

**HR and the law: a comparative study into the  
influence of institutional logics on HR  
practitioner approach  
to employment laws in the UK and Australia**

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**June 2019**

## **ABSTRACT**

This study examines how HR practitioners in the UK and Australia make sense of and approach employment laws in private sector organisations. The current HRM literature suggests that all HR practitioners and organisations respond to and comply with employment laws in the same way, and that compliance is straightforward and necessary to secure organisational and social legitimacy. However, despite the well-recognised tension between social legitimacy and the demand for managerial autonomy and flexibility, the approach taken by HR practitioners to employment laws has not been empirically explored. Through semi-structured interviews with HR practitioners and specialist employment lawyers this qualitative study addresses that gap. The institutional logics perspective is combined with sensemaking theory to comparatively examine contextual influences at the micro-level of HR practice.

Contrary to the assumptions in the HRM literature, the findings reveal that HR practitioners in both the UK and Australia have to contend with institutional complexity and balance the goals and values of different institutional logics when approaching employment laws. In both countries HR practitioners had to balance legislative requirements (state-based logic) with business goals and demands from management (corporate-based logic). This thesis argues that this balance is achieved differently by HR practitioners in the two countries and is connected to the multi-level and interrelated ‘constellations of logics’ drawn on by the participants. For UK participants, the corporate logic and demands from senior management appeared to dominate and shape how they identified, interpreted employment laws and the action then taken. In contrast, the Australian institutional environment appeared more diverse, better enabling HR practitioners to mount effective arguments for compliance. The findings emphasise how HR practitioners are embedded in organisations and the wider institutional context, and also how the dominance of a corporate logic can effectively stymie compliance with employment laws.

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## **ACKNOWLEDGEMENTS**

There are a number of people who helped me get to the point of submitting this thesis, without whom I am sure I would not have made it.

First, my family. To my fantastic children, Bea and Idris. Their love, happiness and wonderful distraction sustained me through the good, mediocre and toughest times. To my mum, Joy, and my dad, Peter, who have been supportive, loving and there. Except for my supervisors they have been subjected to hearing more about this study than anyone, which they tolerated with such good grace. They really have gone above and beyond. To my sister, Emma, whose support helped me get to the finishing line (even if she doesn't believe there is any place for qualitative research!).

To my friends, who have helped keep me sane and have also heard more about HR practitioners and employment laws than I am sure they would have liked (some more willingly than others!).

To my supervisors, in particular, Jane Suter, who has been there from the very beginning and whose encouragement, support and belief in what I was doing has been invaluable, it truly kept me going. To Tony Royle, who helped me through to the end, and Linda Perriton, who set me off on this PhD journey.

To all those who were involved in the research, all the participants and those who helped me find them. There would have been no study without them. Finally, to the Economic and Social Research Council, who provided a scholarship for this study and helped keep me (somewhat) solvent.

## **AUTHOR'S DECLARATION**

I declare that this thesis is a presentation of original work and I am the sole author. This work has not previously been presented for an award at this, or any other, university. All sources are acknowledged as references.

# **CHAPTER 1**

## **Introduction**

Human resource (HR) practitioners are commonly employed by private sector organisations and have a role to play in relation to employment laws and the handling of internal matters that are required by or connected to the requirements of such laws (Markoulli et al, 2017). However, despite practitioner involvement and interest in this topic there have been few studies into how HR practitioners approach these laws in practice.

### **1.1 The HRM literature: role evolution, assumptions and theory**

HR practitioners have been traditionally associated with a legal role, which can be traced back to the days of personnel management and industrial relations (PM&IR). The legal aspect of the PM&IR function may be connected to the increase in the number and scope of employment laws and collective representation of workers by trade unions in the 1960s and 1970s (Berridge, 1992; Brown et al, 2000). At this point in time those in the PM&IR function were responsible for the interpretation of these new laws and maintenance of union relationships (Legge, 2005; Marchington, 2015), which Torrington and Hall (1987: 8) describe as “legal wangling”. However, with changes in the global economy and a major shift in UK government policy in the 1980s toward a more hostile environment for trade unions, the underlying purpose of the PM&IR - increasingly known as the HRM - function appeared to shift to an increased focus on the efficient achievement of business, and often financial, objectives (Beer et al, 2015; Brown et al, 2009; Casio, 2005; Kochan, 2007; Storey, 1992; Torrington et al, 2017). The evolution to ‘strategic’ HRM arguably occurred in the US in the mid 1980s (Kaufman, 2015), and had taken hold in the UK and Australia by the late 1980s (Brown et al, 2009; Jackson et al, 2014; Kaufman, 2007; Legge, 2005; Marchington, 2015). Strategic HRM is seen to concentrate on, “...the relationship between HRM and firm performance” (Kaufman, 2015: 396), and the effective management of the organisation’s ‘human’ resources in order to achieve this objective.

The changing emphasis regarding the purpose of the HR function arguably led to Ulrich's (1997) business partner model for HR practitioners. This model is recognised as the dominant contemporary role framework for HR practitioners in the UK (Caldwell, 2003; Francis and Keegan, 2006; Marchington, 2015), and of considerable influence in Australia (AHRI, 2016; Sheehan and De Cieri, 2012). While this model included, for example, the HR practitioner as employee champion or advocate, involved in representing employee interests to management, the 'strategic partner' role appears to have dominated (Francis and Keegan, 2006). The strategic framing of the HRM function is seen to have led to preoccupation with how HR practitioners contribute to organisational performance (Beer et al, 2015; Boxall and Purcell, 2000; Legge, 2005; Sheehan et al, 2014a) rather than the legal and regulatory aspects of HR practice (Harris, 2005). While the tension and paradox between the different roles that HR practitioners are meant to fill is well recognised, even by Ulrich (1997; Kryscynski and Ulrich, 2015a and 2015b), there is little discussion in the HRM literature of what this may mean for the way in which HR practitioners approach employment laws and compliance. The HRM literature itself also reflects this tension, with some arguing HR is responsible for compliance (Beatty et al, 2003; Cascio, 2005; Wright and Snell, 2005), while Ulrich et al (2015: 3) claim it is a "historical myth" that HR practitioners ever had such a role.

One reason for the lack of attention to the legal role of HR practitioners in the HRM literature may be explained by assumptions that compliance occurs and is straightforward. For example, there are references to how there is, "no choice" (Cohen, 2015: 213) but to comply and that, "adhering to the law is not optional" (Parkes and Davis, 2013: 2413). In turn, these assumptions may be explained by the theoretical understanding of how laws are handled by HR practitioners and organisations. The HRM literature focuses on what has been termed 'old neo-institutional' theory (Lewis et al, 2019), which presents laws as determinative of practice as they are considered to impose an 'iron-cage' (DiMaggio and Powell, 1983) over practice. As all organisations should comply with the same laws, all organisations are considered to comply in the same way, with those laws assumed to have a homogenising influence over the approach by HR practitioners. In addition, compliance with employment laws is

considered necessary in order for the organisation to appear socially legitimate (Boxall and Purcell, 2016; Paauwe, 2004; Paauwe and Boselie, 2007). While the HRM literature does recognise the potential for tension between the socio-political goal of social legitimacy and more economically focused goals of obtaining cost-effective labour and maintaining organisational flexibility (Boxall and Purcell, 2016; Paauwe and Boselie, 2007), there is little consideration of how these tensions may be resolved in practice. Boxall and Purcell (2016) tentatively recognise that not all organisations prioritise compliance in the same way, but this is generally presented as a problem for specific low-pay sectors and smaller organisations (that may be less likely to have a dedicated HR function).

In summary, there is a dearth of research into how HR practitioners make sense of and approach matters governed by employment laws. The focus in the HRM literature on the structural and supposedly deterministic nature of law, and the perception that it seamlessly transfers from the external environment into HR practices and action, may account for the limited theoretical discussion and lack of research interest into the role played and approach by HR practitioners to employment laws. If it is assumed that what the law says is what happens, then this would suggest there is little to examine. However, the tension and potential incompatibility between the different roles and demands that HR practitioners are expected to satisfy are not just an academic concern.

## **1.2 Where was HR?**

If HR practitioners are involved in the straightforward and unproblematic transmission of employment laws into practice, then there should be few successful claims by (ex)employees against their employers. Moreover, there should be few situations that raise the question of ‘where was HR?’. However, over the course of this study there have been high profile examples of where organisations (and the HR practitioners employed by them) appear to have taken a flexible approach to compliance. These include: the “extremely disturbing” (Business, Innovation and Skills Committee, 2016: 3) employment practices of Sports Direct, which included failure to pay the minimum wage, alleged health and safety breaches and penalisation of employees who took sick

leave; and the naming and shaming of almost 180 employers that failed to pay the minimum wage, including organisations such as Wagamama and Marriott Hotels (Department for Business, Energy and Industrial Strategy (DBEIS) et al, 2018). Additionally there has been increased public and policy interest arising from the #metoo movement and a related concern about the use of non-disclosure agreements (NDAs) to silence individuals subject to sexual assault, harassment and discrimination in the workplace (Women and Equalities Committee (WEC), 2019). Indeed, in an article published by the US based Society for Human Resource Management, J. Taylor (2018) argues that ‘where was HR?’ is a fair question and that HR should do more to foster safe and respectful workplaces. However, there is little consideration of the practical challenges that HR practitioners may encounter if they attempt to enforce such requirements. While these examples occurred after the commencement of and did not motivate this study, they are arguably symptoms of a wider issue that this study did set out to explore, of how HR practitioners make sense of employment laws.

It was the seemingly straightforward and trouble-free presentation of HR’s legal role in the HRM literature that motivated this study, as this depiction did not reflect my experience of working as a specialist employment lawyer in the UK and Australia, and as a HR manager in Australia. My experience in these roles included seeing an organisation set aside a ‘litigation budget’ because it knew it was not dismissing employees fairly. It also included seeing a HR practitioner give in to internal pressure from management to make a pregnant woman redundant simply because she was going to take maternity leave. The HR practitioner involved attempted to blame my legal advice and falsely claimed I had approved this course of action, when it transpired that she had been pressured by the manager of the department involved to adopt this approach. These experiences meant that when I first reviewed the HRM literature to examine how it discusses employment laws for my Masters dissertation, I was struck by the apparent divide between the academic HRM debates and what happens in practice.

When I returned to England after eight years in Australia I was surprised by the comparatively low level of legal rights to which employees were entitled in the UK, and scant attention given to the existence and protection of those rights in the media and by political parties. With personal experience of how HR practitioners approach

employment laws, this apparent lack of interest and concern raised wider questions about what is influencing the way in which HR practitioners make sense of these laws in practice. The examples given above suggest that regardless of what the law may require or legal advice received managers may be reluctant to comply with employment laws, which compete with other priorities. This can place HR practitioners in a difficult position as they manage conflicting demands and expectations. However, the HRM literature pays little attention to the potential practical challenges and difficulties HR practitioners may face in the management of situations that should be governed by employment laws. It is this gap in the literature that this thesis aims to begin to address.

### **1.3 Theoretical background**

The ‘old neo-institutional’ theory currently used in the HRM literature does not appear to provide much assistance in terms of explaining the potential problems with compliance, indicated above. A theoretical perspective was needed that specifically recognised the importance of the institutional context and that offered a lens through which to explore any tension between the different demands HR practitioners may face. As is also highlighted by Lewis et al (2019), more recent advances in institutional theory, in particular the institutional logics perspective, appear well suited to HRM scholarship. This perspective provides a suitable theoretical grounding for this study, as it links the macro-level touched upon in the HRM literature with the micro-level of individual action, also bringing agency, not just structure, into consideration. It recognises that human practices are not the direct instantiation of, for example, employment laws, and in order to have effect institutions need to be made sense of and interpreted (Binder, 2007; Thornton et al, 2012).

While the mainstream HRM literature tends to assume that laws are straightforward and compliance happens, insights from other academic disciplines (legal, socio-legal, employee / industrial relations) highlight problems with this presentation and the important role played by individuals in how laws are enacted. Legislation may be ambiguous, laws need to be interpreted, what constitutes compliance can be constructed by individuals, and law-in-action may be very different from law-on-the-books (for



example: Baek and Kelly, 2014; Black, 1997; Collinson and Collinson, 1996; Edelman, 1992; Moorhead et al, 2019; Parker, 2009; Suchman and Edelman, 1996). Writing from a socio-legal perspective, Larson and Schmidt (2014: 1) helpfully emphasise how the law is not, "...majestically separate and uniquely powerful", and that the way it operates, "...remains connected to the messiness of the daily life of politics, culture, economic activity, and social relations". These insights point to the potential influence of non-legal institutions on the way in which HR practitioners may make sense of not only employment laws, but also their position and role within the organisation.

The institutional logics perspective recognises the existence of a multi-level (macro, meso-field, organisational and micro) and inter-institutional environment, with each institution (such as the state, corporation, market and profession) having its own specific logic and overarching rationality. This is important, as what 'makes sense' to an HR practitioner in a matter involving employment law is likely to depend on which lens it is seen through, whether that be, for example, the lens of a state, corporate, community or professional logic, or some combination. An oft-cited definition of institutional logics is provided by Thornton and Ocasio (1999: 804), who describe them as the, "...socially constructed historical patterns of material practices, assumptions, values, beliefs and rules by which individuals produce and reproduce their material subsistence, organise time and space, and provide meaning to their social reality". This perspective integrates the structural, symbolic and normative aspects of each different institutional logic, and no single logic is assumed to be determinative of practice (Thornton and Ocasio, 2008). Each individual logic is seen as having its own set of goals, demands, values, vocabulary of practice and associated identity (Thornton and Ocasio, 2008; Thornton et al, 2012). Rather than an area of practice being governed by only one logic, Goodrick and Reay (2011) highlight how there may be multiple institutional influences that form a 'constellation of logics'. The logics that make up the constellation may complement each other, or they may prescribe incompatible and conflicting sets of values, goals and prescriptions for behaviour, which has been described as 'institutional complexity' (Greenwood et al, 2011). Individuals are seen as 'embedded' in their institutional context, including the organisation they work within (Moorhead et al, 2019). However, institutional scholars also point to how a multiplicity

of logics may open up 'space' (Waldorff et al, 2013) and enable individuals to exert agency.

Given the well recognised tension between the goal of social legitimacy and legal compliance, and the more economically motivated goal of managerial flexibility and autonomy in handling of the workforce (Boxall and Purcell, 2016), the potential to account for incompatibility between values and goals is important. This study deliberately sought to avoid the assumption in the HRM literature that a particular logic (state-based) governs practice. Accordingly, it does not presuppose which logics influence HR practitioners. Instead, the intention was to examine how individual HR practitioners make sense of employment laws and to identify the institutional logics that influenced them. This approach follows Reay and Jones (2016), who refer to taking a bottom-up approach to the capture and identification of relevant constellations of logics.

Of the different levels of the institutional environment, the micro-level has received the least attention (Lewis et al, 2019; Powell and Rerup, 2017; Waldorff et al, 2013). Moreover, additional concepts are necessary to examine how individuals navigate the institutional environment (Bévort and Poulflet, 2015). For the purposes of this study, sensemaking appeared most appropriate as it is concerned with how individuals rationalise and justify action taken, positioning this process in terms of their own identity and expectations of others (Weick, 1995; Weick et al, 2005). Sensemaking is also occasioned by complexity, where there may be different cues and influences that need to be made sense of (Weick, 1995). This is particularly useful to this study, as sensemaking is recognised as being occasioned by situations that are ambiguous, where there are conflicting goals, different value orientations, paradoxes and tensions (Weick, 1995). The tension between the different roles that HR practitioners are expected to fill may present such a situation. In terms of the connection between institutions and sensemaking, Weber and Glynn (2006) present a framework of institutionalised typifications in sensemaking. This framework elevates the role of the social and historical context in shaping individual sensemaking by focusing on individual identity, the situational cues perceived as important and relevant, and the action taken (discussed more in chapter 3). Weber and Glynn (2006) argue that institutions provide the building

blocks of and are interwoven with the process of individual sensemaking, as they shape the form of interpretation engaged in and the way individuals communicate. This study builds on and extends Weber and Glynn's (2006) framework, adapting it to help provide a structure for analysis of the data; the conceptual framework used in this study is set out in more detail in chapter 4.

#### **1.4 The research questions and research design**

This study aims to address the knowledge gap in the HRM literature in terms of our understanding of how HR practitioners interact with employment laws. It seeks to identify the influences on HR practitioners when it comes to handling and making sense of matters covered by employment law and that shape the action taken. To do this, the study departs from the current theoretical approach discussed in the HRM literature, and instead adopts the theoretical perspectives of sensemaking and institutional logics. The study will provide an understanding of the influences on HR practitioners, contributing to the HRM literature and providing data that may be expanded upon in future research.

The review of the mainstream HRM literature and additional insights drawn from other academic disciplines, examples of which are given above, led to identification of the primary research question:

**How do institutional logics influence the way HR practitioners make sense of and apply employment laws in practice within the context of private sector organisations in the UK and Australia?**

The following sub-questions were also identified:

- Which logics influence the approach taken by HR practitioners in each country?
- How do the identified logics impact on HR practitioner work-identity, the way they make sense of situations involving employment laws and the action taken?

- How do concerns about social legitimacy influence the approach taken by HR practitioners toward employment laws?

In examining these research question this study makes several contributions. It examines a gap in knowledge in the HRM literature in terms of our understanding of how HR practitioners make sense of employment laws - a 'black box' area of HRM practice. Using the institutional logics perspective, and focusing on the micro-level of individual HR practitioner sensemaking, it provides a contextualised understanding of the institutional environment within which HR practitioners operate. It builds upon Weber and Glynn's (2006) insights into how institutions provide the building blocks and are interwoven with how individuals make sense of different institutional influences, providing a fine-grained analysis of the importance of the entire institutional environment in which HR practitioners are located. Accordingly, it also contributes to the institutional logics literature in terms of deepening our understanding of how individuals manage and make sense of institutional complexity.

This study adopts a critical realist ontology (recognising the potential variety of influences on individuals and the interplay between structure and agency) and interpretivist epistemology. A qualitative methodology is used to explore the experiences, understanding and perceptions of the participants and to connect these findings to contextual features and institutional logics. A comparative research design was adopted, as comparison of findings from two different contexts helps with identification and isolation of the enabling and constraining influence of different institutional logics on HR practitioners, and the way they made sense of employment laws. From the institutional logics perspective, Waldorff et al (2013) highlight how comparing and contrasting the constellations of logics in two different countries and how they impact action can help identify patterns and influences that may otherwise go unnoticed. In relation to sensemaking, Maitlis and Christianson (2014) also argue that it is helpful to compare findings from different cultures in order to explore the situational cues that may trigger and inhibit sensemaking. The choice of countries was shaped by the researcher's experience of working in the two countries, but also because they share a number of similarities. They both operate under a common law legal system, have a developed economy and well established HR professional associations. However, as

indicated above, there also appear to be differences in terms of concern for and interest in employment rights. Interviews were conducted with HR practitioners and also specialist employment law lawyers, the “compliance professionals” identified by Edelman (2004: 239).

## **1.5 Outline of the thesis**

This section gives a brief overview of the organisation of the thesis, which is divided into 9 chapters, and an overview of the aims of each chapter, including the key arguments and themes for each part of the thesis. A précis of each chapter is set out below.

Chapter 2 sets out a detailed review of the mainstream HRM literature and theory in relation to HR and the law. This chapter focuses on: contemporary HR role formulations; the potential for role tension between a strategic focus on facilitating the achievement of business objectives on one hand, and the goal of social legitimacy (and legal compliance) on the other; the dominance of a purely structural understanding of the relationship between HR practitioners and the law (based on neo-institutional theory); and the little that is known about the way HR practitioners approach employment laws. It then explores insights from other academic disciplines that highlight the potential ambiguity of law and how laws do not simply determine practice, as is generally assumed in the HRM literature.

Chapter 3 then presents the theoretical approach adopted in this study. It argues that the sensemaking and institutional logics perspectives offer a more suitable theoretical lens for examination of how HR practitioners apply employment laws.

Chapter 4 sets out the research design. It addresses the critical realist and interpretivist research philosophies that shaped the qualitative and comparative design of this study. It sets out how the data was analysed thematically and how the work of Weber and Glynn (2006) was used to develop a conceptual framework that centres on the concepts of identity, situation, action and the sensemaking processes that connect them (see Figure 3, p.101).

Chapter 5 provides an overview of macro and meso-level features of the UK and Australian context that may impact on how HR practitioners make sense of employment laws. At the macro-level this chapter focuses on the legal system, the historical development of employment laws and the current status of employment rights and entitlements in each country. It highlights differences in the way the state has historically and currently approaches regulation of the employment relationship, and how it balances the interests of efficiency and business against those of equity and the employees. This chapter also provides background to the expressed role, purpose and rights of various field-level actors, including statutory bodies, unions, HR practitioner associations and the media.

Chapters 6 (UK) and 7 (Australia) present the findings from the two countries. Using the conceptual framework discussed in chapter 4 (Figure 3, p.101), these chapters present the interpretive analysis of the interview data and how the participants made sense of employment laws in the UK and in Australia. These chapters examine the work-identity of the HR participants, and how this appeared connected to the way participants interpreted employment laws, the situational cues taken into account and the forms of action taken. The findings chapters also identify the constellations of logics drawn on by the participants and the features of the multi-level institutional environment they referred to as influencing their sensemaking process. An illustration of the multi-level and inter-institutional environment in the UK is set out in Figure 4 (p. 178), and in Australia is set out in Figure 5 (p.220).

Chapter 8 compares and discusses the findings from each country. The chapter first considers how the findings relate to the theoretical understanding in the HRM literature. Contrary to assumptions in the HRM literature that HR practitioners are involved in the straightforward and trouble-free implementation of employment laws, it argues that all the participants in this study faced a situation of institutional complexity. The way the participants resolved this complexity depended upon the constellations of logics drawn upon, how these logics interacted, and influences from the multiple levels of the wider institutional environment (field-level actors and the organisation). It also focuses on differences in the work-identity indicated by HR participants in each country, and how

these differences may be connected to the way they then made sense of and interpreted employment laws. Finally, it discusses the interplay between institutional structure and individual agency.

Chapter 9 is the final chapter and concludes this thesis. This chapter answers the research questions, sets out the contributions to knowledge, the implications of this study and also indicates various areas for future study.

## **1.6 Summary and concluding remarks**

There have been few studies that analyse how HR practitioners approach and make sense of employment laws. This may be due to the heavy reliance on ‘old neo-institutional’ (Lewis, 2019) theory in the HRM literature. Laws are assumed to provide an iron-cage over HR practice leading to homogeneity in terms of HR practitioner and organisational responses. However, this assumption is called into question given the tensions that HR practitioners are expected to manage and resolve, and insights from other academic disciplines into the non-deterministic way law works in practice.

This study draws on theories of institutional logics and sensemaking to examine how HR practitioners in two different countries make sense of employment laws. This facilitates an analysis of how broader institutional forces interact with work-related identity, situational cues and action taken in HR practitioner approaches to compliance and non-compliance with employment law. In addition to contributing to the little that is known about this area of HR practice, this study adds to the institutional logics literature. By focusing on accounts provided by HR practitioners and employment lawyers this study provides a nuanced and multi-level picture of the institutional influences perceived by individuals as relevant and important in their day-to-day practice. The next chapter provides a detailed review of the HRM literature, highlighting problems with the way HR practitioners are currently assumed (and theorised) to approach employment laws.

