Environmental concerns are not evident in the various OHS legislation in Australia.<sup>26</sup> However, the responsible authorities do work together on issues of common concern. For example, Worksafe Victoria, the statutory authority that is responsible for the administration of the OHS legislation in Victoria, works together with Victoria's Environmental Protection Authority on the management of major hazards facilities.<sup>27</sup> The memorandum of understanding between the two authorities reflects the common ground between the areas which the authorities are legally responsible to administer. In addition, environmental considerations are included in the *Dangerous Goods (Transport by Road or Rail) Regulations 2008* (Vic), which is also administered by WorkSafe Victoria. Similar dangerous goods transport laws apply in every state and territory and also refer to the environment.

The current OHS laws allow scope for strengthening the link between OHS and environmental issues. Authorities that administer OHS laws can educate workers on environmental matters that are linked to occupational health and safety or dangerous goods. These authorities can also draft sustainability guidelines in addition to OHS guidelines and codes.

#### *The occupational health and safety structures*

The OHS requirement to consult and train workers on matters affecting health and safety<sup>28</sup> can incorporate

14. Professor Andrew Stewart, *Submission to the Senate Education, Employment and Workplace Relations Committee Inquiry to the Fair Work Bill 2008, Submission 98*, 4; see also Australian Council of Trade Unions, *Submission 13*, 31; Professor David Peetz, *Submission 132*, 13; Unions Western Australia, *Submission 70*, 11; Textile Clothing and Footwear Union of Australia, *Submission 11*, 16–17; Dr John Buchanan, *Submission 150*, 4.

15. Commonwealth Final Report, n 13 [4.65].

16. See cases discussed in Andrew Stewart, *Stewart's Guide to Employment Law* (2009) [8.28 – 8.29].

17. *Fair Work Act 2009* (Cth) s 172(1)(b). 18. (1974) 3 ALR 305.

19. Creighton and Stewart, above n 9, [4.29].

20. *Application for variation by State Electricity Commission of Victoria* (1992) 34 AILR 242.

21. UNEP, above n 1, 70–73 and 74–81.

22. See Michael Tooma, *Safety, Security, Health and Environment Law* (2008) ch 1.

23. *Ibid.*

24. UNEP, above n 1, 67.

25. Climate change adaptation focuses on dealing with the unavoidable impacts of climate change. See National Climate Change Adaptation Framework <coag.gov.au/coag\_meeting\_outcomes/2007-04-13/docs/national\_climate\_change\_adaptation\_framework.pdf> at 27 April 2009. It mentions human health generally but not related to the workplace.

26. See *Occupational Health and Safety Act 2000* (NSW); *Occupational Health and Safety Act 2004* (Vic); *Workplace Health and Safety Act 1995* (Qld); *Occupational Health Safety and Welfare Act 1986* (SA); *Workplace Health and Safety Act 1995* (TAS); *Occupational Health and Safety Act 1984* (WA); *Occupational Health and Safety Act 1989* (ACT); *Work Health Act 1986* (NT); *Occupational Health and Safety Act 1991* (Cth).

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the sharing of information and training to do with environmental risks and carbon output or greenhouse gas emissions generally. This is directly relevant to the employer's general duty under OHS laws if the environmental risk intersects with the risk to health in the work environment.<sup>29</sup> In addition, while the focus of the employer duty is still to provide and maintain, for employees and contractors, a working environment that is safe and without risks to health, employers are also obliged to ensure, so far as is reasonably practicable, that persons other than their employee are not exposed to risks to their health or safety arising from the conduct of the undertaking of the employer.<sup>30</sup> This might easily be interpreted to include environmental risks, including from global warming, caused or contributed to by the activities of the employer's business, particularly if it affects the health and safety of the public.

An important component of the OHS system is the appointment of health and safety representatives at workplace level to assist with the operation and enforcement of the OHS law.<sup>31</sup> The UNEP report proposes the extension of rights and powers given to existing health and safety representatives so that they may also work on environmental matters in the workplace.<sup>32</sup> For example, the health and safety representative may promote information and education on sustainable work practices among workers as well as promote safe work practices.

