High heels and head scarves
Clothing-related discrimination in the workplace

“[D]iscriminatory dress codes remain widespread ... the existing law is not yet fully effective in protecting employees from discrimination at work.” — Report of a British House of Commons Joint Committee.

In 1977, the British Employment Appeal Tribunal heard an unusual complaint from an aggrieved bookseller. Austicks Bookshops in Leeds had a policy that prohibited female workers from wearing trousers. One employee, Ms Schmidt, refused to comply. She was dismissed, and subsequently brought proceedings on the basis that the employer’s policy constituted sex discrimination.

In rejecting Ms Schmidt’s claim, Justice Nicholas Phillips recognised the expansive powers of an employer to determine appropriate dress code in the workplace. “As a general proposition,” he opined, “an employer is entitled to a large measure of discretion in controlling the image of his establishment, including the appearance of staff, and especially so when, as a result of their duties, they come into contact with the public.”

Read in 2017, the judgment in Schmidt seems rather antiquated. Certainly, the law has taken intervening four decades to address such discrimination. Yet the dilemma faced by Ms Schmidt — comply with a sex-specific dress code or be dismissed — lingers to this day.

Indeed, just last year professional services firm PwC found itself at the centre of a media storm after an outsourced receptionist in London was sent home for refusing to wear high heels. The furore led to a joint committee inquiry by the House of Commons, which found that clothing-related discrimination remained widespread in Britain and had not been adequately addressed by legislation. There is no evidence to suggest that the situation is any better in Australia.

This is not solely a matter of sex discrimination either. An employer’s ability to regulate employee dress standards, regardless of gender, remains unsettled. Questions of religious discrimination also intrude. In March 2017, the European Court of Justice found that it was not discriminatory to fire a Muslim employee who insisted on wearing a head scarf contrary to a workplace policy prohibiting visible signs of religious belief. These issues are interrelated.

This article will begin by discussing an employer’s power to prescribe and enforce dress codes in the workplace. It will then consider possible legal remedies available to aggrieved employees, located in discrimination legislation and the Fair Work Act 2009 (Cth). Given the paucity of Australian case law in this area, reference to foreign jurisprudence will be made where appropriate.

Dress codes — a lawful and reasonable direction?

The ability of an employer to direct an employee in the course of employment is not unfettered. Whether workplace dress codes are binding on employees will predominantly depend on the lawfulness and reasonableness of the direction.
Two preliminary matters can be shortly stated. Authority could, in principle, be conferred by statute to issue directives regarding dress — the Public Service Act 1999 (Cth), for example, could be amended to mandate in the APS Code of Conduct that all public servants wear professional attire. In the absence of statutory authority, a contractual source of power needs to be found. While uncommon, there are no theoretical obstacles to an employment contract expressly prescribing clothing standards within its clauses, or incorporating such standards by reference to a dress code policy. If such statutory or express contractual authority was present, there could be no doubting the force of an employer direction to that effect.

However, the typical avenue for an employer to regulate workplace attire is via the implied contractual obligation for an employee to obey directions. An employer is able to promulgate non-contractual workplace policies and direct that employees adhere to same, with wilful refusal to comply constituting a breach of contract.

The test for determining the validity of an employer’s direction is long-settled. As Justice Owen Dixon expressed in a 1938 High Court judgment, “[i]f a command relates to the subject matter of the employment and involves no illegality, the obligation of the servant to obey it depends at common law upon it being reasonable.” His Honour continued:

But what is reasonable is not to be determined, so to speak, in vacuo [in a vacuum]. The nature of the employment, the established usages affecting it, the common practices which exist and the general provisions of the instrument … governing the relationship, supply considerations by which the determination of what is reasonable must be controlled.9

The first element of this “lawful and reasonable” test, legality, gives rise to a chicken-and-egg difficulty. Whether a dress code-related direction is lawful will largely depend on whether it is in contravention of discrimination legislation. But as the discussion below demonstrates, that is a fraught question, the answer to which is unlikely to be immediately obvious on its face. It would take a brave employee to disobey a purportedly lawful and reasonable direction on the conviction or hope that, following subsequent unlawful discrimination-based litigation, the direction will be found unlawful.