## **CHAPTER 2**

### **Review and critique of HRM literature and theory**

The topic of employment law is of clear interest to HR practitioners (Markoulli et al, 2017). The website of the UK based HR association, the Chartered Institute of Personnel and Development (CIPD), has an extensive employment law section that lists numerous fact sheets and case law summaries (CIPD, no date-a). In 2017 the CIPD also expanded its offering of legal assistance to members to include 24/7 access to legal advice (Flynn, 2017). Similarly, the Australian based HR association, the Australian Human Resources Institute (AHRI) website includes an entire section dedicated to articles covering legal matters, in part because HR practitioners are recognised as responsible for implementation of employment legislation (AHRI, 2012). AHRI also provides its professional members with insurance cover (Goodear, 2014), which is necessitated in Australia because of the potential for HR practitioners to be held personally liable for breach of employment laws by their employer (Sheedy, 2016). Despite practitioner interest in employment law this has not been matched by scholarly interest into the topic of HR and its relationship with these laws (Markoulli et al, 2017), and very little is known about influences on this role or the approach practitioners take toward legal matters.

This chapter sets the scene for this study and reviews the HRM literature in some key areas. It starts by examining how the role of the HR practitioner has been conceptualised and how priorities for the role have seemingly changed over time. The shifting focus of HR's role has raised questions about how practitioners can manage the well recognised tension between the many roles they are expected to play. The second section reviews how the legal role of HR is discussed in the HRM literature, and how legal compliance is considered necessary to achieve the non-economic goal of social legitimacy. While compliance in order to achieve this goal is admirable, it is in clear tension with more strategically and economically oriented goals of managerial flexibility and autonomy. The third section then explores the current theoretical underpinnings of discussion about HR and the law in the HRM literature. Review of this



literature highlights how it is limited to consideration of neo-institutional theory, and arguments that organisations need to be congruent with the external environment in order to appear legitimate and that all organisations comply with laws in the same way. The final section critiques this presentation and highlights reasons to suspect the approach taken by HR practitioners toward employment law and compliance may not be so straightforward.

## **2.1 The changing emphasis of the personnel management and industrial relations (PM&IR) / HR function**

Before reviewing how the legal role of HR practitioners is discussed in the HRM literature, and how this literature theorises the interaction between HR practitioners and legislation, it is necessary to put the general practice of HRM into context. This section explores how ideas about the purpose, role and function of PM&IR / HR practitioners have arguably changed over the last 50 years. It highlights how the contemporary role formulation for HR involves the prioritisation of business objectives, and raises questions about how this may result in tension and conflict when it comes to the handling of legal issues.

### **2.1.1 The days of PM&IR**

The early 2000s witnessed a brief flurry of publications that explored the changing practical and rhetorical nature of the PM&IR / HRM function (see Armstrong, 2000; Boxall et al, 2007; Legge, 2005). It is beyond the scope of this review to cover the full debate about the alleged differences between PM&IR, HRM and strategic HRM, but the changing focus and priorities of the role which have arguably taken place are relevant to how HR practitioners may approach and interpret their various responsibilities.

The 1960s-1970s witnessed the increasing juridification of the employment relationship in the UK (Berridge, 1992; Brown et al, 2000; Dickens and Hall, 2009). There was an increase in the volume of employment related legislation and number and extent of statutory employment rights, greater awareness amongst employees of those rights and

increased militancy and organisation of unions and employees (Brown et al, 2000; Dickens and Hall, 2009; Legge, 1978). At this point in time, when management of new employment legislation and industrial relations became a priority for organisations, the PM&IR function was deeply involved in, “legal wangling” (Torrington and Hall, 1987: 8). Such wangling included responsibility for the interpretation and implementation of these new laws and management of union relationships (Berridge, 1992; Kaufman, 2007; Legge, 2005; Marchington, 2015; Torrington, 1989).

In contrast, the development of labour regulation and IR representation in Australia had followed a quite different path (see chapter 5 for more detailed discussion), with empowerment of trade unions and almost universal coverage of workers by complex and comprehensive regulation occurring much earlier in the 20th century (Marshall et al, 2009). However, Australian PM&IR practitioners in the 1960s were also responsible for management of relationships with unions and increasingly formal employment practices (Kramar, 2012). As a result, and unsurprisingly, the role of PM&IR was theorised at that time as including a heavy emphasis on management of the organisation’s legal obligations.

An influential writer on the role of PM&IR in this period was Karen Legge, who depicted the PM&IR function as either deviant or conformist innovator (Legge, 1978). Legge’s seminal work created a key conceptual hook for the function (Francis and Keegan, 2006; Guest and Woodrow, 2012; Marchington, 2015). The first role, that of the deviant innovator, can be connected to the growth of employment related legislation and trade union activity in the UK in that period. Given the potential consequences for non-compliance with these laws and expectations, Legge (1978) saw the need to attend to these aspects of PM&IR practice as shifting the definition of ‘success’ to one that did not simply focus on efficiency criteria. She saw an opportunity for practitioners to develop legal expertise, provide associated strategic direction to their respective organisations and consequently improve their professional standing (Legge, 1978). In this role PM&IR practitioners would be driven by and act as the advocate for social values and norms, challenging any dominant organisational norms that conflicted with them. The second role was that of conformist innovator, prescient of later strategic

formulations of HRM. In this role practitioners direct their activities to the achievement of organisational success, with an emphasis on ensuring cost effectiveness. The actions of the PM&IR team are shaped by organisational financial criteria and support, rather than attempt to alter, organisational goals and values. In what may now be considered an optimistic and vain hope, Legge (1978: 85) argued that PM&IR specialists, "...would reject the value implications" of this latter approach. Recognising the tension between these two positions, Torrington and Hall (1987: 10) comment that while a focus on employee relations - or IR - (associated with being a deviant innovator) and a focus on managerial control (associated with being a conformist innovator) do not necessarily conflict, "...they are seldom found in equal proportions". A focus on the law may be seen to involve promotion of societal values that do not always align with organisational priorities. Accordingly, the approach taken by those working in PM&IR / HR is crucial, in terms of how these proportions get balanced and resolved.

The importance of the legal environment to PM&IR / HR role formulations is also seen in later models of the HR function that drew on Legge's (1978) work, such as the regulator role developed by Storey (1992). This role was described as tactical and interventionist, involving the formulation, promulgation and monitoring of observance of rules, whether these were internal procedures or union agreements. Both Legge's (1978) concept of the deviant innovator and Storey's (1992) regulator role contained the ethos of pluralism, with practitioners promoting legislated employment rights regardless of whether they were desired by or in the short-term interests of the organisation. A pluralist position involves recognition and acceptance that different groups within an organisation may hold valid but competing interests (Berridge, 1992; Geare et al, 2009, Marchington, 2015). Storey (1992: 6) notes pluralism was the, "conventional wisdom" until the mid-1980s, with the PM&IR function intermediating between managers and workers. However, with the increasing influence of neo-liberal economic policy and decreasing trade union density and union representation in the UK (driven in part by hostile trade union legislation), the regulator role was arguably becoming obsolete with many PM&IR managers seeking to distance themselves from the regulatory focus of the 1960s and 1970s and associate themselves with the more unitarist, 'modern' and strategic HRM practice (Storey, 1992). While the increasing marginalisation of unions

and individualisation of the employment relationship occurred much later in Australia than in the UK (from the mid 1990s and into the early 21st century (Marshall et al, 2009; Pyman et al, 2010)), Australia was not immune to changing and market-driven ideas (Kaye, 1999) about what PM&IR and then HRM should contribute to the organisation.

### 2.1.2 The rise of HRM and strategic HRM

#### 2.1.2.1 1970s and 1980s: changes to the HR function

In 1979 the UK elected a new Conservative (Thatcher) government, which heralded a weakening of union power and a move towards individualisation of the employment relationship, leading to an associated increase in the power of employers and popularity of the idea that employers need flexibility in management of their respective workforces (Brown et al, 2000; Dickens and Hall, 2009). At a similar time changes in the global economy led to a shift in the focus of business (Kochan, 2007), with Cascio (2005) noting that in the 1980s US organisations increasingly demanded financial, not legal, accountability from management functions. The economic recession in the UK in the 1970s and 1980s arguably also led to an increasing focus on short-term survival rather than long-term outcomes (Torrington and Hall, 1987). Australia also experienced similar economic uncertainty as a result of inflation and increasing global competition during the 1970s and 1980s (Kramar, 2012), intensifying pressures on PM&IR and HR practitioners to improve and support organisational productivity and flexibility (Brown et al, 2009; Kaye, 1999). These changes had an impact on the values underpinning HRM, with neoliberal economic theory becoming the dominant paradigm for HRM (Beer et al, 2015), and arguably led to an emphasis on how HRM practices should improve employee performance (Kramar and Parry, 2014 (Australia)) and how the HRM function should be aligned with and committed to meeting management interests and needs (Torrington and Hall, 1987). Storey (1992) suggests there are twenty-seven points of difference between British PM&IR and HRM managers; a summary of these points of difference are reproduced in Table 1 below. This analysis would suggest that

there has been a change in tenor of the transition from the ‘regulator’ role to a more ‘strategic’ outlook.

**Table 1:** Points of difference between PM&IR and HRM

(Adapted from Storey, 1992: 35)

<b>Dimension</b>	<b>Personnel and industrial relations</b>	<b>HRM</b>
Rules	Importance of devising clear rules / mutuality	‘Can do’ outlook; impatience with rule
Guide to management action	Procedures	‘Business-need’
Nature of relations	Pluralist	Unitarist
Key relations	Labour-management	Customer
Corporate plan	Marginal to	Central to
Prized management skills	Negotiation	Facilitation
Labour management	Collective bargaining contracts	Individual contracts
Relations with stewards	Regularised through facilities and training	Marginalized

The concept of ‘strategic’ HRM appeared in the US in the early 1980s and had become widely accepted in the UK and also Australia by the end of the decade (Brown et al, 2009; Jackson et al, 2014; Kaufman, 2007; Legge, 2005; Marchington, 2015). However, although being ‘strategic’ is discussed in-depth in the HRM literature, there is no conclusive definition (Salaman et al, 2005). Strategic HRM is said to emphasise how the HRM function and management of the organisation’s human resources contribute to organisational goals and viability in an attempt to achieve a sustained competitive advantage (for example see: Boxall and Purcell, 2000; Kramar, 2012 (Australia); Torrington et al, 2017). A ‘sustained competitive advantage’ involves a focus on questions of economic value through decreasing costs and ensuring that organisational resources are rare and hard to imitate. Under the influence of this strategic imperative,

the HRM function needs to ensure the workforce is managed in a way to generate economic value (see Barney and Wright, 1998; Beatty, 2009; Huselid et al, 1997). Where organisations have adopted strategic HRM, it is claimed that the contribution of HRM is measured through financial performance or accounting indicators (Brown et al, 2009 (Australia)). These are not only seen as more legitimate than non-financial indicators, but are also easier to quantify than outcomes for a wider range of stakeholders, including society and the local community (Beer et al, 2015).

#### 2.1.2.2 Ulrich's (1997) business partner model: paradox and tension

Ulrich (1997) sets out four roles for the HR function: strategic partner, administrative expert, change agent and employee champion. Later developments saw the 'employee champion' role recast as 'employee advocate', this role is described as involving the communication of employee voice, representing employee interests to management and taking a stand against non-compliant behaviour that may damage the organisation's reputation (Ulrich and Brockbank, 2005). The rhetoric of a strategic 'can-do' outlook with a heavy focus on meeting business (economic) objectives is clearly highlighted in Ulrich's (1997) business partner model. Within Ulrich's model there is little reference to the legal role to be played by HR practitioners, nor the approach they should take to legal issues. Caldwell (2003) notes that Ulrich's 'employee champion' role has most overlap with Storey's regulator role, albeit in a new and reinvented HR way. Each role was envisaged as equally important to each other, but all roles were cast as subservient to the overarching goal of improving organisational performance and consequently aligned with management. Ulrich's (1997) concept simply concentrates on how practitioners should deliver value across the board, with value being defined and measured in economic terms (Ulrich and Brockbank, 2008).

The business partner concept is recognised as the dominant contemporary role framework for the HR function in the UK and has also been promoted by the CIPD (CIPD, 2009; Caldwell, 2003; Francis and Keegan, 2006; Marchington, 2015; Pritchard, 2010; Storey, 2007). Ulrich's work has also been of great influence within the Australian HR community (Sheehan and De Cieri, 2012), and his work on the desired

attributes and capabilities of HR practitioners was instrumental in development of AHRI's 'model of excellence' setting out the desired HR core competencies (AHRI, 2016: 13). However, while Ulrich's business partner model has proved attractive, even he noted the inherent paradox in expecting HR practitioners to meet the needs of employees while also implementing management agendas (Ulrich, 1997). No practical suggestions are provided to HR professionals about how to manage or balance the plurality of roles and interests they are entrusted with. Ulrich (1997: 45) simply urges HR practitioners to, "balance the tension". Writing much later, Kryscynski and Ulrich (2015a: 379-380) encourage practitioners to, "embrace" and manage the paradox of their position in order to achieve, "great beauty, opportunity and growth". In a separate document published on the AHRI website they also argue that HR practitioners need to be, "paradox navigators" (Kryscynski and Ulrich, 2015b; no pagination), managing the inherent tensions of business. While it is questionable whether practitioners see role tension and resulting role conflict in such a positive way, the strategic partner role appears to have become cemented as the core tenet for the HR function, discussed below.

Caldwell's (2003: 998) study into the fate of Storey's regulator role amongst UK HR practitioners highlights how this role was seen as, "...the archetype for the values of old style personnel practice and the antithesis of new style HRM", with HR practitioners being, "...more than ready to dump the past". The implications for representation of employee interests and needs were clear, with one participant quoted as saying they were there to serve business needs and had, "...given up the role of fair arbiters" (Caldwell, 2003: 998). Similarly, Harris (2005: 80) points out that the legal and regulatory aspects of HR practice are considered a, "negative role", given how HR's contribution to the organisation is measured. Francis and Keegan's (2006) study of UK HR practitioners also highlights the demise of the employee champion role, finding strong influence of the unitarist point of view that organisational and employee goals are aligned - that what is good for the organisation is also good for the employee. Failure to address the real possibility of tension and value-role conflict meant it was resolved in a one-sided way. Through analysis of interview data, Francis and Keegan (2006) found heavy use of the strategic business partner concept, with HR practitioners

framing discussion of all aspects of their work in business and strategic related terms. HR practitioners' values and practice were underpinned by this focus on strategy and they had become locked into use of 'business speak'. In formulating HR matters in this way practitioners closed down opportunities to perceive and understand issues in terms of employee needs, which also made it harder for them to draw on broader social values and alternative measures of success. In the Australian context, Sheehan and De Cieri (2012: 158) also refer to the importance for HR practitioners to master the use of the, "language of business", in particular business awareness and financial literacy.

Studies examining the adoption of the strategic role by HR practitioners in Australia raise concerns regarding how the HR function can adjust to multiple roles. Sheehan et al's (2006: 147) survey of AHRI members found a strengthening of HR's strategic role and requirement to demonstrate how they contribute to, "...bottom line outcomes", but also primary responsibility for IR, or employee relations, matters. Sheehan et al (2006) discuss the challenge for HR practitioners in managing the role of strategic partner while also acting as employee advocate. Similarly, Brown et al's (2009) study into how Australian HR practitioners' managed employee-centred duties found that while they were still performed, they were justified and redefined in terms of their strategic contribution. However, the Australian academic and practitioner literature also contains the suggestion that wholesale adoption of Ulrich's unitarist perspective on merging of the multiple roles played by HR practitioners may be more challenging and troublesome in Australia (Sheehan et al, 2006) than, for example, in the UK. There are references to how the complexity of and changes to the Australian IR system, with a shift from centralised bargaining to the level of the workplace, has arguably *increased* the responsibility of and focus on HR for these matters (Brown et al, 2009; Sheehan et al, 2006) and the promotion of fairness and justice (Lowry, 2006). Similarly, an article on the AHRI website that discusses the declining influence of unions, questions whether this then increases pressure on HR to be truly representative of all stakeholders (Dorney, 2017). Despite the clear influence of the strategic HRM paradigm in Australia to ensure HR practices are focused on achieving organisational objectives and indication that HR practitioners are adopting a unitarist perspective (Kramar, 2012), how the resulting tensions get balanced may be influenced by different factors when compared to other



countries. As Sheehan et al (2006: 148) state, in Australia there are, "...cases where the unitarist assumption of common goals is not evident".

While not focused on legal issues, studies into the ethical aspects of HR practice have highlighted the problems that HR practitioners may face if they pursue goals that are not seen to contribute to the overarching goal of firm level performance. De Gama et al (2012) explored how HR commitment to organisational goals and the drive to add value contributed to a 'business first' discourse, leading HR practitioners to distance themselves from and depersonalise employees when making decisions that had human consequences. Similarly, Parkes and Davis' (2013) study found pressures on HR to show allegiance to the organisation and expectations regarding what the function should contribute meant it was difficult for HR practitioners to perform a role as ethical steward and there were negative personal consequences associated with speaking out on ethical issues. In the Australian context, Van Buren III et al (2011) found that HR was primarily responsible for employee relations (such as negotiating and setting wages, equal employment opportunity and health and safety) and ethics activities, but these aspects of practice were not considered as important as its strategic focus. In both Parkes and Davis' (2013) UK study and Van Buren III et al's (2011) Australian study, HR practitioners were often involved in the creation of ethical policies but much less involved in their promotion or enforcement.

Preparation of policies could be seen to discharge the ostensible responsibility for such areas without the complication of engaging in what could be considered non-strategic behaviour. It would appear that HR practitioners adopt a similar approach when handling new legal requirements. A survey of UK employers conducted by the CIPD (2005) concludes that as 78 per cent of respondents reported implementing new laws by changing policies, this implementation was effective. However, simply having or changing a policy does not mean that it will be followed; there may be problems in ensuring the consistent and fair implementation of HR policies and processes in both theory (Guest and Bos-Nehles, 2013; Townsend, 2013 (Australia)) and in practice (Macklin, 1999 (Australia)). Accordingly, if HR practitioners are concerned with broader social values and ensuring the organisation follows relevant employment laws,

the importance they place and influences on meeting the demands and outcomes required by legislation are important.

### 2.1.2.3 The HR profession

Professional associations play an important role in creating, reinforcing and potentially disrupting ideas and expectations regarding professional identity and the principles and standards that should guide how individual professionals behave (Muzio et al, 2013). Both the CIPD and AHRI appear concerned with promoting the HR business partner concept, a concern which appears to stem from enduring legitimacy and status problems faced by the HRM function and the (lack of) power of HR practitioners to influence or intervene in business decisions (Macklin, 1999 (Australia); Sheehan et al, 2014a (Australia); Sheehan et al, 2014b (Australia); Thompson, 2011 (UK)). HR practitioners have been consistently urged to focus on their contribution to the business. In the lead article of an edition of the Harvard Business Review titled, 'It's time to blow up HR and build something new', Cappelli (2015) argues that HR needs better business knowledge and a greater focus on the financial benefits of HR practices. In response, the AHRI CEO stated, "the consensus is there is much to do in order to reaffirm the standing of true HR business partners, and to build the capabilities of those who have not yet become the HR partner businesses want" (Goodear, 2015: no pagination).

The CIPD is also concerned with the internal image and standing of HR practitioners, seen in a survey of 'leaders' views of our profession' that warned spending too much time on employment law risked being perceived as slow and reactive (CIPD, 2013). The emphasis on the strategic aspects of HR's role can be seen in a wide variety of CIPD publications. For example, in a CIPD collection of thought pieces, Holley (2015: 13) states that it is "disturbing" that HR practitioners would focus on personal development in areas such as employment law, when they could be focused on finance and strategic management. A headline to an article on the CIPD People Management webpage emphasises how, "HR needs to broaden its own mind and become more commercial" (Whitelock, 2016). The front cover of the June 2019 edition of the CIPD magazine also refers to its focus on, "People", and the cover story reiterates how, "...

it's never been more important for HR to demonstrate commercial awareness" (Jeffery, 2019: 24). The emphasis appears to be on the financial contribution made by HR practitioners and efficient achievement of business objectives. Consequently, it is perhaps unsurprising that a recent CIPD report into diversity and inclusion found that, "some business leaders" require HR to provide a, "financially driven business case for action" (Green et al, 2018: 2). While moral behaviour and diversity (to the extent it does not overlap with discrimination law) may not be legally mandated, it is easy to see how a focus on financial outcomes may not always lead to arguments in support of compliance.

The enduring appeal of the business partner concept in the UK can be seen in the annual CIPD business partnering conference. An advert for the 2019 conference sets out some 'core principles' for the HR function in any organisation: "[it] needs to be closely aligned with the organisation's structure, leaders and line managers in order for HR Business Partners to add value and help achieve objectives, drive change and promote stakeholder satisfaction" (CIPD, no date-b: no pagination; emphasis added). The focus here is clearly on alignment with management and achievement of organisational and financial objectives. However, in light of corporate scandals in the UK the CIPD has also explored how it can create a stronger HR professional identity (CIPD, 2017). The CIPD hoped that a clearer professional identity would help HR practitioners manage the paradoxes and tensions that bedevil the role, enabling them to promote ethical values and take into account the interests of multiple stakeholders, not just the management team (CIPD, 2017). The 'new' CIPD profession map released in November 2018 (Cheese, 2018) does include, for example, 'ethical practice' as a core behaviour (CIPD, no date-c). Despite this, the paradox and tension that may affect the HR function is also evident in the list of core behaviours, which includes 'commercial drive'. Within the profession map 'commercial drive' is defined as: "using a commercial mindset, demonstrating drive and enabling change to create value" (CIPD, no date-c: no pagination). In relation to this core behaviour, HR practitioners are urged to, "deliver business outcomes and benefits", "develop and present robust business cases" and "drive sustained commercial success" (CIPD, no date-c: no pagination).

In terms of how these commercial behaviours may co-exist with a role in relation to employment laws, the new CIPD profession map (CIPD, no date-c) sets out the knowledge and behaviours required of HR practitioners at four different levels of practice. Where employment laws are referred to the only references to acting, “consistently with relevant regulation and law” (CIPD, no date-c: no pagination) and ensuring, “people practices are compliant” (CIPD, no date-c: no pagination), relate to the lowest two levels of HR practitioners. For the highest two levels, chartered members and chartered fellows, the emphasis is on how to assess and mitigate legal risk (CIPD, no date-c). ‘Legal risk’ is not a static concept and organisations may differ in terms of the degree of risk they are prepared to accept. It is also worth noting that in the legal literature having an ‘appetite for legal risk’ is considered a willingness to accept and tolerate potentially unlawful behaviour (Moorhead and Vaughan, 2015). Accordingly, the focus on serving business needs in contemporary HR role formulations raises questions about how senior UK HR practitioners approach employment laws. Changes to the professional model and map for UK HR practitioners may be a positive step, and are possibly an acknowledgement that the focus of HR had shifted too far towards an emphasis on performance goals. However, getting the business-first genie back into the bottle may prove difficult when HR practitioners are given mixed messages about how they should approach and prioritise their duties and the practice of HRM. Turning to Australia, the AHRI ‘model of excellence’ sets out what HR practitioners should know, do and what may be expected of them (AHRI, no date-a). However, despite the potential personal liability Australian HR practitioners have for breach of employment laws, this model makes no reference to the legal aspects of HRM practice. (The personal liability of HR practitioners in Australia is discussed in more detail in chapter 5).