The measures recommended by UNEP are not regulated by OHS laws unless they intersect or overlap with the risk to health and safety in the workplace. They may still, however, be useful and help the company meet its legal obligations under environmental legislation.<sup>33</sup> According to the UNEP report, large international employers such as the Michelin Company in Spain have agreed with their respective workforces to expand the role of health and safety representatives to cover environmental issues.<sup>34</sup> The inclusion of similar clauses in enterprise agreements in Australia would face the obstacle of the 'matters pertaining' rule under the Act.<sup>35</sup> This obstacle could be overcome if clauses were drafted to connect the environmental concerns with OHS or dangerous goods and if they included a trade union consultation term.

It is not unusual for progressive organisations to combine OHS and environmental considerations in their risk management systems. In fact, an integrated approach to risk management is encouraged at corporate level.<sup>36</sup> These initiatives have not been

instigated as a consequence of mandatory legal obligation. Rather, it is seen as an effective management practice in companies and organisations. This indicates that organisations see advantages to an integrated approach between OHS and the environment. It has also been suggested that OHS officers (otherwise known as safety officers) in existing organisations may be 'coopted to manage the environmental portfolio in addition to their safety responsibilities'<sup>37</sup> in response to the introduction of an emissions trading scheme.

## Corporate Social Responsibility

### General principles

It is beyond the scope of this article to examine the extensive literature on CSR.<sup>38</sup> It will discuss the basic principles in the context of Australian law and then highlight some shortcomings. The 2006 Corporations and Markets Advisory Committee ('CAMAC') report noted that CSR essentially meant the following:

In essence, the focus of the issue of corporate social responsibility is on the way in which the affairs of companies are conducted and the ends to which their activities are directed, with particular reference to the environmental and social impact of their conduct. A responsible company, like a responsible individual, is one that acknowledges and takes responsibility for its actions.<sup>39</sup>

CSR focuses companies' attentions on the impact of their decisions and activities on the environment, their workforce and the wider community. It puts the focus on the long-term viability of the company and its processes rather than short-term profits and immediate material interests of shareholders. CSR also encourages companies to focus on a wider group of non-shareholder stakeholders in their decision-making. This includes customers, suppliers and employees. This is at odds with Australian company law principles that support the shareholder primacy model. Ultimately, directors' duties are owed to the shareholders and not to a wider group of stakeholders as suggested by CSR principles.

There is a patchwork of legislation and general law doctrines which are relevant to the area of CSR in Australia.<sup>40</sup> The law regulates companies by imposing broad duties upon directors and senior officers which gives them wide discretion in decision-making and by requiring certain disclosure by directors as to the environmental performance of the company.<sup>41</sup> One of the prime legal obligations, which provide the foundation for the operation of CSR in Australia, is the duty imposed upon directors of companies 'to act in the best of the interests of the company'. This duty is

27. Victorian Workcover Authority, *Memorandum of Understanding Victorian Workcover Authority and Environment Protection Agency* (2008) <worksafe.vic.gov.au/wps/wcm/resources/file/ebf68006c18630e/MoU\_Environmental\_Protection\_Authority\_June\_2008w.pdf > at 27 April 2009. See also *Occupational Health and Safety Act (Major Hazard Facilities) Regulations 2000* (Vic).

28. See *Occupational Health and Safety Act 2004* (Vic) s 22(2)(e) and ss 35–36.

29. See *Occupational Health and Safety Act 2004* (Vic) s 21.

30. See *Occupational Health and Safety Act 2004* (Vic) ss 20–21 and 23.

31. See *Occupational Health and Safety Act 2004* (Vic) ss 54–55.

32. UNEP, above n 1, 35.

33. For an examination on environmental regulation and how it intersects with health and safety in the workplace see generally Tooma, above n 22.

34. UNEP, above n 1, 35.

35. *Fair Work Act 2009* (Cth) s 172(1)(a).

36. Tooma, above n 22, 1–4.

37. *Ibid* 1.

38. For a detailed examination of CSR principles see Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (2007); Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (2002).

39. Corporations and Markets Advisory Committee (CAMAC) Report, *The Social Responsibility of Corporations*, December 2006, 15.