The second consideration, reasonableness, is little easier. While Justice Dixon provides some guidance, it will ultimately be a value-influenced decision made by the presiding judge. Case law suggests that deference will be shown to the employer’s judgment. One judicial decision noted: “a reasonable employer … can be allowed to decide what, upon reflection and mature consideration, could be offensive to the customers and the fellow employees.”10
In the primary Australia case in this context, Australian Telecommunications Commission v Hart, an employee wore a caftan to work on a number of occasions and refused instructions from his superiors to desist from doing so. Justices Russell Fox and Ian Sheppard (Justice Ray Northrop dissenting) found that these were lawful and reasonable directions. The employer held legitimate concerns “as to its image being detrimentally affected by the appellant’s frequent wearing of caftan whilst on duty”, and this — together with its pre-existing dress code policy — supported the validity of the direction.12

One touchstone, both in determining reasonableness and evaluating discrimination, might be contemporary social standards. In the British case of Smith v Safeway PLC, a male employee refused to cut his hair so that it was not below collar length, contrary to his employer’s policy. The Court of Appeal held that an “appropriate criterion to be applied” when considering the policy, which did not apply to women, was “the conventional standard of appearance”. The employee’s claim ultimately failed.

On the other hand, in Bree v Lupevo Pty Ltd, the New South Wales Administrative Decisions Tribunal found that an employer unlawfully discriminated against a male employee who refused to remove an earring. The Tribunal noted that the earring was a “form of adornment which ... is not uncommon to be worn by male persons in the modern day community.” As it “would not constitute a safety hazard and would not physically interfere with the proper discharge of the duties of the Applicant”, his dismissal constituted unlawful discrimination.

Statutory remedies

If an employee refused to comply with a direction as to dress code, was dismissed, and a Court later held that the direction was not lawful or reasonable, damages for breach of contract would be available. Additionally, there are a range of statutory remedies available to employees who believe that they have suffered clothing-related discrimination in the workforce.

Sex discrimination

The Sex Discrimination Act 1984 (Cth) prohibits direct and indirect discrimination on the basis of sex, sexual orientation, gender identity, relationship status and a number of related characteristics. Relevantly, the Act makes it unlawful for an employer to discriminate on the basis of these characteristics “in the terms or conditions of employment that the employer affords the employee” or “by subjecting the employee to any other detriment”. State and territory legislation typically provides similarly.

Cases in the United States and Britain emphasise that dress codes distinguishing between genders are not necessarily discriminatory. In Jespersen v Harrah’s Operating Company Inc, a casino employee in Nevada refused to comply with a newly introduced make-up policy for female staff. The majority rejected her discrimination claim, holding: “Grooming standards that appropriately differentiate between the genders are not facially discriminatory ... The material issue under our settled law is not whether the policies are different, but whether the policy imposed on the plaintiff creates an “unequal burden” for the plaintiff’s gender.”18
There was, though, a vocal dissentent in *Jespersen.* “The inescapable message is that women’s undoctored faces compare unfavourably to men’s … because of a cultural assumption and gender-based stereotype that women’s faces are incomplete, unattractive, or unprofessional without full makeup,” argued Judge Harry Pregerson. “We need not denounce all makeup as inherently offensive … to conclude that requiring female [employees] to wear full makeup is an impermissible sex stereotype and is evidence of discrimination because of sex … Therefore, I respectfully dissent.”

*Jespersen* is just one part of a considerable strain of American jurisprudence in this area. In *Gerdom v Continental Airlines Inc,* an airline imposed bodyweight restrictions on female flight attendants but “no weight restriction whatsoever on a class of male employees who performed the same or similar functions.” The Court of Appeals struck this down as violating anti-discrimination legislation. The airline’s case was not helped by its attempt to justify the policy on the grounds of a desire “to compete [with other airlines] by featuring attractive female cabin attendants”, which the Court found to be “discriminatory on its face”.

In a similar vein to the majority view in *Jespersen,* Lord Justice Andrew Leggatt noted in *Smith* that discrimination “consists, not in failing to treat men and women the same, but in treating those of one sex less favourably than those of the other … If men and women were all required to wear lipstick, it would be the men who would be discriminated against”. In the same case, Lord Justice Phillips (who also decided *Schmidt*) stressed the importance of a holistic approach: “[O]ne has to consider the effect … in the overall context of the [dress] code … taken as a whole and not garment by garment or item by item”. There is comparatively little case law in Australia about sex discrimination based on clothing or make-up requirements of employers. The adverse costs nature of anti-discrimination litigation, and the relatively low awards of damages in such cases prior to *Richardson v Oracle Corporation Australia Pty Ltd,* are possible explanations. However, it does not require a crystal ball to suggest that an increase in such litigation might be forthcoming.