## **2.2 The legal role of HR**

The HRM literature on the contemporary HR role orientation suggests that while HR practitioners may be involved with employment laws their focus is perhaps in alignment with management and achievement of organisational objectives. The section above highlights how the many roles expected of HR practitioners may result in paradox and tension. This section now turns to examine how the specifically legal aspect of the HR

practitioner role is discussed in the HRM literature. It starts with the connection made between legal compliance and the goal of social legitimacy. It then highlights how role tension is evident in the way the legal role of HR is discussed. Finally, it explores the scant literature on how HR practitioners and organisations approach and perceive employment laws.

### 2.2.1 Social legitimacy and legal compliance: tensions and decoupling

In apparent recognition of the heavy economic focus of the HRM literature and neglect of the social context in which organisations operate, socio-political objectives were (re-)introduced to academic discussion of the goals of HRM around the turn of the millennia. One of these goals was social legitimacy, defined by Suchman (1995: 574) as, "...a generalised perception or assumption that the actions of an entity are desirable, proper or appropriate within some socially constructed system of norms, values, beliefs and definitions".

The pursuit of social legitimacy has been linked to the need to comply with the law, with Boxall and Purcell (2016: 14-15) stating that the, "...legitimacy goal [of employers] is legal compliance" (emphasis added). The focus is on compliance with local laws, customs and expectations of how people should be treated at work, as failure to comply with these could affect the organisation's standing or reputation. Boxall and Purcell (2016: 268) emphasise that social legitimacy may be more important for HR functions in larger organisations, such as multi-national corporations, as smaller firms have the ability to, "fly under the radar". Paauwe (2004) also refers to social legitimacy as a goal for HRM, emphasising how the relationship between an organisation and its employees should be characterised by fairness and legal compliance in order to be perceived as legitimate. Paauwe (2004) goes on to categorise these as the 'moral' obligations of HRM as opposed to economic drivers of HRM practice. This distinction is similar to that discussed by Boxall and Purcell (2016), who present legitimacy (and with it, compliance) as a socio-political and not economic goal. Consequently, legal compliance is not considered to be something that can be used to further the strategic objectives of the organisation (Paauwe, 2004). Nor is legal compliance perceived as

something that could be used to differentiate an organisation from its competitors or contribute to creation of a competitive advantage (Boxall and Purcell, 2011; Orlitzky, 2007). The logical inference may then be that a competitive advantage can be obtained by not following the law (Cunliffe, 2014).

The tension between the pursuit of social legitimacy and other more organisationally desirable objectives, such as managerial flexibility and the unfettered power to act in the interests of the business, is well recognised (Boxall, 2007; Boxall and Purcell, 2016; Lees, 1997; Paauwe, 2004; Paauwe and Boselie, 2007). In one of the earliest accounts of social legitimacy within the HRM literature, Lees (1997) identified overlapping areas of focus for HR practitioners, including: organisational survival and competitiveness, with HR working to meet financial and commercial demands; and legitimacy, which he noted should operate under a different value system and involve HR concentrating on moral behaviours and practices. Lees (1997) highlighted the tension that existed between these two areas and believed the only way for this tension to be resolved was for HR to remove itself from strategic involvement so it could effectively focus on ensuring legitimacy. He went on to argue that a focus on internal efficiency measures risked all choices regarding workplace management, including legal compliance, being governed by commercial and financial considerations. However, similar to the fate of Legge's (1978) 'deviant innovator' role discussed above, it appears that contemporary HR has aligned itself with the organisation and management.

Boxall and Purcell (2016) also refer to these tensions and problems for HR practitioners, emphasising the potential divide between management power and social legitimacy, and with it legal compliance. In order for HR practitioners to successfully champion legal compliance they note management needs to accept, "constraints on its power" (Boxall and Purcell, 2016: 22), but also recognise that this may not be given up willingly. Harris (2005) also briefly refers to the tension that exists between the demands of legal regulation, market imperatives and organisational demands for control. In addition, Paauwe and Boselie (2007) refer to institutional (legitimacy seeking) and competitive market (economic value seeking) pressures and the need for HR to achieve a 'strategic balance' between them. Paauwe and Boselie (2007) also refer

to normative institutional mechanisms coming from professional bodies and networks that influence members to operate in the same way, such as the now common assertion that HR must add value and be business oriented - the focus of discussion in the section above. Boxall and Purcell (2016) also make reference to the potential influence of trade unions and the approach taken by the government in ensuring compliance is taken seriously, which suggests the need for oversight of organisational compliance to ensure it occurs.

There are brief references in the HRM literature to organisations where social legitimacy and compliance are not prioritised. Boxall and Purcell (2016: 23) refer to a, “minority” of organisations where there may be, “stubborn management resistance” to legitimacy - and compliance - goals. There is recognition that not all employers view the pursuit of legitimacy in the same way and there consequently appear to be different levels at which this tension gets resolved; for example, some employers breach health and safety and minimum wage legislation (Boxall and Purcell, 2016; Marchington, 2015). While the need to be socially legitimate is emphasised as necessary for organisational survival (Lees, 1997; Paauwe, 2004; Paauwe and Boselie, 2007), reference to, “levels” (Boxall and Purcell, 2016: 24) of concern for social legitimacy - and with it legal compliance - suggests the potential for a continuum of concern for this goal. The legitimacy (not HRM) literature provides some insight into how HR practitioners and organisations with a low level of concern for compliance may get around the problem of being seen to be socially legitimate. For example, Suchman (1995: 574) refers to legitimacy as “a perception” and highlights how legitimacy may be preserved by appearing to be compliant, which is not necessarily the same thing as being compliant. Drawing on Parkes and Davis’ (2013: 2417) insight in their study into the role of HR practitioners in ethics, “a lack of visible blunders” does not mean the organisation is ethical. Similarly, a lack of visible non-compliance does not necessarily mean employment laws have been complied with, as there are ways of handling non-compliance by ensuring details of the matter are kept confidential and out of the public eye. Meyer and Rowan’s (1977) seminal work is often cited in the HRM literature in relation to the goal of social legitimacy, yet despite this their account of how organisations may symbolically adopt structures to signal conformity with the

institutional environment that are then ‘decoupled’ from actual day-to-day practice has been overlooked in the mainstream HRM literature. Meyer and Rowan (1977) argue that the risk of de-coupling may be greater where institutional pressures are perceived to be in tension with organisational goals of efficiency and cost-effectiveness. Given the tension between social legitimacy / compliance and managerial demands for power and flexibility, discussed above, the risk of decoupling practices may be considered to be high.

The use of confidentiality clauses or non-disclosure agreements (NDAs) to silence complainants has been highlighted in the wake of high profile examples of NDAs used to silence individuals who have been sexually harassed during employment (WEC, 2019). In the UK context, NDAs are often contained in settlement agreements (a legal contract settling claims or disputes individuals have in relation to their current or former employment); in the Australian context they are known as a ‘deed of release’. A settlement agreement usually sets out the amount to be paid to the (ex)employee in return for their agreement to not make any claims arising out of and keep confidential the circumstances that led to the pay-out (Advisory, Conciliation and Arbitration Service (ACAS), 2018). A recent report by the House of Commons Women and Equalities Committee (WEC, 2019) into the use of NDAs in cases of harassment and discrimination includes reference to how HR departments may be failing to take steps to remedy the organisational culture, or action against those found to have been involved in such behaviour. It goes on to highlight how the: “effective enforcement of workplace protections requires a careful balance of encouraging compliance and delivering enforcement. The evidence is clear that currently there simply is not enough enforcement in the mix” (WEC, 2019: 42). The report also refers to the imbalance of power between employers, particularly large organisations with deep pockets, and employees, and how: “...the misuse of NDAs is one element of a wider system of legislative, regulatory and judicial measures and processes that are failing to protect employees from discrimination and abuse of power” (WEC, 2019: 48). These extracts from the WEC (2019) report highlight how NDAs may be used by organisations to retain an appearance of legitimacy, without the need for compliance. The report also points to the importance of the wider regulatory environment in the UK, and how it has



arguably contributed to and enabled the cover-up and silencing of discrimination and harassment through a lack of effective enforcement.

However, settlement agreements are not only used in matters of alleged sexual harassment or discrimination, as their reported use in the UK public sector in 2016 has also caused some controversy (The Guardian, 2016). The concern was not just connected to the huge expenditure involved in ‘paying off’ employees, but also because these agreements were used to silence whistleblowers and those with valid claims. Following this coverage, Calnan (2016) raised concerns that UK HR professionals in the private and public sectors may be pressurised by senior executives to use settlement agreements with confidentiality clauses. Another article published on the CIPD website discusses the use of settlement agreements by ‘top universities’, and how they paid out more than fifteen million pounds between August 2017 and July 2018 (Kirton, 2018). While Kirton (2018: no pagination) notes the circumstances that led to these pay-outs are unknown, she quotes an employment lawyer who argues they may be, “...a price worth paying to ensure that overall costs are minimised”. When it comes to tension between economic and socio-political goals, as discussed above, this suggests that economic goals and outcomes may be the primary focus.

However, despite the apparent tension and potential for conflict between the different roles and focus of HR practitioners there is little discussion in the HRM literature of the impact this could have on the approach they take to legal matters and compliance. Nor is there any discussion of how these tensions may be resolved by a decoupling of practice from symbolic presentations of compliance. How and whether the goal of social legitimacy is prioritised and the approach taken by HR to employment laws and compliance has not been explored. This research seeks to begin to address this gap through an in-depth explanation of the influences on HR practitioners, and how they make sense of and prioritise the different demands they are subject to, when it comes to the handling of employment laws.

### 2.2.2 Questionable assumptions about compliance and HR role confusion

The HRM literature contains various assumptions that suggest compliance simply occurs; Cohen (2015: 213) states that when it comes to compliance, "...there is no choice on this dimension", and Parkes and Davis (2013: 2413) similarly comment that, "...adhering to the law is not optional". Following legal rules is seen as, "...the price of admission" to business (Orlitzky, 2007: 274), with Boselie et al (2000:8) describing HR practitioners as involved in translating and, "...following" employment legislation. Beatty et al (2003: 258) also comment that it is relatively easy to determine what is lawful behaviour and what is not, and breach of the law is, "...usually clear". Knowledge of what the law requires is assumed to be straightforward (Syedain, 2015), and is assumed to lead to compliance. The CIPD, for example, urged HR practitioners to sign up to its 'HR inform' service to, "...keep up-to-date with the latest case decisions and remain fully compliant with the law" (CIPD, 2015: no pagination). Aside from discussion of the goal of social legitimacy, HRM texts focus heavily on descriptions of legislation, case law and related bodies and institutions; for example, Torrington et al (2017) devote 19 pages to a description of the legal and institutional framework for HRM in the UK. The assumption appears to be that if HR practitioners know the content of applicable employment law, then it will be complied with. However, the tension between the many roles and goals of HR may complicate the apparently seamless transition of laws from the external environment into organisations.

In addition to knowledge of the law seemingly leading to compliance, the academic HRM literature also contains references to how HR practitioners are responsible for ensuring compliance. There are various brief and generic statements by HRM scholars regarding HR's responsibility for ensuring the organisation complies with legal requirements (see Beatty et al, 2003; Cascio, 2005; Wright and Snell, 2005). HR practitioners are advised that they may need to be willing to put their job on the line to ensure compliance (Beatty et al, 2003). As HR practitioners in Australia may be held personally liable for organisational breach of employment and employment laws, such advice may be pertinent to them. An article on the AHRI website also highlights the need for labour laws to be complied with in order to avoid financial penalties and for

HR practitioners to protect their own professional reputation (Sheedy, 2016). Sheehan and De Cieri (2012) also refer to how HR expert knowledge in areas such as interpretation of employment law has enabled Australian HR practitioners to have greater influence within their respective organisations.

However, there are also various small comments about the need for HR practitioners to not be seen as the police, watchdogs or ‘cops’ when it comes to compliance (Reilly and Williams, 2006; Ulrich, 1997). Despite being cited above for referring to how there is no choice but to comply, Cohen (2015) goes on to add, in the same article, that legal compliance should not obstruct strategy. In addition, there is subtle advice to HR practitioners on how to balance the tension between legal and organisational demands. The CIPD distributed via email to all members, and AHRI made available on its website, a collection of essays from “seventy-three human resources thought leaders from across the world” (Dufrane, 2015: I). This collection had global distribution and was intended to reach one million HR practitioners worldwide, “...in an effort to advance the HR profession” (Dufrane, 2015: I). In this publication, Nyberg and Ulrich (2015: 418) argue that HR professionals need to have a range of abilities including that of, “lawyer”. In this role HR practitioners need to understand the legal environment and develop strategies that enable the organisation to ‘deal’ with new regulations. How practitioners should ‘deal’ with laws, and whether this equates to compliance, is not entirely clear. However, writing in the same publication, Ulrich et al (2015: 3) argue that when it comes to laws and regulations: “...good HR leaders help the organisation make good business decisions that match the risk tolerance (or appetite) of the organisation”. They do not go on to explain what is meant by this, but it would appear they are trying to distance the HR role from any association with a strict compliance function. Reference is made above to the connection between legal risk and unlawful behaviour, and Moorhead et al (2019) also point out that management of legal risk may lead to a focus on protection of the organisation rather than what the law requires. They also add that legal ‘risk management’ arguably has the potential to desensitise the organisation to the legal issues and rights involved, and de-ethicalise decisions made (Moorhead et al, 2019).

A strategic perspective on compliance is given most attention in the work of US scholars, Roehling and Wright (2006), who develop an ‘organisationally sensible’ approach to making employment related decisions that have a legal element. HR professionals are urged to only follow legal requirements that are clear and specific, such as certain health and safety practices and payment of the minimum wage. (It is interesting to note these are the two specific examples given by Boxall and Purcell (2016) and Marchington (2015) of UK laws that some employers do breach). In relation to laws that are ambiguous or uncertain, which may be the case if the legislation is new or the precise requirements for compliance are not yet clear, Roehling and Wright (2006) advise HR practitioners to avoid prioritising the law over organisational considerations. Instead, HR practitioners are urged to consider the litigation risk, or whether the employer is likely to be sued, before complying. This use of the term ‘risk’ here appears similar to that discussed above and in the legal literature, which entails a focus on organisational objectives rather than legal requirements.

There are also a number of articles on the CIPD website that strongly suggest a more organisationally focused and strategic approach to legal issues has been taken up in the UK. Gibbons (2010: no pagination; published on the CIPD website) calls on HR practitioners to understand and appreciate their organisation’s, “...approach to employment law risk” when considering issues with a legal element. Again, the focus in matters of risk is on the organisation rather than what the law may require. In balancing compliance with business needs, Gibbons (2010: no pagination) stresses the need to consider the likelihood of being sued before acting, taking into account the local labour market, trade union activity and, “the kind of people you employ”. Gibbons (2010) does not elaborate on what is meant here, but it suggests that different employees may be treated differently when it comes to employment laws. Another article published on the CIPD website contains interviews with employment lawyers who strongly suggest that UK employers do gauge the legal risk involved before deciding how to act. Kirton (2017) reports how the introduction of fees to make a claim at an employment tribunal led to a large drop off in the number of claims lodged. As a result of the decreased risk of being sued, many employers reportedly reduced their focus on legal requirements by not following their own procedures and not paying employees their entitlements

(Kirton, 2017). Yet another article published on the CIPD website (Rees and Mortimore, 2017: no pagination) applauds the ‘skilful’ and ‘artful’ way that HR practitioners interpret and implement employment law, playing an important role in, “protecting” the organisation from legal liability. They describe the way HR practitioners approached gender pay gap reporting obligations, engaging in a, “...clandestine set of practices” to ensure attention to the data provided was minimised (Rees and Mortimore, 2017: no pagination). These articles suggest that UK-based HR practitioners may be focused on delivering what the organisation wants, as opposed to ensuring employment laws are followed.

### 2.2.3 HR and employment law: what is known

While there has been very little empirical interest in the HRM literature to the approach taken by HR practitioners toward employment laws, there is one (unpublished) study that explored the response of HR practitioners in large, unionised organisations in New Zealand to two pieces of legislation (Anderson et al, 2013). The findings of this study were positive: HR managers were not hostile to the legislation and reported that their organisations would meet, if not exceed, the legally mandated minimum requirements; compliance was also considered important in order to protect the corporate reputation. However, these findings may indicate the influence of the wider New Zealand context and the presence of trade unions in the organisations surveyed. Anderson et al’s (2013) research also focused on laws that were either similar to provisions already agreed to by the organisations and that were contained in collective agreements negotiated with the union (rest breaks), or did not appear to have imposed many restraints on managerial flexibility or autonomy (consultation requirements). In relation to consultation, the respondents reported that if an organisational decision had already been made consultation was avoided, but if consultation did take place it only ever led to small changes in the organisational approach taken. Accordingly, the country, its institutional context, trade union influence and the nature of the law in question may all potentially have an impact on how HR practitioners interact with and approach employment laws.

Other studies that have indirectly touched on the interaction of HR practitioners with employment laws do not present such a positive picture and highlight the influence of the organisation and the expectations and demands of senior management. Collinson and Collinson (1996) report UK HR practitioner concerns that attempts to stand up to discriminatory behaviour could lead to being labelled a feminist or trouble maker and impede career progress. In an Australian study, Macklin (1999) found that HR practitioners had to 'sell' the benefits of moral actions to senior management in order for them to be acceptable. Writing in the IR literature, Dickens and Hall (2005) argue the problem of focusing on a business case is that it can lead to a business case against action, if that action is not considered to be in the business' interests.

There is also the suggestion that while UK HR practitioners and employers may consider employment law necessary, they also consider it an unwanted burden (Curran and Quinn, 2012; Jordan et al, 2013). In considering the burdens and benefits of employment law, a generalist HRM text-book concludes they are both (Torrington et al, 2017). The burdens are all felt at the organisational level; laws are seen to hamper economic competitiveness by adding costs and restricting organisational flexibility which, as discussed above, is likely to be in tension with the goal of social legitimacy and compliance. In contrast, most of the benefits focus on broader social objectives such as promotion of social justice, the need to protect employees and addressing national skills shortages. According to this text-book, the only business focused benefit is the economic argument that the workforce will be more productive and motivated if they are treated in accordance with the law. However, it is questionable whether basic compliance with the minimum legally mandated entitlements would operate as a motivating factor, or whether senior management would be moved by the potential societal benefits of compliance. Torrington et al (2017) do not discuss the goal of social legitimacy, but do highlight how if this was seen as sufficient to justify and warrant a positive approach to legal matters and compliance, then economic benefits may be considered an additional bonus.

## **2.3 The HRM literature: theory**

Assumptions regarding the non-optional nature of compliance and the lack of research interest in the interaction between HR practitioners and employment laws may be explained by the theoretical underpinnings used in and relied upon by the HRM literature. A review of the HRM literature indicates recognition of the influence of the external context on HR practices, however, there is no consideration of what may happen if external influences are in tension with organisational demands. The reason for this appears to be reliance on a narrow strand of neo-institutional theory and the assumption that externally imposed laws have a coercive and deterministic impact, with the HRM function ensuring compliance in order for the organisation to be socially legitimate. However, for reasons discussed above, it is questionable whether the pursuit of social legitimacy has this effect.

### **2.3.1 External environmental context**

It is widely accepted that organisations and HR practitioners do not operate in a vacuum, and the relevance of the external environmental context to the HRM function and its practices and procedures is well recognised in the HRM literature (Baron and Kreps, 1999; Beer et al, 1984; Boxall and Purcell, 2016; Marchington and Wilkinson, 2016; Paauwe, 2004; Paauwe and Boselie, 2007; Roehling et al, 2009). Where legal matters are concerned, the external context is necessarily highlighted as laws and regulations emanate from the state and are imposed upon organisations. In what is considered one of the first detailed frameworks for strategic HRM, Beer et al's (1984) Harvard model of HRM emphasises that HR policies are influenced by stakeholder interests (such as employees, unions, the government and local community) and by situational factors (including laws, societal values, management philosophy and union-management relations). While this model is helpful in that it recognises a range of influences on the choice of HR policies, it does not account for how those choices are made by individuals within the organisation, what happens if different influences recommend a different policy approach or whose interests get prioritised. The discussion above highlights how these issues may arise when HR practitioners handle

legal matters, and how, for example, laws and societal values may be in tension and conflict with management philosophy. Beer et al (2015: 427) later urged a 'back to the future' reconsideration of the full range of stakeholders that HRM should attend to, noting how, "...the added value focus [of HRM]... defined outcomes mainly in terms of economic value (productivity and efficiency) and neglected employee well-being and societal well-being". Similarly, in advocating for greater consideration of the wider environmental context on HR practitioner choices and practices, Watson (2004: 464) notes how the emphasis on HRM as contributing to competitive advantage, "...take[s] for granted - and therefore treat[s] as incontestable - competitive market capitalist values". If the focus of HR practitioners is on satisfying organisational demands for economic value and efficiency, this raises questions about how they also respond to and handle externally imposed employment laws.

Following Beer et al's (1984) work, Sparrow and Hiltrop (1997) developed a detailed model of factors that influence HRM in Europe, such as the national emphasis on, for example, the importance of employer flexibility or protection of employee rights and extent of trade union representation and powers contained in legislation. Likewise, Baron and Kreps (1999) identified legal factors as one of the main external environmental factors that impact on organisations. While there is recognition in these accounts that the country-specific institutional environment may impact the nature of HRM (Kramar and Parry, 2014; Sparrow and Hiltrop, 1997), what is missing is an examination of whether there are national differences in the way in which HR practitioners (and organisations) then respond to legislation; for example, whether the way a country legislates for and protects employee rights then alters how HR practitioners balance those demands against potentially conflicting organisational expectations of efficiency and flexibility. Beer et al (1984) recognise that the intent of legislation may not always get translated into practice, and Boxall and Purcell (2016) note different employment laws lead to variation in HR practices between countries. However, the laws of a specific country are generally considered to be the, "table stakes" (Boxall and Purcell, 2000: 195) that all affected organisations must comply with in order to be legitimate (despite recognition that compliance may be variable (Boxall



and Purcell, 2016)). Accordingly, the external legal context is generally theorised as imposing a straight-jacket on HRM practice that HR practitioners cannot avoid.

### 2.3.2 Neo-institutional theory

The lack of empirical attention to the legal role of HR practitioners and the assumptions regarding how they interact with employment laws, set out in the sections above, may be explained by the way this aspect of HRM practice is theorised. The only theoretical discussion in the HRM literature of the legal role and legal aspects of HR centres on discrete aspects of neo-institutional theory (see Boxall and Purcell, 2011; Paauwe, 2004). Paauwe and Boselie (2007) argue that neo-institutional theory highlights how organisations are not purely economic entities making unencumbered and rational decisions about how to organise and behave in response to market pressures. As a consequence of being embedded in society, organisational behaviour and practices are seen to be shaped by the external institutional environment, which includes pressures from legal and professional regulatory bodies, and social and sectoral expectations (Paauwe and Boselie, 2007). These insights are similar to those discussed in the sections above and, again, the focus is on the level of the organisation rather than individuals within the organisation who may need to balance competing pressures and expectations.