40. For a discussion of the laws see CAMAC, above n 39, ch 3; Also see Belinda Simmons, 'Corporate Social Responsibility: have recent reforms safeguarded the future?' (2008)(1) *National Environmental Law Review* 55–60.

41. *Corporations Act 2001* (Cth) s 299(1)(f) and s 299A.

a statutory duty under s 181(1)(a) of the *Corporations Act 2001* (Cth). Generally, directors and senior officers of a company are to act in the 'best interests in the company as a whole'. This is understood at law to mean the financial well-being of the shareholders as a general body.<sup>42</sup> Although directors should consider the interests of future shareholders as well as existing shareholders,<sup>43</sup> there has been no decision that shows a circumstance where directors have been in breach of their duties because of a short-term view of the benefits to the company.<sup>44</sup>

The UNEP report insists upon ensuring that companies that have committed to CSR policies are kept accountable to their commitments.<sup>45</sup> Enterprise bargaining can be used to complement CSR strategies by including relevant CSR commitments in the company's enterprise agreements. This will allow workers to ensure that the CSR policies are actually implemented.<sup>46</sup> From a labour-management perspective this may be beneficial in ensuring the company is consistent in implementing its commitments and policies at all levels. As already discussed this is subject to the 'matters pertaining to the employment relationship' jurisprudence in Australia. However, CSR initiatives would not be permitted under the 'matters pertaining' jurisprudence. The Explanatory Memorandum to the Act specifically exclude CSR from being enforceable content [673]. Although the reference to CSR is not clear, it appears that if the clause was drafted in a way that showed a direct impact on the employment relationship it is unlikely to be considered invalid.

### Comparison with the United Kingdom

The position in Australia differs from the United Kingdom where significant public pressure led to amendments in 2006 to the *Companies Act*. The amendments require listed companies to report on their environmental and social impacts and on employee and supplier issues. In addition, company directors now have a duty to consider the impact of their business on a wider group of stakeholders, including the interests of the company's employees and the impact of the company's operations on the community and the environment.<sup>47</sup> While this is a positive step towards improving the consideration given by directors to employees and the environment, it does fall short of mandating specific attention to these interest groups. The vague language of the amendments gives much discretion to directors.

Section 172, which is the governing duty, titled 'Duty to promote the success of the company' does not displace shareholder primacy. It states that directors must 'promote the success of the company for the benefit of its members as a whole'; however, in doing so, have regard to various competing interests. Employees together with the environment must compete with other interests and it does not require them to be given any priority.<sup>48</sup> In spite of the shortcomings noted, it is a positive, albeit incremental move to enshrine 'enlightened shareholder value' in

legislation as has been done in the *Companies Act*. The concept of 'enlightened shareholder value' originated from general CSR principles and is an example of CSR having an influence over legislative content.

In 2006, CAMAC found that there was no need to change the current corporate governance framework in Australia to facilitate greater corporate social responsibility as was done in the United Kingdom. CAMAC found that the formulation of directors' duties allowed decision-makers to take broader social and environmental considerations into account.<sup>49</sup>

### Conclusion

The UNEP report highlights the importance of dialogue between management and workforce in transitioning to carbon-lean production and in finding solutions to wider environmental problems caused by workplaces. In Australia, green friendly policies are governed by management. As companies in Australia face little legal compulsion to follow the UNEP recommendations discussed in this article, it would require a strong business case to motivate management to engage employees and commit to CSR principles in the ways envisioned by the UNEP report.

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42. *Greenhalgh v Arderne Cinemas Ltd* [1951] 2 All ER 1120 at 1126.

43. *Provident International Corporation v International Leasing Corp Ltd* [1969] 1 NSWLR 424, 440.

44. CAMAC, above n 39, 84–85.

45. UNEP (2007), above n 1, 92–102.

46. *Ibid* 78.

47. *Companies Act 2006* (UK) s 172.

48. See Stephen Bottomley and Anthony Forsyth, 'The New Corporate Law: Corporate Social Responsibility and Employees' Interests' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (2007) 307–35, 331–3.

49. See generally, CAMAC Report, above n 39.