**Religious discrimination**

While there is terminological divergence among the patchwork quilt of state and territory anti-discrimination schemes, all jurisdictions except New South Wales and South Australia prohibit discrimination in the workplace on the basis of religion. In the Australian Capital Territory, for example, the *Discrimination Act 1991* protects “religious conviction” and prohibits discrimination in the form of “refusing the employee permission to carry out a religious practice during working hours.”

Although case law on these and similar provisions is not plentiful, they have been litigated on several occasions. In both *Dixon v Anti-Discrimination Commissioner of Queensland* and *Ciciulla v Curwen-Walker,* it was held that discrimination due to the absence of a particular religious conviction was as unlawful as discrimination because of a religious conviction. In other words, discriminating against someone because they are not Christian is the same as discriminating against them because they are Christian. This may sound obvious, but it required the intervention of the Queensland Supreme Court to convince the Anti-Discrimination Commissioner of the incorrectness of the proposition that “the ordinary meaning of ‘religion’ does not include an absence of religion”.

An interesting question that can arise is the extent to which an employer must tolerate religious practices that are burdensome. While the wearing of a head scarf hardly imposes any cost on the employer, requiring prayer breaks or alternative hours during religious festivals may well cause business difficulties. And in the clothing context, what if a customer refused to be served by employees wearing religious adornments?

Legislation somewhat anticipates these difficulties, and the religious practice provision in the Australian Capital Territory is only applicable where the performance of the practice during work hours is “reasonable having regard to the circumstances of the employment” and “does not subject the employer to unreasonable detriment.” However, Justice Howard Nathan in *Petroleum Refineries (Australia) Pty Ltd v Marett,* albeit in a different statutory context, was dismissive of the weight of such factors: “If discrimination occurs because of a person’s private life as expressed through their religious belief, then a breach of the Act is made out, regardless of the economic consequences. Religious freedom is not an ingredient of an economic equation, however costly that freedom may be either to an individual or employer.”
Other relevant exceptions, which have also been read narrowly by the courts, include carve-outs for religious organisations, the ability to discriminate on the basis of genuine occupational requirements of the position and where discrimination is necessary to comply with other legislation. Dominique Allen provides a helpful example: “An employer could rely on this [latter] exception if they discriminated against a person who wears a religious headdress if it could not be worn in conjunction with protective head covering [required by workplace health and safety laws].”

Unlike in the sex discrimination sphere, federal legislation does not to any considerable extent coexist with state statutory schemes in this context. Section 9 of the Racial Discrimination Act 1975 (Cth) prohibits “any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin”. While courts have acknowledged a degree of overlap between ethnicity and religion, not all religious groups would find protection in the Racial Discrimination Act.

Finally, a constitutional issue might arise if government employers introduced dress codes that discriminated on religious grounds, given the religious freedom clause in section 116 of the Constitution. While justice cannot be done to that complex topic in this article, it has been considered by others — albeit in a non-employment context. The implied freedom of political expression might also be engaged in an appropriate case.

**Fair Work Act**

Clothing-related discrimination can also constitute adverse action under the Fair Work Act’s general protections provisions. Section 351 prohibits adverse action on the basis of “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”. In addition to protecting gender and religious attributes, the political opinion, national extraction and sexual orientation categories could all foreseeably be invoked in clothing-related discrimination cases.

“Adverse action” is broadly defined, ranging from dismissing the employee to prejudicially altering their position, and extends to prospective employees and independent contractors. The much-discussed reverse onus — requiring the employer to show that the challenged action was not taken for the alleged (prohibited) reason — makes the Fair Work Act a more claimant-friendly source for redress than traditional discrimination remedies.