Despite broader consideration of neo-institutional theory in the HRM literature in relation to other aspects of HR practice, where legal institutions are addressed their influence appears to be clear and conclusive. The classic work of Meyer and Rowan (1977) is referred to when discussing the need for the HR function and organisations to pursue the goal of social legitimacy (Boxall and Purcell, 2011; Paauwe, 2004; Paauwe and Boselie, 2007). Meyer and Rowan (1977) argue that organisations conform with institutional rules emanating from the external environment in order to appear legitimate and increase chances of survival. The pursuit of social legitimacy (discussed above) has been incorporated into the goals of HRM and is cited where there is discussion of the need for organisations to comply with local laws (Boxall and Purcell, 2016; Lees, 1997; Marchington, 2015; Paauwe, 2004). However, and also discussed above, Meyer and

Rowan's (1977) account of how actual practices may be decoupled from symbolic representations of compliance is not referred to in relation to HR and the law.

The work of Scott (2014) and his concept of 'three institutional pillars' has also been influential in the theoretical discussion in the HRM literature. Scott (2014) identified three institutional systems that influence organisations: regulative, normative and cultural-cognitive. Where HR and legal compliance are concerned the regulative pillar is highlighted as this involves employment laws and the mechanisms and bodies involved in ensuring conformity with them (Boxall and Purcell, 2011). Normative institutional systems, comprising societal values and moral attitudes regarding the appropriateness of behaviour (Scott, 2014) are only referenced in terms of particular societal expectations of behaviour that are then legislated for (Boxall and Purcell, 2011). Cultural-cognitive institutional systems, with a focus on shared and taken for granted understandings and beliefs (Scott, 2014), are not discussed in terms of HR's role in and approach to legal matters.

DiMaggio and Powell's (1983) seminal account of three mechanisms by which organisations are constrained by the prevailing local environment and become more similar with one another through isomorphism, both in terms of how they respond to the local environment and in the practices they adopt, is also highlighted (see Boselie et al, 2000; Boxall and Purcell, 2016; Paauwe, 2004; Paauwe and Boselie, 2007; Wood et al, 2012). Where HR and law are considered, the coercive mechanism is emphasised; pressure to behave in a particular way comes from the state, is set out in legislation and enforced through regulatory bodies and court / tribunal systems. DiMaggio and Powell (1983) depict these institutional forces as imposing a structural and deterministic 'iron cage' over organisational practices and behaviour, again minimising any scope for individual agency (Djelic, 2010).

The overall presentation of neo-institutional theory in the HRM literature in relation to HR and the law is relatively straightforward and clear. It emphasises the need for organisations to be congruent with the external legal environment in order to appear socially legitimate, and also sees the legal machinery of the state as coercive, allowing

little to no room for individual variation. The neo-institutional works relied upon in the HRM literature represent a particular strand of institutional theory, which Lewis et al (2019) term 'old neo-institutionalism'. (The different phases and strands of institutional literature can get confusing, as 'old institutionalism' did highlight the relevance of individuals' values and interests to the practices and behaviours then engaged in (Djelic, 2010; Selznick, 1996), but these theoretical insights did not make into discussion of HR and the law in the HRM literature). The reliance of HRM scholarship upon old neo-institutional theory to explain the relationship between HR and the law may account for the lack of interest in how HR practitioners handle employment laws and how they manage and resolve the apparent tension between compliance and management demands. It may also account for assumptions that legal compliance is straightforward and not optional. However, a wider review of the academic and practitioner literature suggests the way HR practitioners approach employment laws may vary and be far from straightforward. Examination of the individual level of HR practice would contribute to filling this gap in knowledge in the HRM literature and would also require a different theoretical perspective, which is discussed in the next chapter.

#### **2.4 Critique of 'old neo-institutionalism' as the appropriate theoretical framework**

Review of the HRM literature on the topic of HR and employment law casts doubt on the appropriateness of the theoretical framework used, and veracity of the assumptions that HR and organisations have no choice but to comply with law. It is argued here that a purely structural theoretical framework for the conceptualisation of how law influences and works on HR practitioners is not viable. This section first summarises the evidence from within the HRM literature that indicates HR practitioners are faced with a number of different institutional pressures when it comes to how legal matters should be approached. While the way individuals interact with the law has not been explored in the HRM literature, insights from the sociological, socio-legal and legal literatures help indicate the relevance of other pressures and influence on the approach that may be taken. As such, this section draws on insights from other academic disciplines to support the argument that laws are not determinative of practice, and that individual HR

practitioners have the capacity for individual agency, to intervene and shape what happens in practice.

#### 2.4.1 Tension: the existence of potentially conflicting demands

When the HRM literature refers to the tensions that HR practitioners are subject to in the management of legal issues it arguably highlights the existence of different expectations regarding the goals and outcomes HR is directed toward, (in particular, see discussion in section 2.2.1 above). Lees' (1997) presentation of legitimacy makes clear that the way the HRM function is conceptualised, with its business focused priorities and strategic aspirations, means it has different reference points and criteria of success than perspectives that concentrate on conformity with the external institutional context. Given the divergent nature of the outcomes involved with a focus on legitimacy and those demanded by the organisation (financial and commercial), he concludes that HR should focus purely on legitimacy and satisfying legal requirements. As noted, this recommendation appears to have been as successful as Legge's (1978) depiction of HR as 'deviant innovator', or Storey's (1992) 'regulator' role for HR. HR practitioners appear to remain involved in management of employment laws, but are also responsible for supporting management and the achievement of organisational outcomes. The suggestion that HRM is subject to different ideas about what constitutes acceptable and rational behaviour is echoed in various brief comments throughout the HRM literature. This is seen in the tensions referred to above, such as that between social legitimacy and managerial flexibility and autonomy (Boxall and Purcell, 2016), and conflicting demands coming from legislation, the market and the organisation (Harris, 2005). In balancing potentially contradictory expectations of behaviour the role of and approach of HR practitioners to legal matters would appear to be far from straightforward.

The old neo-institutional theory used in the HRM literature does not help elucidate what may happen in practice where there are conflicting sets of expectations and goals, nor whether the level from which the demands originate (organisation; societal) makes a difference. Thornton et al (2012) comment that while DiMaggio and Powell (1983) conceived of three different institutional processes and mechanisms, they do not account

for what happens if different institutions suggest different outcomes. The theoretical approach taken in the HRM literature therefore appears unduly limited, and one is needed that takes into account the potential for incompatibility and complexity in terms of institutional prescriptions for action.

#### 2.4.2 The indeterminacy of law and importance of individuals

The focus in the HRM literature on the structural and supposedly deterministic nature of law has arguably contributed to assumptions that compliance is straightforward and HR and organisations have no choice but to comply. However, insights from the legal, socio-legal and sociological literatures emphasise how law-in-action is not the same as law-on-the-books (Black, 1997; Larson and Schmidt, 2014; Suchman and Edelman, 1996). The idea that laws provide authoritative and coercive statements of what will happen in practice is condemned as naive (Black, 1997; Suchman and Edelman, 1996), with Black (1997: 52) stating this is a, "...rather quaint idea held onto by those who are still fixated by the legal paradigm". Suchman and Edelman (1996) provide a thorough and clear critique of the (old) neo-institutional idea that laws determine practice (as argued in the HRM literature), highlighting how law can be uncertain, ambiguous, contested and subject to normative pressures. In a later edition of his seminal work on institutions, Scott (2014: 62) also recognises arguments that law, particularly where it is ambiguous (see also discussion in chapter 5 regarding ambiguity in the law, particularly in common law legal systems), is often un-authoritative and, "...better conceived as an occasion for sense-making and collective interpretation, relying more on cognitive and normative than coercive elements for its effects".

These insights are also supported by various studies; Baek and Kelly's (2014) socio-legal study of compliance with parental laws in Korea found organisational attitude toward gender norms influenced how the organisation then responded to the legislation. The stronger the norms, the less organisations were found to comply. Edelman's (1992) sociological study of US organisations found policies and procedures were created in order to provide the appearance of compliance with anti-discrimination laws, but managers then took a flexible approach in how those policies were implemented. In

addition to challenging the idea that the external legal environment alone restrictively constrains and structures organisational responses to legislation, these arguments and studies highlight the involvement and role of individuals in the interpretation and application of law within an organisation.

The HRM literature currently presents and discusses employment laws in terms of providing a definitive and structural straight-jacket over practice, downplaying the role of the individual human actor in this process. However, studies in alternative disciplines highlight how legislation does not seamlessly transfer from the external context into organisations. Laws need to be read, interpreted, understood and then applied by individuals within those organisations. Edelman (1992) argues that laws are often ambiguous and need to be ‘mediated’ into the organisation, which requires the involvement and judgement of individuals. Edelman’s (1992) study also suggested that organisations had more space and leeway to construct compliance where laws were ambiguous and enforcement mechanisms weak. HR practitioners are seen to have a key role to play in mediating the law into the organisation, with Baek and Kelly (2013: 6) referring to them as a, “key channel” between the external legal environment and the organisation. Sociological studies of US organisations have also shown how personnel / HR practitioners play a key role in responding to laws and can even be instrumental in constructing what is considered to amount to compliance (Dobbin and Kelly, 2007; Edelman et al, 1999). Edelman (2004: 239) also collectively refers to HR practitioners and legal advisers as, “compliance professionals”, who construct compliance within and for organisations.

The input of legal advisers is commented on in the HRM literature in terms of the need for HR practitioners to obtain external legal advice and assistance on the meaning of laws and how to apply them (AHRI, 2012 - Australia; Caldwell, 2003 - UK). However, there is no discussion in the HRM literature about the nature of the legal advice that HR practitioners may seek and receive. Again, studies from other academic disciplines suggest that the way in which the law is interpreted and how it should be applied in certain situations may be more malleable than is assumed in the HRM literature. Parker et al’s (2009) study into the professional ethics of lawyers suggests that lawyers and

their clients may resist the law and engage in ‘game-playing’. Gaming the law involves finding, “wobble room” (Parker et al, 2009: 211) and loop-holes, enabling the client to interpret the law to suit its own desires. Ambiguity in the law may support different interpretations of it (Jenoff, 2012), and organisations are then able to evade laws, “... without having to choose to not comply” (Parker et al, 2009: 212), and can maintain the appearance of having complied. Similarly, Moorhead et al (2019) highlight how in-house lawyers may be embedded within their organisation, with the organisation exerting a strong influence over how they see their role, whose interests they prioritise and how they interpret applicable legislation.

Relating these insights to the HR function, the tension between social legitimacy / legal compliance and managerial power and flexibility discussed above suggests that HR practitioners are unlikely to be involved in the unproblematic and straightforward application of employment laws. Concern about the internal organisational standing and legitimacy of the HR profession (see Wright, 2008), which is often defined in terms of its strategic contribution, also raises questions about how HR practitioners perceive their role and how they then interpret legal requirements.

## **2.5 Summary and concluding remarks**

This chapter began with a review of the HRM literature in terms of how the role of the HR practitioner has evolved over time, from clear involvement in “legal wangling” (Torrington and Hall, 1987: 8), to the more recent focus on how HR practitioners can help in the efficient achievement of organisational and financial objectives. The potential tension between these two areas of responsibility is highlighted by the arguably schizophrenic references in the HRM literature to the role that HR practitioners ‘should’ take toward employment laws. These include statements that compliance with employment law is non-optional and straightforward, that HR practitioners are responsible for compliance, but also that HR practitioners are not responsible for and should not enforce compliance. Despite these inconsistencies, there has been little empirical attention given to how HR practitioners actually approach and apply employment laws. The only theoretical discussion about the interaction between

HR practitioners and the law draws on old neo-institutional theory, which posits that the coercive and regulative nature of laws means all organisations (and HR practitioners) comply with those laws in the same way. The need to present as socially legitimate is also connected to legal compliance, both of which are presented as goals of HRM. However, the goal of social legitimacy, and with it legal compliance, are recognised to be in tension with organisational and managerial objectives regarding the efficient management of the workforce. Given the way in which the role of HR practitioners has evolved and is currently conceptualised, this raises the possibility that HR practitioners may be placed in the position of having to resolve and reconcile incompatible demands. The use of NDAs (WEC, 2019) is one potential way of achieving this resolution, as they appear to enable management to act as it sees fit, keep non-compliance quiet and decouple practice from their outward presentation as socially legitimate.

This chapter has also provided insights from other academic disciplines regarding the ambiguity of legislation, and how laws do not impose the compliance straight-jacket as is assumed in the HRM literature. Accordingly, this chapter has outlined the need for a different theoretical framework to facilitate examination of how HR practitioners engage with and apply employment laws, which is the focus of the next chapter.



## **CHAPTER 3**

### **Proposed theoretical approach**

The preceding chapter presented a critique of the current theoretical presentation in the mainstream HRM literature regarding how HR practitioners are assumed to engage with and apply employment laws. Accordingly, an alternative theoretical framework is required that addresses the identified problems and can provide a suitable foundation for this study. As the individual has, to date, been neglected in discussion of how HR practitioners apply employment laws, this chapter first proposes the sensemaking perspective as relevant and helpful to examination of this topic. The way in which individual HR practitioners make sense of employment laws is argued to be central to developing our understanding of how they are then applied. The second section then begins to focus on the importance of the institutional context to individual sensemaking. The work of Weber and Glynn (2006) is highlighted, as their article helpfully emphasises how institutions influence individual sensemaking in terms of identity, the aspects of the situation considered important and action taken. (Their work also provided crucial inspiration for structure of the analysis and presentation of the data, discussed in more detail in chapter 4). The final section widens the theoretical and contextual lens even further, and argues that the institutional logics perspective provides a suitable framework for this study. In relation to this study, institutional logics can be seen as akin to a theoretical exoskeleton, with different institutions providing external (albeit ever-changing) influences on the sensemaking that takes place at the individual level. The institutional logics perspective also helps answer some of the problems with the current theoretical understanding in the HRM literature. The existence of institutional pluralism, in terms of multiple logics operating simultaneously (Ocasio et al, 2017; Thornton et al, 2012) helps highlight how HR practitioners may have to contend with more influences and pressures than simply what the law requires. The potential for institutional complexity (Greenwood et al, 2011), in terms of incompatibility between institutions, also enables a more detailed consideration of the tensions HR practitioners may face in practice.

### **3.1 Sensemaking**

As noted above, the concept of sensemaking appears particularly helpful in terms of the objectives of this study. In an overview of the micro-foundations of institutions, Powell and Rerup (2017: 312) highlight how most micro-level action is concerned with a process of, "...sensemaking.. and muddling through". This section first considers some of the characteristics of sensemaking that recommend it as a suitable perspective for this study. It then goes on to highlight the importance of the individual in sensemaking, in particular how the way an individual identifies may influence the process of sensemaking he/she engages in. Finally, it considers studies that have connected the sensemaking process to influences from the context in which the individual is located, in particular the way the employer (the organisation) can shape how individuals make sense of situations they are faced with.

#### **3.1.1 Characteristics of the sensemaking perspective**

While there is no single definition of sensemaking (Brown et al, 2015; Maitlis and Christianson, 2014), a number of recurring features are seen to characterise this perspective (Maitlis and Christianson, 2014). The features most relevant to this study include: the need for sensemaking in ambiguous situations; that sensemaking is concerned with plausibility rather than truth; and the importance of the language used in making sense of a situation and how that 'sense' is then communicated to others.

The sensemaking literature highlights how sensemaking is occasioned by ambiguous situations (Maitlis, 2005; Maitlis and Christianson, 2014; Weick, 1995). Weick (1995) lists various circumstances when such ambiguity may arise, including situations where different interpretations may be made, different value orientations exist, and there are multiple and conflicting goals. Maitlis (2005) argues that it is sensemaking that enables individuals to rationalise this ambiguity and then enables them to take action. This depiction of the characteristics of ambiguous situations and their relevance to sensemaking appears particularly apt to the focus of this study; for example, the previous chapter highlights how legislation may be ambiguous and interpreted in

different ways (Edelman, 1992; Jenoff, 2012; Moorhead et al, 2019; Suchman and Edelman, 1996), depending on whose interests are prioritised by those doing the interpreting. The previous chapter also highlighted the paradox and tension within contemporary HRM practice when it comes to balancing the potentially competing demands and interests of the organisation and senior management on one hand, and legislation and employees on the other.

If sensemaking is concerned with interpretation, it follows that there may be a number of different interpretations and potentially credible accounts of a particular situation and justifications for action taken. The sensemaking literature emphasises how sensemaking is concerned with the ‘plausibility’ of the story told, which helps protect it (and the individual) from criticism (Schildt et al, 2019; Weick et al, 2005). Indeed, sensemaking scholars argue that sensemaking is not about accuracy or the truth, but whether the story is sufficiently plausible, coherent and reasonable (Schildt et al, 2019; Weick et al, 2005). Schildt et al (2019: 7; emphasis added) define plausibility as a perception that the story or account of a situation has explanatory value and, “is unlikely to be contradicted by further beliefs or observations”. The emphasised wording highlights the importance of the absence of dissenting voices to the sense that has been made, which in the context of legislation may also be connected to the likelihood (or otherwise) of those laws being enforced. In addition to dissenting voices, Schildt et al (2019) persuasively argue that the accountability pressures felt by an individual will influence how he/she makes sense of a situation and justifies action taken. In the context of HR practitioners working within organisations, these pressures may be internal (such as perceived senior management expectations of those in a particular role), or external (from government agencies or regulators).

The sensemaking literature also highlights the important role of language and talk in the sensemaking process. Individuals may draw upon a specific vocabulary to describe situations they are faced with, communicate with others (which in the context of this study could include management, legal advisers and employees), and to construct plausible justifications for action (Brown et al, 2015; Maitlis and Christianson, 2014; Powell and Rerup, 2017; Weber and Glynn, 2006; Weick, 1995; Weick et al, 2005).

Weber and Glynn (2006) also discuss how language primes and shapes the sense that is then made of the situation. Words are seen as cues that help shape the path that leads to a particular destination or form of action. The language used by an individual is unlikely to be value-free and can help provide insight into, for example, his/her identity (discussed in more detail in the next section), but also “... the rules of the game” (Alvesson and Willmott, 2002: 631). If there is tension between the different roles and goals of contemporary HRM practice, the language used and justifications for action relied upon by HR practitioners may help reveal whose interests and which goals are prioritised.

### 3.1.2 The individual in sensemaking

The sensemaking literature, and the discussion above, highlights the importance of the individual in terms of the sensemaking process engaged in. This literature emphasises two particular points of relevance to this study: the identity of the individual; and the individual’s skill and creativity in terms of the action taken, justifications made and, “what one *does* with what one has” (Maitlis, 2004: 1280).

In terms of individual identity, Weick et al (2005: 416) describe it as the, “...root of sensemaking”. How an individual identifies at work and the groups he/she perceives him/herself as belonging to (Walsh and Gordon, 2008) help provide an answer to the (work-based) question of “who am I?” (Weber and Glynn, 2006: 1646). The answer to this question then provides direction and expectations about the role(s) adopted, how situations are interpreted, guidelines for behaviour and ultimately shapes the practices enacted (Alvesson and Willmott, 2002; Brown et al, 2015; Jackson, 2010; Lok, 2010; Pache and Santos 2013; Powell and Rerup, 2017; Walsh and Gordon, 2008; Weber and Glynn, 2006; Weick et al, 2005). (In this thesis the term ‘work-identity’ is used to refer to and encompass the identity or multiple identities that HR practitioners may have at work, and which are relevant to their role and duties when it comes to matters involving employment law). Whether or not an individual HR practitioner meets the expectations of important others, including work-based social groups that are able to enhance his/her status and standing (Walsh and Gordon, 2008), may impact on his/her identity and,

consequently, further sensemaking. Various scholars point to the importance of how an individual perceives judgement by these important others to the reinforcement, or reassessment, of identity (Alvesson and Willmott, 2002; Lok, 2010; Meyer and Hammerschmid, 2006; Weick et al, 2005). Discussion of HR practitioner work-identity and the relevance of the expectations of important others clearly overlaps with the organisational context that the individual HR practitioner is located within. However, before moving to the contextual influences on sensemaking, it is worth noting how the sensemaking literature also refers to the importance of individual skill and craft in terms of how sense is made and action is influenced.

A number of studies highlight the importance of the discursive abilities of managers in terms of making sense of a situation and communicating their understanding to others (Maitlis and Lawrence, 2007; Rouleau and Balogun, 2011). Rouleau and Balogun's (2011) study illustrates how some managers were able to use language, craft messages and engage in organisational politics in a way that helped ensure their interpretation of the situation was adopted. Selection of the right terminology with the right stakeholders was crucial to acceptance of and intertwined with how they made sense of the situation. Similarly, Maitlis and Lawrence (2007) refer to the discursive ability and relevant expertise of individuals in terms of shaping and influencing organisational action, particularly where there are a number of different stakeholders with diverging interests. Combined with insights regarding the plausibility of sense made, discussed above, these studies also suggest that individual skill may be required in order to weave a plausible and justifiable defence of action taken. Consequently, individual HR practitioner behaviour and action may be shaped by the process of sensemaking engaged in, rather than the product of some structural and deterministic force that would see him/her reduced to an automaton (as arguably suggested in the mainstream HRM literature). The next question involves the factors that may be relevant to and influence the sensemaking process.

### 3.1.3 Sensemaking in an organisational context

The sensemaking perspective provides a means of examining and exploring the factors that lay behind and shape action (Snook, 2000). Rather than seeing individual action as the result of an isolated decision, sensemaking highlights the importance of the process through which individuals make sense of the situational context they find themselves in (Snook, 2000; Weick et al, 2005). Attention is then directed toward the area of overlap between the individual and the wider context (Snook, 2000). Maitlis (2004: 1279) describes this as a "focus on action in context", and O'Leary and Chia (2007: 393) helpfully note how that context provides the "underlying framing of sensemaking". Examination of individual HR practitioner sensemaking in terms of contextual influences upon it can arguably lead to a richer understanding of the potentially varied factors that influence practice. The context of HR practitioners would include the organisation they are employed within.

This chapter has already referred to the potential importance of the organisation to the way in which HR practitioners identify and perform their role and duties, and sensemaking studies emphasise the extent to which the organisation may shape an individual's sensemaking processes. Wicks' (2001) study into the forces that contributed to a mining disaster highlights the importance of organisational rules and expectations over the way the miners made sense of their work and how it was performed. Wicks (2001) argues that the informal rules of the organisation, reinforced by the expectations of and monitoring by management, had become more important to the miners than safety concerns. In this study the organisation was a greater influence on the way individuals made sense of and framed their work than the health and safety legislation that should have been prioritised. Wicks' (2001) study notes, as does other sensemaking literature (Maitlis, 2005; Maitlis and Christianson, 2014), how organisational leaders play an important role in terms of influencing and determining how individuals within the organisation make sense of situations. In her study of sense making within symphony orchestras, Maitlis (2005: 41) found what she described as, "restricted sensemaking". This was sensemaking dominated by a single interpretation of the matter

driven and controlled by the perspectives and interests of the leaders of the orchestra due to the lack of alternatives to the approach they desired.

Other sensemaking and identity studies have pointed to the importance of diverse influences on work-identity and action in order to avoid them being singularly shaped by the organisation and what management wants. Alvesson and Willmott (2002) explored how organisations control and regulate the identity of employees in the workplace, and highlight the importance of there existing alternative and counter-discourses to those promoted by management when it comes to identity formation. Schildt et al (2019) argue that the existence of multiple ideas about the action that should be taken in a particular situation can lead to tension, uncertainty, and leave open to critique claims regarding the ‘plausibility’ of sense made and action taken. While this may be seen as more challenging for an individual within an organisation, greater diversity in terms of expectations and goals could provide a greater range of influences on sensemaking than those desired by management. Indeed, Maitlis and Christianson (2014) argue that crises may arise where the organisational culture stifles and restricts sensemaking with the result that the prevailing organisational status quo remains unchallenged. In relation to HR practitioners and employment law this insight points to the importance and relevance of the wider context, including the risk of enforcement and whether or not those within organisations may be called to account for how employment laws have been applied.