There are, though, three exceptions to section 351. The prohibition does not apply where the action is “not unlawful under any anti-discrimination law in force in the place where the action is taken”. Thus in New South Wales, where religious discrimination in the workplace is not contrary to state legislation, aggrieved employees lack Fair Work Act protection. Secondly, mirroring other anti-discrimination schemes, action “taken because of the inherent requirements” of the position does not constitute adverse action. In Coulson v Austereo Pty Ltd, a radio station successfully argued that it was an inherent requirement of the position to work Sunday shifts, such that taking action against an employee who refused to do so for religious reasons was not unlawful discrimination.

Finally, in certain circumstances the adverse action proscription does not extend to religious institutions if the employee’s conduct is contrary to the tenets of that religion.

Where the discriminated-against employee has their employment terminated, the Fair Work Act’s unfair dismissal mechanism provides another source of protection. It can easily be imagined that a Fair
Work Commissioner might consider the dismissal of an employee who refused to wear pants “harsh, unjust or unreasonable”. Yet in *Fairburn v Star City Pty Ltd*, a former worker’s unfair dismissal application against Star City Casino failed under predecessor legislation after she was dismissed for refusing to remove a tongue piercing. Senior Deputy President Robert Cartwright was satisfied that the employer’s “grooming policy” was reasonable, although that case did not involve gender or religious-related arguments.

**Conclusion**

If an Australian bookshop attempted to impose the same dress code in 2017 as that unsuccessfully challenged by Ms Schmidt in 1977, would the ultimate outcome differ? Regrettably, that is not an easy question to answer. While federal, state and territory efforts to address discrimination have made great strides since legislation was first introduced in the 1960s and 1970s, “Australian discrimination law is not beyond criticism”. As Justice Michael Kirby once wrote, “the field of anti-discrimination law is littered with the wounded”.

Susie Zhang is one example. In 2005, Ms Zhang alleged that a purported requirement that she wear a miniskirt while working in the gaming room of a Sydney hotel constituted sex discrimination. Federal Magistrate Rolf Driver was unconvinced. Her claim, he began, “suffers from insuperable difficulties”. Ms Zhang complains about the obligation to wear short skirts upon the basis that this treated her as a ‘sex object’,” the judgment stated. “However, this confuses sex discrimination with sexual discrimination. Ms Zhang must establish that she was treated less favourably than a comparable employee would have been in the same or similar circumstances by reason of her sex. It does not avail her anything to complain that her employer took advantage of her sexuality … there is no evidence that a male employee, if there had been one in the gaming room, would have been treated any differently.”

A magazine photoshoot of the applicant in a bikini was then used against her. “Ms Zhang was not asked to do anything that she was unwilling to do outside the work place,” Federal Magistrate Driver continued. “She admitted owning short skirts and wearing them socially. Further, [the exhibit] shows that Ms Zhang was quite willing to display herself in a sexually alluring and revealing way.”

**John Wilson**

**BRADLEY ALLEN LOVE**

**Kieran Pender**

**BRADLEY ALLEN LOVE**

The authors acknowledge with thanks the input of Dr Dominique Allen (Monash University) and Jessica O’Neill (University of Canberra) during the formative stages of this article.

**Endnotes**

5. There is little empirical research on this topic. Jessica O’Neill at the University of Canberra is currently undertaking survey research for a project entitled ‘Who Wears the Pants: A Study of Gendered Dress Codes in the Service Industry’. Initial results confirm the prevalence of clothing-related discrimination in that sector.
12. Ibid 168.
16. Section 14(2).
17. See, eg, *Discrimination Act 1991 (ACT) s 10(2).*
19. Ibid (emphasis in original).
20. 692 F 2d 602 (9th Cir, 1982) (“Gerdom”).
22. Gerdom 692 F 2d 602, 609 (9th Cir, 1982).
27. Sections 7(1) and 11.
33. See, eg, *Walsh v St Vincent de Paul Society Queensland (No 2) [2008] QADT 32.*
34. *Discrimination Act 1991 (ACT) ss 32 and 33.*
35. Ibid s 30.
36. Allen, above n 26, 6.
37. Ibid 8.
40. Ibid s 361.
41. Ibid s 351(l)(a).
42. Ibid s 351(l)(b).
44. Section 3 351(l)(a). See *Hoaulk v Church of Jesus Christ of Latter-Day Saints* (1997) 79 FCR 44.
45. *Fair Work Act s 385.*
46. PR931032 (6 May 2003).
49. *Smith*.
50. Ibid [60].
51. Ibid [61].
52. Ibid [61].