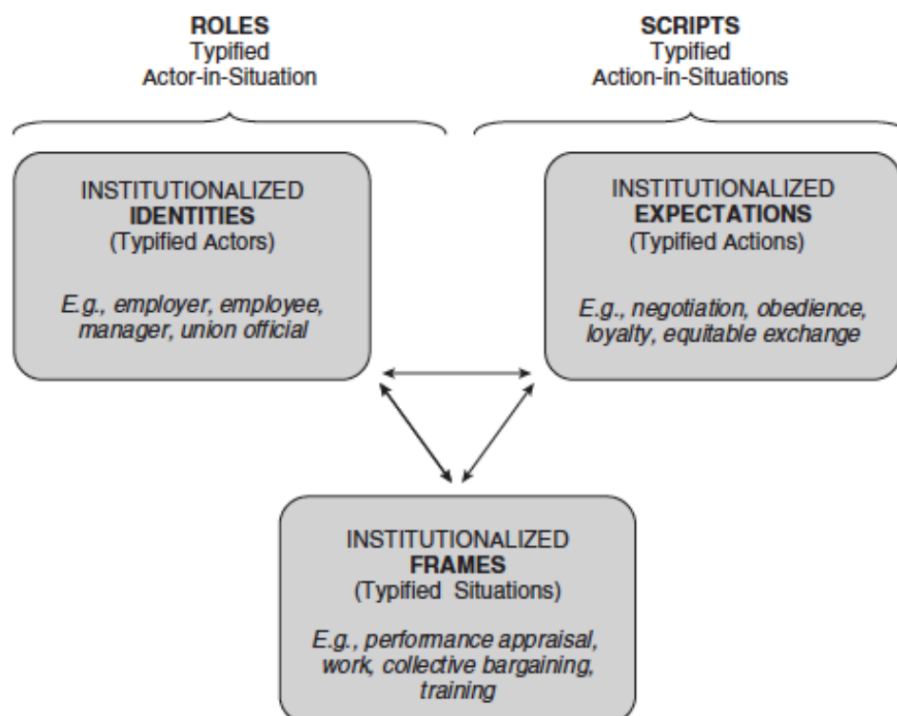
### **3.2 Sensemaking in an institutional context: Weber and Glynn (2006)**

Weick’s (1995) seminal work on sensemaking has been criticised for neglecting the influence of the historical and social context (Weber and Glynn, 2006). However, more recent discussion regarding sensemaking highlights the connection between the extra-organisational, institutional context and the individual sensemaking that takes place. Moreover, the compatibility of the sensemaking and institutional perspectives has been explicitly noted along with recognition that there has been a lack of research that utilises both these approaches (Maitlis and Christianson, 2014; Powell and Rerup, 2017; Weber and Glynn, 2006). Maitlis and Christianson (2014) also refer to the lack of research

interest in the institutions that are of most influence in sensemaking, something this study seeks to begin to address. This section focuses on the work of Weber and Glynn (2006), which is particularly helpful in emphasising the links between institutions and sensemaking.

Weber and Glynn (2006: 1644) describe the institutional context as providing the “... building blocks”, and “...interwoven with the process” of sensemaking, with institutions priming, editing and triggering the sensemaking process. Institutions are argued to enter the sensemaking process by providing institutionalised identities and roles, shaping the aspects of the situation that are perceived as important, and consequently guiding the action taken. To illustrate how identity, situation and action are connected by the sensemaking process and influenced by the institutional context, Weber and Glynn (2006: 1645) provide a useful model of the interconnected, “institutionalised typifications in sensemaking”. This model is set out in Figure 1 below.

**Figure 1:** Weber and Glynn (2006: 1645): “Institutionalised typifications in sensemaking”





Weber and Glynn (2006) highlight the possibility that there may be a number of different and potentially contradictory institutional influences, each of which may prime a different identity and provide different answers to the question referred to above of, “who am I?”. Expectations of how someone in the role occupied should act are also seen to edit the sensemaking process. These expectations may come from others (referred to earlier in this chapter) or be self-imposed and stem from the prevalent institution(s). The institutionalised identity drawn upon - what it is to be a HR practitioner in a specific context - and the language used by that individual, are argued to lead him/her to interpret and make sense of their environment in a particular way. The specific situations faced by that individual are also seen to contain different ‘cues’ that direct attention and guide action (Maitlis, 2005; Weber and Glynn, 2006; Weick et al, 2005). Weick et al (2005: 412) describe this as making sense of “what is going on here?”. In this way, institutions frame the situation and cues noticed and provide an answer to the question of, “what do I do next?” (Weick et al, 2005: 412), by shaping the institutional norm followed and action taken (Weber and Glynn, 2006).

Turning Weber and Glynn’s (2006) insights to the way in which HR practitioners interact with and make sense of employment law, review of the HRM literature in chapter 2 suggests that not all employment laws are necessarily followed in relation to all employees. For example, there is the suggestion that the type of law and whether employees are likely to sue for breach of it should be taken into account before action is taken to comply (Gibbons, 2010; Roehling and Wright, 2006). These references suggest that not all situations covered by employment laws are necessarily approached and acted upon in the same way. In relation to employment laws there may also be differences depending on who can be held liable for non-compliance (for example, Australian HR practitioners may be held personally liable), the effectiveness of enforcement, involvement of other actors such as state regulators, and the potential penalties and risks that may flow from non-compliance.

Finally, foreshadowing discussion in chapter 4 (research design), it is worth highlighting that Weber and Glynn’s (2006) model (Figure 1) was used and adapted to help structure analysis and presentation of the data in this study. The conceptual framework developed

for these purposes is set out in Figure 3 (p.101), and is explained in more detail in section 4.5.3.

### **3.3 The institutional logics perspective**

The section above made reference to different institutions as connected to different identities, roles and scripts for action (Weber and Glynn, 2006). The influence of a range of institutions is arguably evident in the conflicting and varied presentation of the role and approach HR practitioners are urged to take toward employment law, discussed in chapter 2. Despite theorising HR practitioners as solely influenced by what employment laws require, there is also considerable reference in the HRM literature to the tensions and role paradox that they are expected to balance and manage. These tensions can be seen as the product of different institutional demands, whether originating from the legal machinery of the state, professional standards, the corporation or market. In order to examine the potentially varied institutional influences on HR practitioner sensemaking when it comes to employment law, this section proposes institutional logics as an additional and helpful theoretical approach; Lewis et al (2019) also promote institutional logics as useful for HRM scholarship and investigation into how the external, social context influences individual HR practitioner behaviour. This section first explores what institutional logics are and the multi-level nature of the perspective before examining each logic in turn. It then focuses on some of the reasons why institutional logics is well suited to the study of HR and the law, in particular: the potential for inter-institutional contradiction and complexity (Greenwood et al, 2011); and the compatibility of the institutional logics and sensemaking perspectives, recognising that individuals are involved in interpreting, prioritising and making sense of institutional demands (Binder, 2007; Powell and Rerup, 2017; Thornton et al, 2012).

#### **3.3.1 Institutional logics**

The institutional logics perspective has developed from and forms part of institutional theory, with Friedland and Alford (1991) first discussing how different and potentially contradictory institutions could shape individual preferences and interests. However, it

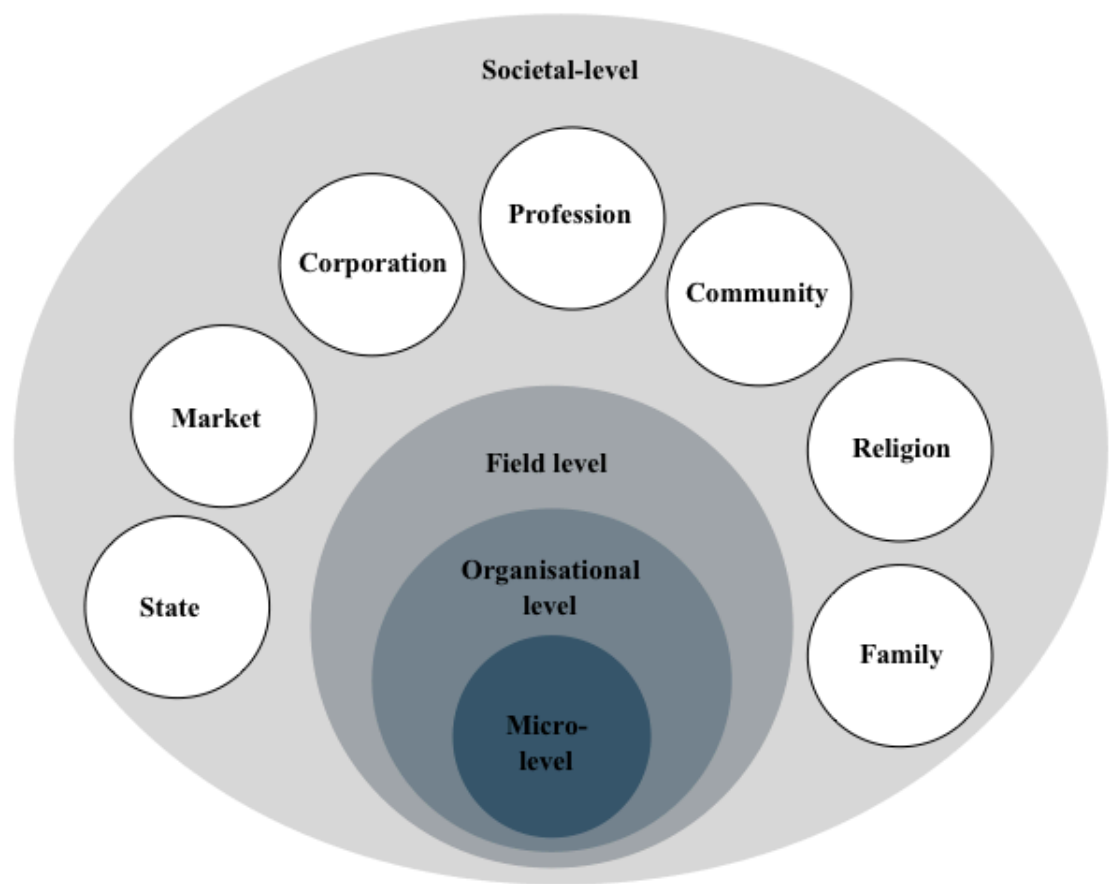
is presented as a distinct meta-theoretical framework for the study of the interrelationships between institutions, organisations and individuals (Thornton and Ocasio, 2008; Thornton et al, 2012). Instead of prioritising either structure or individual action, the institutional logics approach connects the two and sees action as dependent on how individuals are embedded within and influenced by different institutional orders. Society is conceived of as an inter-institutional system comprised of these institutional orders, which Thornton et al (2012) identify as the state, market, profession, corporation, community, religion and family. Institutions are also considered historically contingent, in that they will change over time and the way they are interpreted may shift (Thornton et al, 2012). The institutional orders relevant to this study are discussed in more detail in the following section. Each order has a different logic and set of behavioural expectations, which Thornton et al (2012: 2) define as, "...frames of reference that condition actors' choices for sense making, the vocabulary they use to motivate action, and their sense of self and identity".

Different logics recommend different practices and principles, which in turn shape reasoning and what is considered to be rational (Thornton and Ocasio, 2008; Thornton et al, 2012). Accordingly, what behaviour or approach makes sense to an individual may depend on the logic they are predominantly influenced by; for example, Friedland and Alford (1991) refer to the way a market logic may emphasise self-interest, while a professional logic may highlight the importance of professional reputation. While the influence of specific logics can be seen in material practices they are also evident in symbolic constructions that guide those practices (Thornton et al, 2012). Language is seen to take a central role here, with each logic having a particular vocabulary of motives or practice that may guide attention and help shape individual sensemaking (Thornton et al, 2012).

The institutional logics perspective also conceives of a, "nested" (Thornton et al, 2012: 13), multi-level institutional environment, meaning actors are nested or embedded in progressively higher order levels (Thornton et al, 2012). The levels comprise: the macro societal-level, which provides the institutional building-blocks that help shape the lower levels (Thornton et al, 2012; Weber and Glynn, 2006); the meso-level of the field - the

wider network in which the organisation operates, which includes field-level actors such as regulatory agencies (DiMaggio and Powell, 1983; Jackson, 2010); the organisation, (see also discussion above regarding sensemaking in an organisational context) in which individuals may be described as, “organisationally embedded” (Moorhead et al, 2019: 147) and may influence how individuals then make sense of institutional logics (Martin et al, 2017); and the micro-level of the individual (Thornton et al, 2012). While the institutional environment will differ depending on the context, a non-contextualised illustration of how it may operate is set out in Figure 2.

**Figure 2:** Illustration of institutional environment



The rest of this section will explore various relevant aspects of the institutional logics perspective in more detail.

### 3.3.2 The different institutional logics

As noted above, each logic is seen to provide a specific frame of reference and prescription for behaviour and as such has peculiar defining characteristics. However, before examining the characteristics of each logic, it is worth noting that in this thesis reference will be made to the different institutional logics in terms of the originating order, such as the market, state or community logic; this follows the approach taken by, for example, Martin et al (2017) and Waldorff et al (2013). Studies that have focused on other levels of analysis have instead combined influences from various institutional orders; for example, Uhrenholdt-Madsen and Waldorff (2019) focus on the field-level 'logic of compliance' and trace this to the institutional orders of the state and corporation. Their focus is on work environment management in Denmark and they argue that the compliance logic is influenced by state regulation (institutional order of the state), and also by the order of the corporation, as compliance help ensures the business is run efficiently and avoids sanction. While the state and corporate institutional orders may combine to produce a compliance logic in the Danish context of work environment management, the discussion earlier in this chapter highlights how these orders may be in opposition when it comes to the handling of employment laws by HR practitioners. The potential tension between what the law requires and management demands for autonomy and power may mean the state and corporate logics do not always align. In addition, there is also the possibility that other institutional logics, such as community and profession, may combine with the state and / or corporate logics in order to strengthen or weaken their effect, depending on the context. Martin et al (2017) recommend the disaggregation of logics and their respective influence, and this is the approach taken in this study.

Turning to the different institutional logics, Thornton et al (2012) provide a typology of ideal types that emphasise or amplify the essential components (ideas, practices, properties and boundaries) of each logic. In this way, the characteristics of the different logics may be used as a tool or map to help identify their influence (Scott, 2014; Lewis et al, 2019). Each ideal type may help locate the source(s) of rationality that individuals draw upon, but they do not provide an accurate description of the phenomena studied or

an account of the approach taken by individuals (Scott, 2014; Thornton et al, 2012). Weber et al (2013: 353) also warn that such ideal types will not reflect the, “lived social realities” of those studied, and that the different logics may differ in practice in terms of scope, clarity and strength.

However, as noted, characteristics of the different logics can help with identification of their influence in the data collected (Weber et al, 2013). Thornton et al (2012: 73) provide a helpful overview of examples of these characteristics, some of which are summarised in Table 2. (Religion and family have been omitted as their influence was not apparent in the findings of this study).

**Table 2:** Summary of ideal types / characteristics of institutional logics  
(Adapted from Thornton et al, 2012: 73)

	<b>State</b>	<b>Market</b>	<b>Profession</b>	<b>Corporation</b>	<b>Community</b>
<b>Root Metaphor</b>	Redistribution mechanism	Transaction	Relational network	Corporation as hierarchy	Common boundary
<b>Sources of legitimacy</b>	Democratic participation	Share price	Personal expertise	Market position of firm	Belief in trust
<b>Sources of authority</b>	Bureaucratic domination	Shareholder activism	Professional association	Board of directors / Top management	Commitment to community values and ideology
<b>Sources of identity</b>	Social and economic class	Faceless	Association with quality of craft / personal reputation	Bureaucratic roles	Reputation
<b>Basis of norms</b>	Citizenship in nation	Self-interest	Membership in guild / association	Employment in firm	Group membership
<b>Basis of attention</b>	Status of interest group	Status in market	Status in profession	Status in hierarchy	Investment in group

	<b>State</b>	<b>Market</b>	<b>Profession</b>	<b>Corporation</b>	<b>Community</b>
<b>Basis of strategy</b>	Increase community good	Increase efficiency / Profit	Increase personal reputation	Increase size and diversification of firm	Increase status / honour of members and practices
<b>Informal control mechanisms</b>	Backroom politics	Industry analysts	Celebrity professionals	Organisation culture	Visibility of actions

In addition to the characteristics set out in Table 2 above, it is also helpful to examine how features of certain logics have been identified and categorised in other studies in ways that are relevant to the focus of this study.

In relation to the state logic, Greenwood et al (2010: 523) refer to it in terms of the, “orientation of the state in securing social and political order”. Writing in the IR literature, Godard (2002) similarly sees the influence of the state in terms of legal regulation, but also in terms of shaping the broader economic and social environment in which organisations are located. Godard (2002: 274) also highlights how state-made laws may be ‘strong’, in that employers see little choice but to comply, or ‘weak’, where resistance to those laws may be considered a, “...viable option”. The financial penalties set by the state for breach of employment laws means there is also overlap with a market logic in terms of financial outcomes.

The logic of the market is connected with a focus on competition and the containment of costs (Martin et al, 2017), and focus on profit, economic incentives and financial self-interest (Waldorff et al, 2013). A market logic is arguably evident in depictions of the purpose of HRM in terms of efficiency, adding value (Paauwe and Boselie, 2007) and contribution to the achievement of competitive advantage (Watson, 2004). Martin et al (2017) note how the market and corporate logics are often conflated, but recommend their separation as they can lead to differences in practice.

The corporate logic has been connected to managerial control of activities, practices and

routines (Goodrick and Reay, 2011; Martin et al, 2017), and a focus on the organisation (Bévort and Poulflet, 2015). Bévort and Poulflet (2015) argue that in terms of HRM the corporate logic appears to have the strongest influence. This influence is also arguably evident in the emphasis that HR practitioners align themselves with the leaders of the organisation and focus on achievement of organisational objectives (CIPD, no date-b; see discussion above).

In contrast, a professional logic may be evident in terms of the degree of control retained by the identified professionals over the areas of responsibility (Waldorff et al, 2013), and a degree of independence from the organisation (Moorhead et al, 2019). In relation to HRM, Bévort and Poulflet (2015) refer to a professional logic as entailing the provision of expert advice, with authority based on merit and quality defined by professional standards. Muzio et al (2013: 703) also point to ‘new’ professions, such as HR, that are, “...born directly out of organisational contexts”. Accordingly, the ‘profession’ of HR may overlap with influences from a corporate logic, but how this affects the approach taken to employment laws is unknown.

Finally, a community logic may be characterised by a commitment to community values, concern with reputation and visibility of actions (Thornton et al, 2012). In terms of how that community is defined, Marquis et al (2011) indicate it can relate to a geographical area or a specific community of individuals who share common activities, beliefs or interests. Ingram et al (2010) highlight how the values of different local communities, expressed through local community protests, impacted on where new Wal-mart stores were opened in the US. Ingram et al (2010: 85) refer to this as a, “geography of legitimacy... [and] illegitimacy”, which could be relevant in the context of this study in terms of the extent to which concerns about social legitimacy influenced the approach taken by HR practitioners in matters governed by employment laws.

### 3.3.3 Institutional pluralism and complexity

In contrast to the HRM literature, which assumes that HR practitioners and organisations simply enact and comply with employment laws, the institutional logics



perspective highlights how there may be ‘institutional pluralism’ with multiple logics co-existing and operating simultaneously (Martin et al, 2017; Ocasio et al, 2017; Thornton et al, 2012). Goodrick and Reay (2011) helpfully describe how these multiple logics may form a ‘constellation of logics’. If there are multiple logics in a particular constellation, the relationship between those logics becomes important (Waldorff et al, 2013).

The institutional logics perspective does not assume that any one particular institutional logic is dominant over the others (Friedland and Alford, 1991; Thornton and Ocasio, 2008), which is relevant here given contrary assumption in the HRM literature about there being ‘no choice’ but to comply (Cohen, 2015). In discussion of law in the US context, Heimer (1999: 45) argues that while, in theory, “...law trumps other institutions”, laws rarely provide sufficient guidance or detail about how they should specifically be acted upon, individuals within the organisation need to translate legal requirements and those requirements may be enforced or ignored in practice. Heimer (1999: 39) also makes two other important points about law: that it is only when a, “specified actor” within the organisation is required to apply the law that the issue will be seen as an, “organisational problem”; and that a combination of logics may be needed if laws are to have their greatest effect. This appears to overlap with Waldorff et al’s (2013) argument that if certain logics are present together they may strengthen each other (a facilitative relationship), or practices may satisfy more than one logic at the same time (an additive relationship).

The institutional logics perspective also highlights how there may be ‘institutional complexity’, with incompatibility between logics in terms of conflicting goals, values, identities and prescriptions for behaviour (Greenwood et al, 2011; Ocasio et al, 2017; Pache and Santos, 2013; Waldorff et al, 2013). (It is worth noting the similarity between the depiction of institutional complexity, and situations that are ambiguous and require individuals to engage in sensemaking, discussed above). The review of the HRM literature in chapter 2 and discussion of the tension between the different objectives HR practitioners are meant to satisfy may mean they have to navigate institutional complexity. HR practitioners have a role to play in relation to employment laws, but

these may conflict with demands from management for flexibility and autonomy in handling of the workforce. Various scholars have set out factors that may influence how institutional complexity is managed. Greenwood et al (2011) refer to how organisations may respond to such complexity, highlighting various organisational characteristics that may heighten or weaken the influence of different logics. These characteristics may be relevant to how individual HR practitioners approach employment laws, as HR practitioners are usually employed by and located within organisations. Greenwood et al (2011) refer to the nature of the field and existence of actors that may control, oversee or regulate what happens within a particular organisation, such as the government, business community and agencies that may endorse organisations. They also refer to the way the organisation itself may ‘filter’ external influences through, for example, organisational structure, hierarchy, connections to the external environment and the power of individuals within the organisation who ‘carry’ a particular logic. In this way the, “receptivity” (Greenwood et al, 2011: 342) of groups within the organisation to different institutional pressures may differ. Martin et al (2017) also point to the importance of the way different units within an organisation were configured to how individuals within those units handled different institutional demands. Again, these insights echo those discussed in the sections above regarding sensemaking.

In respect to the way individuals may handle complexity, Pache and Santos (2013) highlight the importance of individual identity to the way they respond to competing demands; also similar to the sensemaking perspective. If an individual identifies with one particular logic, Pache and Santos (2013) argue that he / she may be particularly attached to it and committed to seeing it prevail, even if they are familiar with and understand the requirements of other logics. Identification with more than one logic may result in a commitment to see both succeed (Pache and Santos, 2013). The institutional logics literature refers to identity that simultaneously draws on different logics as a ‘hybrid’ identity (Bévort and Suddaby, 2016; Lok, 2010; Meyer and Hammerschmid, 2006). Thornton et al (2012) also refer to how an individual may have multiple identities, with a particular identity being more accessible in and activated by different situations. Nevertheless, they go on to argue that that an individual need not identify with the goals of a particular logic to remain committed to achieving those

goals, and provide the example of conformity with regulation. However, in relation to the handling of legal matters, the legal literature points to the importance of professional identity in the approach taken. While his focus was in-house lawyers rather than HR practitioners, Moorhead (2015) refers to how a commitment to stronger professionalism could support a greater commitment to corporate governance, ‘doing the right thing’, and taking a ‘mature’ attitude to interpretation of legal requirements. As HR practitioners may be characterised as in-house, “compliance professionals” (Edelman, 2004: 239), these insights may be relevant here. Although the lack of clear professional obligations for HR practitioners, in contrast to the professional obligations of lawyers, may mean they experience or perceive less pressure to interpret employment laws in this way.

These insights raise important questions regarding how HR practitioners resolve the recognised tensions and conflicts within their role (see chapter 2). The concepts used and discussed in the institutional logics literature, including identity, also lead to a focus on the individual micro-level and the connection between institutions and sensemaking, discussed earlier in this chapter.

#### 3.3.4 The micro-level of institutional logics

While research into the micro-level of institutional logics has been neglected (Lewis et al, 2019; Powell and Rerup, 2017; Waldorff et al, 2013), the institutional logics perspective does allow for examination of how individuals perceive, make sense of and handle the complexity and ambiguity created by the existence of multiple institutional orders and their logics (Thornton et al, 2012). The institutional logics perspective sees individuals as ‘embedded’ within their particular institutional environment, with different logics providing alternative identities, sets of values and vocabularies of practice and motive (Pache and Santos, 2013; Thornton et al, 2012). Moorhead et al (2019) also note how individuals can be embedded within the organisation they are employed by. Different scholars take differing views regarding the extent to which individuals may exert individual agency in the approach taken, for example, Martin et al (2017) downplay the level of autonomy and creativity of individual actors. However,

institutional logics are not seen as ‘iron cages’ that dictate individual action (Bévort and Poulflet, 2015; Thornton et al, 2012), and allow the potential for the “partial autonomy of individual actors” (Thornton et al, 2012: 7).

Individual action is unlikely to be the direct instantiation of a particular logic, as is assumed in the mainstream HRM literature regarding the apparent existence of an employment law as leading to action that complies with that law. Logics may constrain individual behaviour, but where there are multiple logics and institutional complexity individuals may have a degree of choice regarding the logic(s) drawn upon in making sense of their environment, as discussed above (Bévort and Poulflet, 2015; Jackson, 2010; Thornton et al, 2012; Waldorff et al, 2013). Waldorff et al (2013: 104) refer to how multiple logics can, “...open up space” and provide individuals with scope to exert autonomy and enable them to take different courses of action. The action taken is likely to be a product of and reflect how the individual made sense of the logics and demands they were subject to (Binder 2007; Heimer, 1999; Waldorff et al, 2013; Wilcox, 2012). The need for individuals to interpret and make sense of different logics, manage local systems of meaning, professional commitments, and traverse internal webs of power and influence before action takes place has led to the description of institutions as ‘inhabited’ (Binder, 2007; Hallett, 2010).

In terms of examining the micro-level, concepts are needed that can help describe how individuals interact with and make sense of their institutional environment (Bévort and Poulflet, 2015). Thornton et al (2012) developed a cross-level model indicating how macro-level institutional logics may influence individual action, which includes a number of relevant concepts. The model focuses upon the availability and accessibility of the logic to the individual, which may depend upon the individuals experiences, connection to the logic and the circumstances of the particular situation. These are seen to combine with organisational practices and characteristics to focus attention and activate an individual actor’s identity, sets of goals and schemas; schemas being expectations or guides regarding how to behave in specific situations (Thornton et al, 2012). Thornton et al (2012) highlight how an individual may have multiple identities (related to his / her profession or occupation, employer, department or personal

characteristics such as gender or nationality) and multiple goals (that may conflict and stem from different logics). The combination of logics, organisational influences, identities, goals and schemas then directs sensemaking and decision making, leading to a particular set of practices and actions. For reasons discussed earlier in this chapter, the sensemaking perspective appears particularly suitable for examination of how HR practitioners approach employment law. HR practitioners may have to navigate a path through a number of different logics, (the literature points to the relevance of, at a minimum, state and corporate logics), including potentially ambiguous legislation, raising questions about how they interpret employment law and situations when those laws need to be applied.

Studies that have explored identity, sensemaking and the micro-level of institutions often focus on the accounts provided by participants and what these reveal about the way they perceive, prioritise and rationalise particular issues (Alvesson and Deetz, 2000; Alvesson and Willmott, 2002; Lok, 2010; Maitlis and Lawrence, 2007; Meyer and Hammerschmid, 2006; Moorhead and Hinchley, 2015; Weber and Glynn, 2006; Weick, 1995; Weick et al, 2005). The language used by individuals can help provide insights into their identity and the institutional logics drawn upon. As noted, different institutional logics may be associated with a specific vocabulary of practice or motive, and members of particular social groups may use specific terms that help guide their attention and sensemaking (Thornton et al, 2012). An example of this approach can be found in Moorhead and Vaughan's (2015) report into the management of legal risk, and they interviewed lawyers to explore how they understood, defined and framed legal issues. Moorhead and Hinchley's (2015) study also examined how lawyers understood ethics as relevant to their role, using interview data to explore how they balanced the tension between their professional obligations and the commercial logic of business. While they noted that, "we cannot prove what is going on in someone else's head" (Moorhead and Hinchley, 2015: 393-394), they added how: "...there is significant value in exploring someone's experience of their own mind".

The institutional logics perspective has not been widely used in the HRM literature (Lewis et al, 2019; Martin et al, 2016). However, Martin et al (2016) did examine the

rationales provided by HR executives in justifying decisions regarding which business school was selected to provide executive education. These rationales were linked to different institutional logics, including the influence of a market logic resulting in a need for HR executives to make a business case to justify and defend their decisions. Wilcox (2012) also used this approach to study the moral agency of HR managers in a large Australian organisation, focusing on the language they used to gain insight into their meaning-making - their values, sympathies, identities and allegiances. Self-identification with a strong professional HR identity was argued to enable the HR managers to influence outcomes according to those values, and help them withstand a dominant market logic associated with Anglo-American market capitalism (also seen to dominate in Australia) focused on efficiency and short-term gains. These studies suggest that HR practitioners may be expected to approach their responsibilities and couch their advice in terms of goals that are acceptable according to corporate and market logics, which may be of clearer influence in organisations that are driven by a profit motive. However, a professional logic may provide that alternative set of expectations and standards referred to above. The potential ambiguity of legislation, also discussed above, is relevant here. Greenwood et al (2011) refer to how the specificity of goals and practices required by a specific logic is important; the greater the ambiguity in the goals and practices required the greater the scope for discretionary action, which is more likely to be governed by organisational interests. It is argued to be the interplay of institutional demands with local meaning systems, professional obligations and personal commitments that leads to human creativity (Binder, 2007), and the potential for heterogenous HRM practices (Wilcox, 2012).

### **3.4 Summary, concluding remarks and research questions**

This chapter has outlined an alternative theoretical framework to that currently used in the HRM literature for understanding and exploring the way in which HR practitioners make sense of and apply employment law. It began by focusing on the sensemaking perspective as this enables a focus on how individuals make sense of ambiguity, whether in the law itself or in the nature of the situation. The work of Weber and Glynn (2006) is also highlighted as it emphasises the interconnection between institutions, in

terms of institutionalised identities, situation and action, and how these are connected by the process of sensemaking. It also argued that the institutional logics perspective appears well placed to account for the potential that HR practitioners have to face institutional complexity (Greenwood et al, 2011) when applying employment laws. On the basis of the review of the HRM literature it would appear that HR practitioners may have to handle incompatible demands, goals, value-systems and identities from, at least, corporate and state logics. However, it may be that HR practitioners also draw on other logics, which raises the question of which logics influence their approach and how these logics interact. As HR practitioners in Australia may be held personally responsible for organisational breach of employment law, in contrast to the position in the UK, a comparison of the experiences of HR practitioners in these two countries may provide useful insights into the nature of the institutional influences upon them (further explored in the following chapter).

With these arguments in mind, the research questions are:

**How do institutional logics influence the way HR practitioners make sense of and apply employment laws in practice within the context of private sector organisations in the UK and Australia?**

The following sub-questions were also identified:

- Which logics influence the approach taken by HR practitioners in each country?
- How do the identified logics impact on HR practitioner work-identity, the way they make sense of situations involving employment laws and the action taken?
- How do concerns about social legitimacy influence the approach taken by HR practitioners toward employment laws?

The next chapter provides details above how this study was designed in order to answer these questions, and how the data collected was analysed.

## **CHAPTER 4**

### **Research design**

The review of the HRM literature discussed in chapter 2 highlights the lack of research interest into the approach taken by HR practitioners toward employment law, a clear gap in the literature. The literature review also addresses the current theoretical basis for discussion of this topic in the HRM literature that suggests laws provide a top-down structural and deterministic force that results in a compliance approach by all HR practitioners. This theoretical understanding may help explain the lack of empirical studies as HR practitioners are perceived to have no choice (Cohen, 2015) and no option (Parkes and Davis, 2013) but to comply with employment law. However, this study takes an alternative theoretical approach, combining institutional logics and sensemaking perspectives. The overall aim of the study is to examine the micro-level of practice, of how individual HR practitioners make sense of and apply employment laws, in order to also help improve our understanding of the institutional logics influencing that approach.

This chapter sets out how the study was designed. The first section outlines the philosophical assumptions that provide the foundations of the research design. The second section discusses the abductive research approach adopted, and how the study involved iteration between theory and the data collected. The third section outlines use of a qualitative methodology to answer the research questions, and the fourth section justifies adoption of a comparative, cross-sectional research strategy. The final section explains the research techniques applied, the rationale for the selection of semi-structured interviews and sampling of participants, details of the interviews undertaken and details regarding how the data was analysed.

#### **4.1 Research philosophy**

This section concerns research philosophy and the philosophical assumptions made by the researcher regarding the nature of reality (ontology) and how that reality may be



studied and understood (epistemology). It is important to make clear these assumptions ‘up front’, as they then shape, and should be consistent throughout, the entire research design (Braun and Clark, 2006; Saunders et al, 2016).

#### 4.1.1 Ontology

It is helpful to consider the different ontological positions that can be taken as forming a theoretical continuum. At one end of this continuum lies objectivism, which assumes there is a concrete reality ‘out there’ that exists independently of individual actors (Bryman and Bell, 2011; Cunliffe, 2011; Mills and Birks, 2014). In the context of this study, an objectivist ontology can be seen in acontextual assumptions in the HRM literature that employment law alone structures and determines the compliance approach taken by all HR practitioners in all organisations. As this thesis rejects the idea that employment law could or does have this effect, an objectivist ontology is inappropriate.

At the other end of the continuum lies the subjectivist / constructionist ontology, which sees social phenomena as continually being constructed by individual social actors (Bryman and Bell, 2011). At the far extreme, this perspective is seen to deny the existence of an underlying reality and the existence of structures that can have causal power (Elder-Vass, 2012; Saunders et al, 2016). Moving in from this position are forms of social constructionism that see social reality as constructed by individuals through social interaction (Saunders et al, 2016). While that reality and knowledge of it may be specific to individuals it can also be shared with others and specific to social contexts (Berger and Luckmann, 1991). The focus is on how individuals give meaning to, interpret and understand their world (Bell and Willmott, 2015; Guba and Lincoln, 1994).

Moving to the middle of the ontological theoretical continuum is the position of critical realism (Saunders et al, 2016). A critical realist perspective (sitting toward the social constructionist end of the theoretical continuum rather than the objectivist end) suits the aims and objectives of this study in a number of different ways, namely: the variety and non-determinative nature of influences on individual behaviour, and the interplay between structure and agency.

Critical realism acknowledges the existence of ‘real’ entities that have causal efficacy, in other words entities that can influence and make a difference to individual behaviour (Elder-Vass, 2012; Fleetwood, 2005). Fleetwood (2005: 199-201) sets out four different, “modes of reality” comprising: “materially real” entities such as mountains and the moon; “ideally real” entities including discourse, language, ideas, understandings; “socially real” entities such as social structures and organisational practices, which have no materiality and cannot be touched; and “artefactually real” entities that combine elements of the other modes of reality, such as a violin, which is produced out of raw materials but the use of which is interpreted in a particular way. As legislation is created by humans, and can also be interpreted differently, it appears to fall within the artefactually real category. Writing in the legal literature, Burazin (2019) also refers to law as an artefact in that it is created by humans, but as a special type of institutional and social artefact rather than, say, a violin. Fleetwood (2005) also notes that in order for legislation to have effect it needs to be acted upon by individuals. Elder-Vass (2012) comments that no single entity is necessarily determinative of individual action and behaviour and there may be a number of entities with causal powers in operation at the same time. Accordingly, the action taken may be the product of and shaped by multiple and interacting entities (Elder-Vass, 2012).

The above ontological understanding neatly corresponds with the institutional logics perspective in terms of Ocasio et al’s (2017: 511) “ontological claim that institutional logics are real phenomena” with causal power. The idea of a number of real entities with causal powers existing at the same time can also be connected to the concept of institutional complexity; recognition that a variety of potentially incompatible institutional logics may be in play at any one time (Greenwood et al, 2011). Accordingly, each logic may be seen as having its own potential ‘causal power’, which may or may not be realised depending on how an individual interprets it and makes sense of the situation. This perspective can also be related to depictions of how law works in the socio-legal literature. Edelman et al (2010: 661) distinguish formal law and codified rules, the: “law on the books”, from: “law in action”. Law in action is seen to depend on the social context, the ways in which the law may be manipulated and influenced, and how it is given meaning by the individuals that work with it. This

presentation conceives of the potential for other influences on ‘law in action’ other than simply what it is contained in legislation.

The discussion above further highlights another relevant feature of a critical realist ontology in terms of the interplay between structure and agency. Reed (1997) rejects ontologies that only privilege individual agency, arguing for a nested social ontology that sees human activity as tied to and interrelated with its wider social context. Social structures are not considered deterministic and no single structural logic is considered dominant over another, but these structures are seen as providing the contextual backdrop that may be drawn upon by individuals (Reed, 1997). While Elder-Vass (2012: 18) cautions against seeing individuals as, “...free-floating asocial.. minds”, Fleetwood (2005: 216) adds that individuals do have the ability to, “...have done otherwise; to think and act creatively; to do novel things”.

Accordingly, a critical realist ontology supports a study that examines the ‘empirical domain’ (Reed, 1997; Saunders et al, 2016; Wilcox, 2012) in terms of individual actors (agents) experiences, understandings and how they make sense of the structures that they work with and within. It is consistent with the sensemaking perspective, which highlights that the way people make sense of the environment and context in which they are located are interwoven, not separate (Kudesia, 2017; Weber and Glynn, 2006; Weick, 1995). It is also consistent with the institutional logics perspective, which specifically integrates structure and action and recognises the ability of individuals to exert agency (Thornton et al, 2012). It also reflects the concept of ‘embedded’ or ‘soft’ - rather than ‘heroic’ - agency, in terms of the contextual and varying influence of different institutional logics on individual action (Djelic, 2010; Seo and Creed, 2002; Thornton et al, 2012; Wilcox, 2012). Finally, it also enables the examination of the influences and structures drawn upon by individuals (HR practitioners), using a “bottom-up” and interpretivist approach to the ‘capture’ of institutional logics (Reay and Jones, 2016: 449).

#### 4.1.2 Epistemology

Following from discussion and assumptions about the nature of social reality is the epistemological question of how that reality may be validly studied and explored (Bryman and Bell, 2011; Eriksson and Kovalainen, 2016). Myers (2013) describes epistemology as the ‘theory of knowledge’, covering assumptions about what may be known and how that knowledge may be generated. Different epistemological perspectives may be connected to the different ontologies referred to above. An objectivist ontology and belief that the truth is ‘out there’ and is real and measurable is associated with a positivist epistemology (Eriksson and Kovalainen, 2016; Myers, 2013). From such a study the researcher is considered able to produce universal and law-like generalisations regarding the causes of or criteria for a particular phenomena (Eriksson and Kovalainen, 2016). At the other end of the epistemological continuum is the interpretivist epistemology, concerned with how individuals interpret, make sense of and understand a particular social phenomenon (Saunders et al, 2016; Myers, 2013). To focus on the subjective interpretation and sensemaking of individuals means looking at and endeavouring to understand the phenomenon from the: “inside” (Myers, 2013: 39). The findings of such a study cannot be generalised, but what they can offer is a contextualised understanding (Cunliffe, 2011) that may, “meaningfully reverberate” or, “resonate” with readers (Tracy, 2010: 844).

In relation to this study, an interpretivist epistemology is most appropriate to explore the research questions and is consistent with the critical realist ontology as discussed above. The study seeks to explore the influence of different social structures on individuals, through how participants interpreted, made sense of, experienced and approached employment laws. Insights from the legal and socio-legal literature highlight how legislation is ambiguous, uncertain and contested (Black, 1997; Suchman and Edelman, 1996), it needs to be interpreted before it is acted upon. The way in which individuals approach legislation may be shaped more by social norms and pressures than a seamless and straightforward translation of legislation into practice (Thornton et al, 2009). Meaning and action are dependent on the context, and without that context the meaning may not be understood (Myers, 2013). Consequently, an interpretivist epistemology is well suited to not only sensemaking theory, but also examination of the micro-level of

institutional logics. This understanding reflects Friedland and Alford's (1991: 242) insight that: "individual action can only be explained in a societal context, but that context can only be understood through individual consciousness and behaviour". Reay and Jones (2016) also highlight how an interpretivist epistemology is suitable to examination of how individual behaviour is guided by different logics.

## **4.2 Research approach**

There are three approaches that a researcher may take toward the use and / or development of theory in the study: deductive, inductive or abductive (Saunders et al, 2016).

A deductive approach starts with theory, which is then tested during the course of the study. This approach is commonly associated with a positivist research philosophy and the natural sciences, where hypotheses are tested and the theory used is verified or rejected / modified (Saunders et al, 2016). In contrast, an inductive approach starts with the data, and then focuses on formulating a theory to help explain the findings (Saunders et al, 2016). However, many studies are not purely deductive or inductive (Eriksson and Kovalainen, 2016; Saunders et al, 2016). An abductive approach to reasoning involves the researcher moving between theory and the data. In this approach, detailed data regarding individuals experiences, meanings and understandings can be gathered and explored in relation to existing theory (Saunders et al, 2016). An example of an abductive approach is seen in Gustafsson et al's (2018) study, which iterated between the data and existing theory in order to explain the findings. Gustafsson et al (2018) used an abductive approach in order to better understand the meaning and interpretation participants' gave to their experiences

In relation to this study, which draws on sense making theory and the institutional logics perspective to explore how HR practitioners make sense of employment laws, an abductive approach appears most appropriate. In contrast to the assumptions in the HRM literature that compliance occurs and is straightforward, this study does not assume or seek to test assumptions regarding the approach taken by HR practitioners. The intention is to explore HR practitioner experiences with employment laws,

understand how they made sense of them, and from this also explore what may be influencing them. Accordingly, the theories are applied to help analyse and understand the data.

### **4.3 Methodological choice**

The methodology adopted in a study needs to be aligned with the research philosophy and suitable to answer the research questions (Mills and Birks, 2014). As such, the methodological lens used by the researcher will influence the methods used to answer those research questions (Mills and Birks, 2014). There are two main choices in terms of methodology: quantitative and qualitative.

A quantitative methodology is linked to an objectivist ontology, positivist epistemology and deductive approach in terms of hypothesis testing (Bryman and Bell, 2011), and is often focused on numbers, measurement and frequency (Bell and Willmott, 2015). In contrast, a qualitative methodology is linked to an understanding of social reality as created and shifting (Bryman and Bell, 2011), consistent with a critical realist ontology and interpretivist epistemology. Qualitative research is concerned with understanding the social world through the words and meaning conveyed by participants (Bell and Willmott, 2015).

Applying these considerations to this study a qualitative methodology is most suitable to answer the research questions posed as it enables exploration of the social world of HR practitioners, their experiences, how they make sense of employment laws and their understanding of the role they play in relation to them. In addition, a qualitative methodology can help connect those findings to the specific context (Mason, 2002; Tracy, 2013), which is particularly important when examining the potential influence of different institutional logics and comparing these between countries. Qualitative research is also considered best suited to exploration of topics that have not been studied in-depth (van Esch and van Esch, 2013). As noted, there has been very little empirical research interest in the approach taken by HR practitioners to employment laws, and this study is an early step in terms of surveying the features of this topic. A further reason for adoption of a qualitative methodology concerns its ability to provide,

“a peek into regularly guarded worlds” (Tracy, 2013: 5). While Tracy (2013) was describing research into unknown or marginalised groups, little is known about the day-to-day practicalities and influences on how HR practitioners interact with and approach employment laws. The world of legal compliance, and the obverse world of non-compliance, may involve discussion of sensitive topics and conflicting priorities. A qualitative methodology provides a more flexible approach where such subject matter may be involved and can help capture the complexities and any tensions and difficulties in the role(s) undertaken by HR practitioners.

A further aspect of qualitative research concerns consideration of the experiences and role of the researcher in shaping the study and interpretation of the data - the concept of self-reflexivity (Tracy, 2013). Choices made during the research project are those made by the researcher and as such cannot be divorced from the study itself (Eriksson and Kovalainen, 2016; Tracy, 2013). In relation to this study, my experiences of working as a specialist employment / workplace law lawyer in the UK and Australia, and as an HR manager in Australia, certainly contributed to identification of the gap in the HRM literature in terms of how HR practitioners make sense of employment laws. They also contributed to the design of the research, access to participants, conduct of the research and how the data was interpreted. Failure to recognise my role in this research study would be to gloss over an important aspect of how it was developed and designed.

#### **4.4 Research strategy**

A qualitative methodology can lead to a number of different research strategies, each of which has a different emphasis (Saunders et al, 2016). Accordingly, the research strategy adopted should be one best suited to answer the research questions.

##### **4.4.1 Comparative**

In rejecting the deterministic view that legal structures provide the only influence over HR practitioners the issue of context is of central importance in understanding how they make sense of and approach employment laws. In order to examine the influence of

different institutional logics and how HR practitioners handle institutional complexity, a comparative research strategy provides a good fit.

The comparison of findings from different countries, and examination of similarities and differences between them, enables a better understanding of how institutional logics may enable and constrain individual action (Waldorff et al, 2013). From a sensemaking perspective, Maitlis and Christianson (2014) also argue that examination of the same phenomenon in different contexts can provide greater insights than a single-context, single-country study alone.

After the decision to adopt a comparative research strategy, a choice needs to be made whether to design a case or variable oriented study (Mills et al, 2006; Lor, 2011a; Lor, 2011b). A case-oriented study is concerned with understanding of a small number of cases, while a variable-oriented study focuses on a larger number of countries and operation of a specific set of variables, often abstracted from the local context (Mills et al, 2006; Lor, 2011a; Lor, 2011b). Given the purpose of this study is to examine the contextual (institutional) influences on how HR practitioners make sense of and approach employment laws, a case-oriented approach is more appropriate. This is also consistent with an interpretivist epistemology (Myers, 2013) and the aim of understanding how individual HR practitioners experienced and understood this phenomenon. As Waldorff et al (2013) point out, a focus on a small number of cases enables connections to be made between multiple-levels, situating individual action within its macro and meso-level context.

The next obvious decision involves selection of the countries for comparison. The countries selected had to allow for examination of the influence of different institutional logics on how HR practitioners made sense of employment laws. Jackson (2010: 66) comments that cross-national comparative analysis always involves, "...comparing apples and oranges" because of the inherent differences that exist between the actors and rules in force in different countries. However, in relation to this study, these potential differences were the focus of the comparison. Accordingly, two countries were required that were both similar and different: similar in terms of, for example, legal system, economy and nature of the HR profession (so these were less likely to be the



reason for any discrepancies in the findings), but different in terms of the institutional logics that may influence HR practitioners. The UK and Australia met these criteria, meaning they had what Lor (2011b: 11) refers to as, “potential explanatory value” in relation to the phenomena studied. In addition, my experience of working as an HR manager in Australia and as an employment law lawyer in both the UK and Australia was of clear relevance to the choice of countries. This experience also gave me unique insight into the employment laws in force and potential pressures on HR practitioners in both countries.

#### 4.4.2 Cross-sectional

A decision also needs to be made regarding the research strategy adopted in each of the two countries compared. Studies into sensemaking and other studies that have examined the influence of institutional logics on individuals have commonly adopted a case-study approach (Maitlis and Christianson, 2014 (sensemaking); Martin et al, 2017 (institutional logics)). While such studies can provide valuable in-depth insight into a single case, Martin et al (2017) argue they also have clear limitations and do not provide the breadth of a comparative cross-sectional study. Comparison of different instances of and patterns in sensemaking are more likely to provide insight into the contextual conditions and contingencies that helped shape it (Maitlis and Christianson, 2014; Martin et al, 2017). Therefore, a case-study of a single organisation in each country was not considered a good fit to answer the research questions.

While a cross-sectional research design is often associated with a quantitative methodology and use of surveys (neither of which is used in this study), it is also suitable for collection of data from more than one case and allows for examination of variation between participants (Bryman and Bell, 2011). A cross-sectional study can help establish patterns of association between participants and also provides a suitable research strategy within a qualitative methodology (Bryman and Bell, 2011). Consequently, recruitment of a number of participants with experience of the phenomenon studied was considered more appropriate in this study.

In addition to not limiting the scope of this study to a single organisation, a decision was also made not to limit it to examination of a single or small number of employment laws. The reason for this is that different employment laws can demand different responses from the organisation. Some laws may require little involvement from management, while others can impose greater restrictions on management flexibility and autonomy. Anderson et al's (2013) study provides an example of where a small number of laws were considered and where all of the HR participants reported compliance or over-compliance with the two laws examined (legally required rest-breaks and non-onerous consultation obligations). However, it would be interesting to explore whether the same compliant / over-compliant approach was taken in other situations that required greater managerial involvement; for example, whether the procedural requirements necessary to enact a fair dismissal were always followed. In order to gain a better understanding of how HR practitioners made sense of employment laws and handled institutional complexity the research strategy needed to be open to the potential that the approach taken may differ, depending on the law in question.

#### **4.5 Research techniques**

This section concerns the research techniques used in this study; it considers the selection (sampling) of individual participants, the methods used for data collection (semi-structured interviews) and, finally, how the data was analysed.

##### **4.5.1 Selection of participants**

In order to answer the research questions participants were needed who had experience of the phenomenon studied (Groenewald, 2004). While the group of potential participants clearly included HR practitioners, it also included other, "compliance professionals" (Edelman, 2004: 239). Edelman (2004) argues that this group of professionals includes lawyers inside and outside of the organisation, who provide a form of gateway between the legal realm and the organisation. The way in which lawyers contribute to HR understanding of employment laws was recognised in Sheldon and Juror's (2006) study into the impact of then new Australian employment legislation on HRM practices. They interviewed both HR practitioners and legal specialists, as this

latter group was the main source of information and advice to practitioners. The legal specialists were also able to provide information about the type of concerns held and advice sought by HR practitioners.

A further consideration related to the type of organisation that participants should be recruited from. The research questions entail a focus on the private sector, but a decision was made to not limit the study to HR participants from organisations of a particular industry or size. Following the approach taken by, for example, Gustafsson et al (2018: 78), participants from organisations of different sizes and industries were sought in order to obtain a, “more nuanced understanding” of the influences upon them.

The issues discussed above fed into the approach taken to participant selection. There are a number of different sampling techniques that may be used in qualitative studies and a combination of techniques were used in this study. The primary technique used was purposive sampling, which involves selection of participants based on their ability to help answer the research questions (Saunders et al, 2016). In this study participants were purposively sampled as variety was sought in the range of participants recruited (Bryman and Bell, 2011) in terms of organisational industry and organisational size, for the reasons set out above. Lawyer participants were sought that had worked with HR practitioners in private sector organisations, and HR participants were sought that specifically worked with employment laws and were not, for example, occupied with non-legal aspects of the HR function. An attempt was made to recruit participants through self-selection sampling (Saunders et al, 2016) by, for example, placing a request for suitable participants on the AHRI LinkedIn page; this approach did not generate any responses. Accordingly, an approach that Eriksson and Kovalainen (2011: 52) describe as “backyard research” was adopted. A ‘backyard’ approach involved contacting suitable participants known to the researcher, and also seeking introductions to suitable participants through family, friends and supervisors. Being introduced and vouched for in this way also seemed to soften the initial contact and helped establish an open-encounter, which is important for examination of sensitive topics (Biernacki and Waldorf, 1981; Renzetti and Lee, 1993). As the approach taken by HR practitioners to employment laws could include the potentially sensitive issue of non-compliance these were relevant considerations. A snowball sampling approach was also utilised, which

involved asking participants to name and introduce other appropriate participants who may agree to participate (Eriksson and Kovalainen, 2011; Saunders et al, 2016). While snowball sampling led to some new introductions, the majority of participants were recruited through the ‘backyard’ approach.

In relation to the sample size, Saunders et al (2016) again highlight how this should be related to the research questions and objectives of the study. In relation to this study, the findings are not intended to be generalisable to all HR practitioners in either the UK or Australia, but rather illustrative of the contextual influences upon and commonalities within and between the two groups. Tracy (2013: 138) also cautions against the collection of a, “paralysing amount of data”, which can prohibit effective interpretation. Accordingly, the concept of ‘data saturation’ was helpful, in that data collection should continue until additional data provides little new insight (Saunders et al, 2016; Tracy, 2013). Where in-depth and semi-structured interviews are used, Saunders et al (2016) suggest saturation may be reached at some point between five and twenty-five participants. In this study, eleven participants were recruited from the UK and eighteen participants from Australia. The size of the sample from each country was clearly different, but this reflects the nature of the findings and that ‘saturation’ was reached at an earlier stage in the UK. (Foreshadowing the findings and discussion, this difference between the two countries may reflect the apparent strength and dominance of a corporate logic amongst the participants from the UK. In contrast, a greater range of logics were indicated by the Australian participants and there was more diversity in the accounts they provided). Details of the participants are set out in Table 3 below.

**Table 3:** Schedule of participants

<b>Participant code</b>	<b>Country</b>	<b>Job title</b>	<b>Organisation: sector</b>	<b>Organisation: number of employees</b>
L1	UK	Principal (lawyer)	Law firm	-
L2	UK	Partner (lawyer)	Law firm	-

<b>Participant code</b>	<b>Country</b>	<b>Job title</b>	<b>Organisation: sector</b>	<b>Organisation: number of employees</b>
L3	UK	Senior Associate (lawyer)	Law firm	-
HR4	UK	HR Director	Property services	6,500
HR5	UK	Head of HR	Law firm	1,200
HR6	Australia	Senior HR business partner	Automotive retail	420
HR7	Australia	HR Manager	Retail / warehousing	220
L8	Australia	Lawyer	Law firm	-
HR9	Australia	HR / legal consultant	Various	Various
HR10	Australia	People and Culture Manager	Retail / manufacturing	550
L11	Australia	Partner (lawyer)	Law firm	-
L12	Australia	Principal (lawyer)	Law firm	-
HR13	Australia	HR Manager	Law firm	170
L14	Australia	Principal (lawyer)	Law firm	-
HR15	Australia	HR Manager	Health services	90
HR16	Australia	National HR Manager	Retail / manufacturing	300 (16,000+ group wide)
L17	Australia	Senior Associate (lawyer)	Law firm	-
L18	Australia	Associate (lawyer)	Law firm	-
HR19	Australia	HR Manager	Business services	250
HR20	Australia	HR Business Partner	Recruitment	2750
L21	Australia	Principal Workplace Advisor (lawyer)	IR consultancy	-
L22	Australia	In-house Counsel (lawyer)	Recruitment	2750

<b>Participant code</b>	<b>Country</b>	<b>Job title</b>	<b>Organisation: sector</b>	<b>Organisation: number of employees</b>
HR23	Australia	Executive Assistant - HR	Consultancy	200
L24	UK	Partner (lawyer)	Law firm	-
HR25	UK	Head of HR	Consultancy	350
HR26	UK	HR Manager	Accountants	500
HR27	UK	Director of People	Charity	800
HR28	UK	HR Director	Manufacturing	30,000+
HR29	UK	Head of HR	Law firm	3,000

#### 4.5.2 Data collection: interviews and ethics

This section sets out justification for the use of semi-structured interviews. It then discusses issues connected with data collection including insider research, ethics and the format of the interviews conducted.

##### 4.5.2.1 Semi-structured interviews

As the focus of this study is on exploring HR practitioner experiences with employment laws and the institutional logics that have influenced the approach they take, interviews were considered the best way of accessing these experiences and developing an understanding of the background context in which they occurred (Kvale, 2007; Saunders et al, 2016). The use of interviews can be defended as they provide, “reach with depth” (Bell and Willmott, 2015: xxiv), and are an effective means of accessing participants’ social worlds and exploring their opinions, understandings and explanations for action taken (Tracy, 2013). Interview data should not be seen as a reflection of an actual objective reality, and may involve participants engaging in impression management by reporting socially desirable behaviours (Lee, 2000). However, interviews can provide insights into how the participants construct and position themselves (Alvesson, 2003) and provide a suitable method of data collection

when examining individual sensemaking. Interviews can also provide an insight into the identity of a participant, as the way an individual talks about and describes his / her role, workplace, experiences and others is arguably framed and structured by his / her identity (Alvesson and Deetz, 2000). Indeed, Lok (2010: 1311) describes interview accounts as: “outward facing identity work”. The language used by individual participants in interview may be quite specific (Tracy, 2013), and as such may be connected to different vocabularies of motive (Alvesson and Deetz, 2000). In turn, these vocabularies, and the goals and values prioritised by participants may be connected to different institutional logics. Indeed, Reay and Jones (2016: 449) indicate that interviews can provide rich data for the “bottom-up” induction and identification of patterns of institutional logics.

There are three main types of qualitative interview: structured, semi-structured and unstructured. Structured interviews often take the form of a survey with standardised questions asked of all participants and are linked to a positivist epistemology and fact-finding (Eriksson and Kovalainen, 2016), which is not the purpose of this study. Unstructured interviewing may involve only one question with the direction of the interview shaped by the interviewee (Bryman and Bell, 2011; Eriksson and Kovalainen, 2016), and was also considered unsuitable as there were a number of specific topics to be explored in each interview. Accordingly, a semi-structured interview format was adopted as it provided flexibility in the order and content of questions asked and provided participants with the freedom to raise and discuss additional matters and issues important to them (Bryman and Bell, 2011; Eriksson and Kovalainen, 2016).

#### 4.5.2.2 Insider research

The above reference to sharing of similar experiences highlights a further issue in this study, that of insider research. Dwyer and Buckle (2009) explain that insider research occurs where the researcher is a member of the population studied; in this study the researcher had worked as a lawyer (in the UK and Australia) and HR manager (in Australia). Possession of insider role status offers some challenges, including making assumptions about what participants meant during interviews and failing to probe answers sufficiently (Brannick and Coghlan, 2007; Eriksson and Kovalainen, 2016).

Awareness of this as an issue meant it could be avoided where possible, and participants were asked to fully explain their understanding and motivations behind comments and statements made. However, insider role status also had benefits, including a working understanding of the employment laws participants referred to, an understanding of some of the challenges HR practitioners may be subject to and knowing when to probe further. Follow-up questions could be asked about the influence and involvement (or lack thereof) of others within the organisation in relation to certain situations, which may not have otherwise been offered up.

Also connected to a role as an insider is the ability to understand and appreciate the language, terminology and jargon used by the research participants (Brannick and Coghlan, 2007). One of the identified problems with comparative studies is the problem of translation between the researcher and the researched (Bryman and Bell, 2011; Lor, 2011a), leading to the criticism of holiday or “safari research” (Mayrhofer and Reichel, 2009: 55). While all the participants spoke English, the researcher’s experience and knowledge of the occupational and national contexts studied was drawn upon in the interviews. This included the subject matter discussed, such as working with the many changes to Australian employment legislation, including Work Choices - see chapter 5. It also included understanding that the use of expletives by Australian participants was not necessarily an indication of extreme feeling or emotion, but potentially a routine figure of speech!

Consideration of the researcher’s background as an insider also requires a focus on the participants involved in the study. Access to participants was enabled by the researcher’s background, and Dwyer and Buckle (2009) comment that this can lead to greater openness during the research and added depth to the data. However, Perriton (2000) warns of potential drawbacks with recruiting friends as participants and research in ‘incestuous fields’. These include being wary of over or under valuing data because of the researcher’s relationship with the participant or because the researcher had a similar experience (Brewis, 2014; Perriton, 2000). Brewis (2014: 859) also cautions against assuming that because you may have experience of the phenomena you have, “...’pure’ insider status”. Recognition that research cannot be value free is required,



which in turn requires ongoing reflexivity about the researcher's own values and biases throughout the research process.

#### 4.5.2.3 Ethics

The discussion above also highlights the importance of ethics in terms of the standards that govern conduct of the research study (Saunders et al, 2016). The study, participant information and consent forms were all approved by the University of York's Economics, Law, Management, Politics and Sociology Ethics Committee, before any data was collected. Each participant was provided with a copy of the approved participant information sheet prior to the interview, and the consent form was provided and discussed at the start of each interview. The main concern for the participants was the maintenance of confidentiality and anonymity, which has been preserved by the removal of identifying data from the schedule of participants (see Table 3), the transcripts and findings chapters.

#### 4.5.2.4 Conduct of the interviews

Given the potential sensitivity of the topics to be discussed and the need to build a rapport with the participants, all but one of the interviews were conducted face-to-face. The single interview that was not face-to-face was conducted over the phone at the request of the interviewee. The interviews ranged in length from thirty-four minutes to one hour and twenty-six minutes, but most interviews were approximately one hour long. Permission was sought and obtained to record each interview before the interview commenced.

An interview guide was used that set out the broad topics and issues to be covered in each interview. A pilot interview was conducted with an English lawyer (L1), and the sequence of the issues raised and the approach taken worked well; accordingly, the form of the interview guide was retained and this interview was included in the data set. However, given the comparative nature of the study and interviewing both HR practitioners and employment law lawyers, four separate interview guides were developed (see Appendix C). The guides were all similar and covered the same general

topics, but were also tailored to the occupational context and geographic location. The topics and questions included were not always asked in the same order and depended upon the flow of the interview. The idea of the interview as an informal conversation was also used to encourage participants to raise issues of importance to them and help overcome any reluctance by the participants to open up and talk freely (Eriksson and Kovalainen, 2016). Examination of how HR practitioners approach and make sense of employment laws was likely to cover issues of compliance and potentially the more sensitive area of non-compliance. Adler and Adler (2003) note participants who are vulnerable to litigation - which could be the case in Australia given personal liability - and corporate managers that serve as 'gatekeepers' may resist intrusive questions. Suggested techniques to overcome interviewee reluctance include creation of a less formal atmosphere and the sharing of similar experiences, which were achieved through the tone of the interview conversation, being flexible and not slavishly following the interview guide. Each interview was also ended with the same question, to add anything that the participant thought was relevant.

#### 4.5.3 Data analysis

This section elaborates on the methods used for analysis of the data.

As noted above, the data in this study was collected through interviews and each interview was recorded and then transcribed. The majority of transcriptions were prepared by the researcher, but as a result of hand-health issues some were outsourced to professional transcription services. However, any transcriptions that were outsourced were thoroughly checked by the researcher, which involved listening to the recording and amending the transcript where necessary. This process could be more time consuming than preparing the transcript from scratch, but took less of a toll on the hands. This process also formed part of the early stages of data analysis as it involved listening to the interviews, being 'immersed' in the data (Tracy, 2013), and the initial identification of similarities and differences in the accounts provided by different participants. The interviews were all transcribed as soon as possible after the interview had taken place, and sensitised the researcher to certain topics and issues that appeared to be of importance and recurred or differed between the participants.

In relation to the more detailed approach to analysis of qualitative data, there are a variety of methods that can be used (Saunders et al, 2016). However, the flexibility offered by thematic analysis (Braun and Clarke, 2006; Saunders et al, 2016) was considered the best fit for this study as it allowed for an abductive research approach that involved moving between the data and relevant theory. Thematic analysis can also be used with different theoretical approaches (Braun and Clarke, 2006), and is consistent with the critical realist and interpretivist perspectives that undergird this study. Braun and Clarke (2006: 2) provide a helpful and comprehensive overview of thematic analysis, and highlight how it allows for the exploration of “patterns of meaning” in the experiences and understanding of participants. Accordingly, it is also suitable to the comparative approach taken, enabling development of core themes and concepts that applied in both the UK and Australia, while also allowing for differences in the experiences and understandings of the participants in the two countries.

Braun and Clarke (2006) set out a six-phase guide to the conduct of thematic research. Familiarisation with the data, as described above, formed phase one. Phase two involved generating initial codes. As this study took a ‘bottom-up’ approach to examination of the institutional logics (Reay and Jones, 2016) influencing HR practitioners, the starting point was the data rather than a priori assumptions regarding the logics that existed. The initial codes generated came from the data and were adapted through a constant process of re-reading and comparing the different interviews to one another. Accordingly, the ‘constant comparative method’ (CCM), borrowed from grounded theory approaches to data analysis (Boeije, 2002; Charmaz, 2014), was also helpful. This method involves starting with comparisons within a single interview, with each sentence (or ‘fragment’) of the interview labelled with an appropriate code (Boeije, 2002). It also concerns comparisons between interviews and between groups, and the approach taken is described in the following paragraphs, where appropriate. At the end of this phase over ninety codes had been generated. The codes related to, for example, different employees, different employment laws, the involvement of managers, different areas of focus for the HR function, legal advice, action taken, and also phrases and terminology used by participants. This coding was performed electronically using N-Vivo software, which in the early stages of the research was particularly helpful in

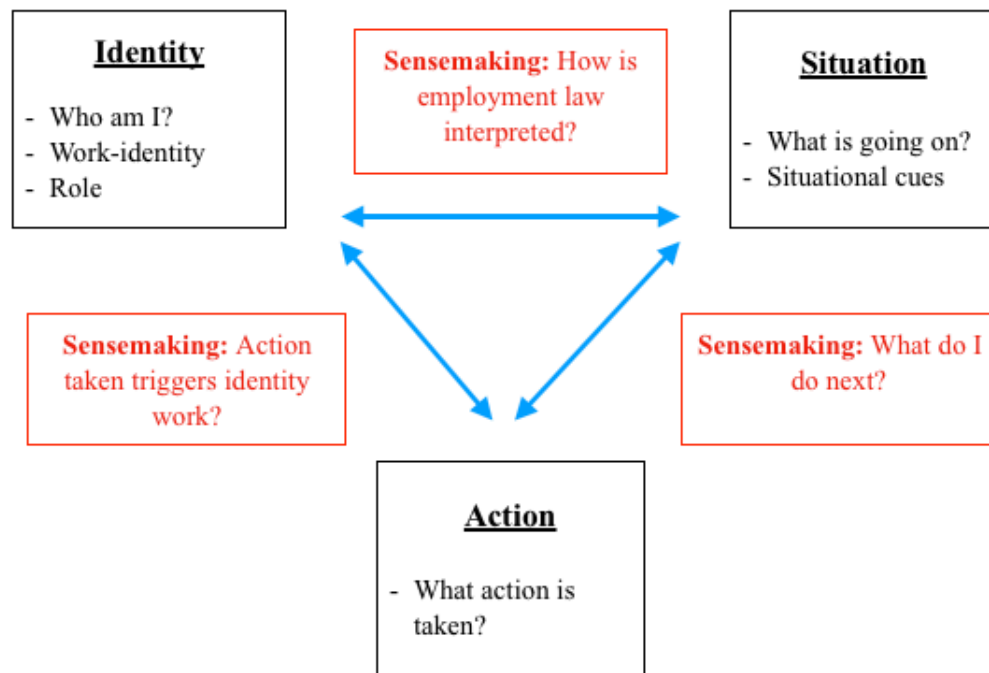
retrieving and comparing material coded in a particular way. However, later stages of the analysis were paper-based due to a greater sense of being ‘immersed’ in the data, and the ability to more readily make and maintain connections between the themes and concepts developed and the wider context.

Phase three involved searching for themes in the data (Braun and Clarke, 2006), and at this stage the interview transcripts were grouped according to country. The reason for this was to help with comparison between the interviews from within each group and to explore any themes and patterns that connected them. This process was similar to Boeije’s (2002) second step of CCM, which involves comparison of interviews from within the same group, which in the context of this study involved participants working in the same institutional environment. The two ‘groups’ of data (the UK and Australia) were then examined for similarities and differences in terms of how the themes and patterns had been and were interpreted. This comparison of interviews from these two groups reflects Boeije’s (2002) third step of CCM.

Throughout this phase the sensemaking and institutional logics literatures were revisited, and iteration between the data and theory helped with the process of identifying and explaining patterns in the data. These patterns could be clustered around particular themes and concepts, including HR practitioner work-identity, how employment laws were interpreted, pressures on HR practitioners to take a particular approach, and how changes in the nature of the situation could lead to differences in the action reportedly taken. As referred to in chapter 3, the work of Weber and Glynn (2006: 1645) and their model of ‘institutionalised typifications in sensemaking’ was particularly helpful during this stage of the analysis. Their model (see Figure 1, p.64) made sense to the data in this study in terms of examination of the, “...institutional context [as] interwoven with the process” (Weber and Glynn, 2006: 1644) of individual (HR practitioner) sensemaking. The concepts included in their model reflected the core themes and concepts that were identified in this study, namely identity, the importance of situational cues and the nature of the action taken. As such, it provided the core of a conceptual framework that gave structure to the themes and how they were connected (Miles and Huberman, 1994). However, in order to provide a helpful structure that worked with and related to the data in this study it helped to separate the concepts out

into their constitutive parts. This led to the development of the conceptual framework in Figure 3, which clearly utilised Weber and Glynn’s (2006: 1645) model, but separated the institutionalised identities, situations and action from the sensemaking process that connects them.

*Figure 3:* Conceptual framework



**Source:** Adapted from Weber and Glynn (2006: 1645)

The framework in Figure 3 was not used as a template for further analysis as all of the data had already been coded and the main themes identified, but it did help narrow the areas of focus. In this way, the framework certainly helped provide what Miles and Huberman (1994: 55) describe as “the best defence against overload”. It also helped ensure the comparisons made between the data from the two countries were targeted and made sense (Miles and Huberman, 1994). From this framework questions could be asked about the differences in the findings between the two countries and what may explain them (Boeije, 2002). This approach was important in this study as the research questions involved placing HR practitioner sensemaking in the wider institutional context and identification of the logics drawn upon in the interview accounts.

Following development of the above framework the researcher re-read all of the interview transcripts and prepared a detailed memo for each. These memos were detailed ‘notes to self’ that highlighted data relevant to the different elements of the conceptual framework, and helped with identification of commonalities and connections within and between interview accounts (Miles and Huberman, 1994; Saunders et al, 2016). Each interview account contained a particular pattern in terms of the work-identity indicated by the participant, how this connected to interpretation of the law in question and the important features of the situation and then the action taken. These concepts were all linked, which the researcher found could get a bit lost in a purely software-based approach to coding and analysis, so the detailed memos helped with this stage of the analysis. These stages of the analysis may be linked to phases four and five of Braun and Clarke’s (2006) approach to thematic analysis, which focuses on review and definition of the themes.

Braun and Clarke’s (2006) final phase of analysis, production of the report, involves selection of data extracts that relate back to and answer the research questions. Chapters 5 and 6 present the findings from the UK and Australia respectively, each chapter using the conceptual framework discussed above (Figure 3) to structure their presentation. The findings are then compared and discussed in chapter 8.

#### **4.6 Summary and concluding remarks**

This chapter argues that a critical realist ontology and interpretivist epistemology are consistent, and suitable for examination of how HR practitioners make sense of and apply employment laws. These philosophical underpinnings are also argued to be consistent with use of the institutional logics and sensemaking perspectives. The chapter sets out the details of the research design, including the abductive research approach adopted and how this involved an iteration between the theories and perspectives used and the data collected. A qualitative research methodology was most applicable to answer the research questions, and a comparative, cross-sectional research strategy was used. Semi-structured interviews were conducted with HR practitioners and specialist employment lawyers in both countries. The interview data was analysed thematically

and a conceptual framework was developed (Figure 3) to assist with the structure of the analysis, which was adapted from Weber and Glynn's (2006: 1645) model of institutionalised typifications in sensemaking (Figure 1, p.64). Before turning to present the findings (chapters 6 and 7), the next chapter provides an overview of the UK and Australian institutional environment within which HR practitioners operate and a discussion of how this environment relates to employment laws.

## **CHAPTER 5**

### **UK and Australia: Background context**

Discussion of the institutional logics perspective in chapter 3 emphasised how institutions are historically contingent (Friedland and Alford, 1991; Thornton and Ocasio, 2008) and operate at multiple levels with individual actors nested in interconnected, higher order levels (Thornton et al, 2012). In their article titled, 'bringing society back in', Friedland and Alford (1991: 232) argue that: "...it is not possible to understand individual or organisational behaviour without locating it in a societal context". Accordingly, it can be argued that the overall approach and attitude taken towards the purpose and content of employment laws at the societal macro-level, which can also be seen to involve a balance with market influences and demands, provides a set of values and frames of reference that have repercussions at lower levels (Pache and Santos, 2010; Pache and Santos, 2013). In relation to the employment relationship the industrial relations (IR) literature has explored the interconnections between the different levels (albeit not necessarily through the institutional logics perspective), arguing that the state government may influence business - and individual - practice through legislation and through its broader ideological aims and policy choices. These are argued to shape the social and economic environment and the normative rules that influence attitudes, behaviour and language (Godard, 2002; Poole et al, 2005). Examples of this influence are suggested by labour law scholar, Davidov (2016: 229), who argues some employers may think it is socially acceptable to breach labour laws, "...because 'everyone is doing it'", or through a belief that it is a, "...victimless crime". In relation to the impact on language, Kunda and Ailon-Souday (2006) argue that the dominance of market ideals in the US affected the discourse of managers, leading to an emphasis on 'adding value', efficiency, elimination of internal bureaucracy and administration and serving customer needs; terms that are also prevalent in contemporary accounts of the role and purpose of the HRM function.

Developing an understanding of what is influencing HR practitioners in their approach to employment law and the handling of legal matters requires an appreciation of the



relevant national (macro) level and field (meso) level context within which they work. It is recognised that ‘constellations of logics’ may apply (Goodrick and Reay, 2011; Waldorff et al, 2013), and it should not be assumed that a single logic (or existence of a law) will dictate individual behaviour and action. Accordingly, this chapter will explore some of the structures and actors that may influence HR practitioners in their approach to employment laws. Despite the UK and Australia often being considered similar, for example, in classification as liberal market economies (in the varieties of capitalism literature - Hall and Soskice, 2001) and in terms of the level of employment protection offered (Harvey and Turnbull, 2017; Organisation for Economic Cooperation and Development (OECD), 2013), closer attention to how these characteristics have historically developed reveals a different picture in terms of how these apparent similarities operate in practice. The difference in emphasis may be seen in the nature of employment rights - including the right to not be unfairly dismissed, the extent to which information is available about those rights and avenues for enforcement of rights. This chapter will also explore the potential influence of various field-level actors, such as HR associations, unions and the media, that may contribute to the emphasis (or not) given to the importance of compliance with employment laws.

## **5.1 Societal macro-level**

As discussed in chapter 3, the institutional logics perspective theorises society as an inter-institutional system made up of different institutional orders, including the state, market, profession and community. While laws can be seen as part of the machinery of the state, Greenwood et al (2010) also argue that the state logic can be seen in the particular orientation of the state toward securing social and political order. This section provides background to the importance of how the state regulates the employment relationship, how this form of regulation has developed historically in the UK and Australia, the nature of the legal system in place and an overview of employee rights and entitlements in both countries.

### 5.1.1 Employment legislation: national approach

Before turning to the historical development of employment law in the UK and Australia, it is first worth briefly discussing the broader influences that may shape the overall national approach taken toward employment regulation and protection. These influences are recognised in the HRM literature, albeit relatively rarely, with Harris (2005) noting how prevailing economic, political and social trends affect the national approach taken toward employment legislation. The IR literature is helpful here as it highlights the multi-disciplinary nature of employment and how those involved in regulating and managing the employment relationship - such as policy makers, legislators and practitioners - may have different and potentially competing values, assumptions and beliefs regarding how the interests of employers and employees should be balanced (Budd, 2004; Budd and Bhawe, 2008). Drawing on the work of Budd (2004), Harvey and Turnbull (2017) refer to the need for society (or the state) to balance three potentially competing objectives of the employment relationship: efficiency, equity and voice.

Taking these points in turn, efficiency is seen to relate to economic performance and generation of profit - often prioritised under a neo-liberal approach with a concern to create a free and increasingly de-regulated labour market (Budd, 2004). Budd (2004) argues the principles of equity and voice are often perceived to undermine efficiency as they involve attempts to limit and regulate operation of the market. Davidov (2016) echoes this view, arguing there has been an increasing tendency to focus on the efficiency goals of labour (employment) law and how these contribute to national competitiveness and creation of profit. Labour laws are often considered to be an, "... unwarranted intervention in free markets" (Davidov, 2016: 179), and unfair dismissal laws are often under attack for being too rigid and inefficient. In the UK context, Harris (2005) also comments that commitment to a free market ideology has led to greatly reduced trade union power and influence and reduction in employment rights. Improved efficiency is presented as a universal goal and a win-win for employers and employees, and Budd (2004) argues the principles of efficiency have become paramount to the HRM function. However, a focus on efficiency also risks losing support for

employment laws that are justified and necessary to address the recognised inequality of bargaining and imbalance of power between employers and employees (Davidov, 2016).

Equity is concerned with fair employment standards and distributive and procedural justice (Budd, 2004). While Harvey and Turnbull (2017: 211) argue (UK) state regulation of employment is, "...good at providing equity", this may only be the case if it is actually complied with. Institutional scholar, Scott (2014: 58), notes that for rules to be effective they must be, "...backed with sanctioning power", and Davidov (2016) refers to the importance of government investment in mechanisms to help ensure enforcement of employment rights. Indeed, governments are recognised as having an important role in ensuring organisations are held accountable (Godard, 2002) and enforcement and legal compliance are taken seriously (Boxall and Purcell, 2016). In the context of this study, voice is concerned with the ability for individual employees or others on their behalf to 'speak out' (Harvey and Turnbull, 2017), and bring a claim against his/her employer. There is brief mention in the HRM literature to the role trade unions can play here in ensuring compliance with employment laws (Boxall and Purcell, 2016). Davidov (2016) refers in more detail to the importance of unions in providing information about the nature of employment rights and provision of legal assistance. Budd (2004: 87) also refers to the problem of, "information asymmetry" between employers and employees, with individual employees lacking the information (and resources) to become the, "...legal equal" of their employer. Taking an institutional logics perspective, how these concerns are balanced by the state at the societal macro-level has the potential to reverberate at lower levels of analysis, impacting the field level (unions, media interest, HR practitioner associations), organisations and individual HR action. Greenwood et al (2010) also emphasise how logics and their associated manifestations are historically contingent, and that influence of the state logic may be discerned by situating behaviour in its historical context.

### 5.1.2 Historical development

Institutional logics are defined as, "...socially constructed, historical patterns of material practices, assumptions, values, beliefs and rules..." (Thornton and Ocasio, 1999: 804; emphasis added), highlighting the historically contingent nature and strength of

different logics at any one time. Accordingly, it is helpful to trace how approaches to the regulation of the employment relationship (necessarily political in focus) in the UK and Australia have developed over time, what Dickens (2008: 4) refers to as, "...baggage from the past". This baggage provides useful insights into the values that have shaped contemporary approaches to state regulation of the employment relationship in each country.

#### 5.1.2.1 Historical development - UK

The UK in the 1960-1970s had arguably adopted a pluralist model and approach to employment relations, concerned with achieving a balance between the interests of employers and employees through strong labour protections and provision for employee representation (Budd and Bhawe, 2008; Deakin et al, 2007). However, this approach changed with election of the right-wing Conservative Thatcher government in 1979 and its commitment to neo-liberalism and free-market competition (Smith and Morton, 2006). Given this ideological perspective (Budd and Bhawe, 2008) the Conservative government made many changes to employment-related regulation, anti-union legislation was introduced and employment protections were increasingly restricted if not removed as they were seen as a burden to business (Dickens, 2008). The focus was on de-regulation, prioritisation of 'flexibility' in management of labour and the increasing individualisation of the employment relationship (Berridge, 1992; Poole et al, 2005). The UK government was more concerned with perceived efficiency rather than equity and voice. The Conservative government remained in power until 1997, and over this almost twenty year period it is argued Conservative policies shifted employer attitudes through promotion of the idea of an enterprise culture (Godard, 2002) and primacy of shareholder value (Marshall et al, 2009). Poole et al (2005: 119) also refer to the decline in trade unions over the period 1980-2000 as, "...one of the most dramatic" changes to have impacted management of organisations in the UK. At the same time the Conservative government was in power, ideas about the role and function of HRM were also shifting to increase focus on its strategic, business-focused, value-add potential.

The election of a Labour Blair government ('New Labour') in 1997 was seen to lead to an upturn in employment related regulation, which Deakin et al (2007: 145) refer to as

a, "...limited revival" of labour protections. One reason for this upturn was New Labour's acceptance of the European Union (EU) Charter of Fundamental Social Rights of Workers, and the inclusion of EU labour law into the UK legal system (Deakin et al, 2017). However, Ewing (2008) argues that the new regulatory restraints were an 'illusion' characterised by various exceptions and exclusions; for example, Goss and Adam-Smith (2001) argue New Labour was reluctant to restrict labour market flexibility when it transposed the EU 1993 Working Time Directive into the UK, and made full use of available derogations allowing employees to 'opt out' of restrictions on maximum weekly working hours. Similarly, Poole et al (2005) argue the election of New Labour did not dramatically alter opinion regarding the role that government should play in relation to the economy and industry. While Dickens and Hall (2006) argue the values of New Labour did differently influence the shape and framework of UK employment law, the extent to which the party supported principles of social justice and fairness was qualified by the extent to which those principles supported a flexible labour market, business interests and economic efficiency. Budd and Bhawe (2008) argue that by the turn of the millennium the neo-liberal paradigm had fully taken hold in the UK, which is associated with an 'egoist' approach to employment relations based on a values system that sees labour as a resource and with efficiency the main state/government objective. The potential impact and influence prioritisation of such goals at a societal level may have had on HRM practice can be seen in the 'business case' for diversity (see Green et al, 2018). However, promotion of legislative requirements in this way may conversely risk creating a business case against compliance if it is not considered to be in the business interest (Dickens, 1999; Dickens and Hall, 2005).

The Conservatives took back power in 2015 (they were part of a Coalition government with the Liberal Democrats from 2010 to 2015), and have continued to focus on how government can promote a flexible and efficient labour market through, for example, its campaign to "tackle employment law red tape" (Department for Business Innovation and Skills (DBIS) et al, 2011). Perceived problems with the system of employment regulation and the ability for disgruntled employees to make claims to an employment tribunal were raised in 2011 by the then UK Conservative Lord Chancellor, George Osborne. Osborne referred to the, "...burdensome effect" of the employment tribunal system and the rights of business not to be subject to, "...vexatious claims and

unreasonable costs” (CIPD, 2011: 7). From July 2013 a new system of fees was introduced, requiring claimants to pay a fee in order to make a claim to an employment tribunal. The fees ranged from £390 to £1,200 and their introduction led to a “dramatic and persistent fall” in the number of claims made with a reduction in claims of between 66 to 70 percent (R v Lord Chancellor, 2017: 12). The legality of these fees was successfully challenged by Unison, a UK union, who pursued the matter to the UK’s highest court (Unison, 2017). The Supreme Court found that the low paid were amongst those most unlikely to make a claim under the fees regime, as any award of compensation is related to earnings (R v Lord Chancellor, 2017), meaning their claims were of lower value and the fees levied proportionately greater. In declaring the fees regime unlawful the Supreme Court emphasised the importance of the rule of law and the ability for people to access courts and tribunals in order to enforce their legal rights as, “...without such access, laws are liable to become a dead letter” (R v Lord Chancellor, 2017: 20). The Supreme Court also emphasised how important it is for employees to be able to enforce their rights, to ensure employers do not always prevail and that they respect employment rights. That the Supreme Court saw the need to make such statements in its judgment is arguably indicative of the general attitude taken towards employment rights by the Conservative UK government and potential impact this was having on compliance within organisations. (The imbalance of power between employers and employees is also linked to the use of NDAs to silence complainants in cases of harassment and discrimination (WEC, 2019). The detrimental impact the fees regime and reduction in enforcement has had on employer attitudes toward employment rights and legal risk has also been alluded to on the CIPD website (Wynn-Evans and McGrandle, 2015) and strongly suggested in the CIPD magazine (Kirton, 2017).

#### 5.1.2.2 Historical development - Australia

The manner in which Australian labour/employment law has developed is quite different to the UK experience. In the early twentieth century Australia introduced an innovative system for the compulsory conciliation and arbitration of industrial disputes. If a dispute existed between a union and an employer regarding employment conditions and wages the dispute could be referred to an impartial tribunal with power to make an industrial award stipulating the wages and conditions that should apply (AIRC, no date;

Creighton, 2007). This system persisted for most of the twentieth century (Anderson et al, 2011; Mitchell et al, 2010), has been described as Australia's principal form of labour regulation over that period (Mitchell et al, 2010), and also meant that unions maintained a "major role" (Creighton, 2007: 92) and involvement in shaping labour regulation (Naughton and Pittard, 2013). Naughton and Pittard (2013) also argue that principles concerned with the 'public interest' and 'protection of the weak' expressly undergirded the conciliation and arbitration system, with these terms permeating discussion of how the interests of capital and labour should be balanced up to the present day and visible in the most recent iteration of Australian employment legislation.

One consequence of this system is a debate about whether it is appropriate for Australia to be included in the list of liberal market economies set out in the varieties of capitalism literature (see Hall and Soskice, 2001). Marshall et al (2009) define the liberal market model as one that favours capital and competition, where the interests of shareholders are prioritised over those of the workforce. They argue that while it could be argued that Australia has more recently shifted toward a liberal market model, it has not historically followed the same pattern and has more similarities with the coordinated model of capitalism that takes a more detailed and protective approach to labour regulation. Indeed, Godard (2002) excludes Australia from the group of liberal market economies on the basis of its centralised wage regulation. Exposure to different values systems and for different periods of time could also impact employment practices and how HR practitioners perceive and approach employment regulation.

Australia had a Labour government from 1983 to 1996, almost mirroring the period that the Conservative government was in power in the UK. The first move away from the centralised system of wage/conditions regulation was taken by a Labour government with introduction of the Industrial Relations Reform Act 1993. This legislation allowed employers, employees and unions to directly settle disputes through enterprise bargaining at the level of the workplace without having to go to the tribunal/commission (Creighton, 2007). However, the legislation also introduced more comprehensive employment protections and rights to take account of the less centralised system (AIRC, no date), such as more uniform protection against unfair dismissal and extension of rights and protections regarding industrial action (Mitchell et al, 2010).

In 1996 a Liberal-National Coalition government gained power (akin to the Conservative party in the UK) and enabled employers to offer individual contracts, known as Australian Workplace Agreements (AWAs), to employees. An AWA enabled an employer and individual employee to contract out of application of an industrial award, provided the AWA did not disadvantage the employee when compared to the benefits contained in the award (van Barneveld, 2006). Following re-election in 2004, the Howard Liberal-Coalition government sought to make further changes to the industrial relations and employment regime through the Workplace Relations Amendment (Work Choices) Act 2005 (Cth) (known as 'Work Choices') (O'Neill and Kuruppu, 2007). Work Choices introduced what have been referred to as the most far-reaching changes to the industrial relations system for a century (AIRC, no date). These changes included replacing the no-disadvantage test for AWAs with only five minimum conditions, which van Barneveld (2006) refers to as removal of an important safety net of employment conditions. Work Choices also exempted employers with one hundred employees or less from the requirement to fairly dismiss employees, reduced the number of matters that could be covered in awards and constrained the power of unions (Creighton, 2007). However, Work Choices also proved to be extremely unpopular. The vitriol directed towards the legislation and the Howard government can be seen in the Australian Council of Trade Unions (ACTU) campaign against it (see discussion below), in the academic literature of the time (for example, Sheldon and Juror, 2006), and in the defeat of the Howard government in the federal election of 2007 (O'Neill and Kuruppu, 2007).

When Labour regained power in November 2007 it was seen to have a clear mandate to abolish Work Choices. Interim steps were taken to prevent employers from entering into new AWAs (O'Neill, 2012) and the Work Choices legislation was then abolished and replaced by the Fair Work Act 2009 (Cth) (FWA). Amongst other things, the FWA reintroduced protection from unfair dismissal, placed a stronger emphasis on enterprise bargaining (rather than individual contracts) and set out ten minimum terms and conditions of employment that apply to all employees - the National Employment Standards. In 2013 Labour lost the general election and was replaced by a Liberal Coalition government, which remains in power. Despite pressure from business groups



to weaken worker and union protections contained in the FWA, Forsyth et al (2017) argues the current government's failure to make these amendments stems from a fear of making what may be unpopular changes, and a union-led scare campaign about return to a Work Choices era.

The historical background set out above helps illustrate how the state logic regarding regulation of the employment relationship and how the demands of efficiency, equity and voice should be balanced differs between the UK and Australia. It also helps explain differences in content and emphasis of employment rights and entitlements in both countries. However, before turning to discussion of these rights, it is important to explain the nature of the common-law legal system shared by both the UK and Australia.

### 5.1.3 Legal system

Both the UK and Australia (and the US) share a common-law legal system, as opposed to a fully codified (i.e. written) civil-law legal system that is in place in, for example, much of continental Europe. The nature of the common-law legal system is important, as it helps explain why the idea expressed in the HRM literature that 'law' is determinative of organisational action is not necessarily accurate or conclusive. The common-law legal system is characterised by two main types of law. The first type is codified law, written law made by parliament; this law is set out in individual 'Acts', also known as statute or legislation. Acts of parliament may be supplemented by statutory instruments, often known as regulations. The second type of law is judge-made law. When judges determine cases brought before the courts and tribunals their judgments create binding legal precedent and legal texts emphasise how judge-made law can be just as important as codified legislation (Darbyshire, 2011). Judge-made law is considered an important part of the legal system and process, and is often needed to interpret the meaning of legislation. Lord Hailsham is reported to have said that nine out of ten cases appealed to the UK Court of Appeal or House of Lords turned on the interpretation of specific words contained in legislation (Zander, 2015). Accordingly, legislation in a common-law legal system is known to be potentially ambiguous and subject to different interpretations (Zander, 2015). Until cases have been decided (and

possibly after, if it could be argued that the circumstances of the case are slightly different), the meaning of particular statutory provisions may be unclear and the way in which individuals, organisations and their legal advisers interpret those provisions will often reflect their own interests and point of view (Zander, 2015). Applying these insights to consideration of the approach of HR practitioners toward employment regulation, it means practitioners may have or perceive there to be a choice about what action to take in a particular situation.

#### 5.1.4 Employment rights and entitlements

The UK and Australia are presented as having very similar levels of employment rights and legislated protections (in the HRM literature, see Harvey and Turnbull, 2017). Consequently, it may be expected that the nature and degree of legal matters that HR practitioners handle would be similar. However, depiction of such similarities between the UK and Australia is based on studies into how the ‘legal origin’ of a country, whether it has a common or civil-law system, may affect the content and nature of its labour law (Deakin et al, 2007). Mitchell et al (2010) raise concerns about some of the measures used in this comparison, as they were limited to five areas of labour law each of which was given equal weight in the overall assessment, despite having potentially differing impacts. The comparison did not include assessment of wage regulation, for which Mitchell et al (2010) argue Australia would have been rated highly in terms of the protection given. The strength of the compulsory arbitration system in Australia referred to above was also not taken into account in measures regarding the right of employees to engage in collective bargaining, which Mitchell et al (2010: 13) refer to as, “... radically understating the strength of Australian law in protecting trade unions and collective bargaining”. Accordingly, presentation of the UK and Australia in similar terms in relation to the extent to which the employment relationship is protected may not reflect practice, nor represent the complexity and nature of the protections offered.

That practice may be slightly more difficult in Australia is suggested in The World Economic Forum’s (WEF) Global Competitiveness Report (Schwab, 2018), which provides a ranking of 140 countries in terms of the factors and institutions that may impact on economic growth and productivity. The areas identified as allowing, “...room

for improvement” include the, “rigidity” of Australia’s labour market (Schwab, 2018: 26); Australia ranks 110th out of 140 countries in terms of hiring and firing practices, 105th in terms of flexibility of wage determination and 66th in the level of co-operation in labour-employer relations (Schwab, 2018). In contrast, the UK ranks 6th most competitive out of 140 countries in terms of hiring and firing, 12th in flexibility of wage determination and 28th for co-operation in labour-employer relations (Schwab, 2018). The different rankings given to Australia and the UK may also support the argument that the demands of a liberal market economy have impacted differently on the form of employment regulation in the two countries. Some of the differences can be seen in examination of the minimum terms and conditions of employment that apply to employees, explored next. However, it is first worth highlighting what the WEF Report reveals about perceptions of the employment relationship when concerns for the market seemingly dominate; Schwab’s (2018: 41) focus is on labour market, “...flexibility, namely, the extent to which human resources can be reorganised”. In an earlier iteration of the report, Schwab (2017: 318) emphasised, “...labour markets must... have the flexibility to shift workers from one economic activity to another rapidly and at low cost, and to allow for wage fluctuations without much social disruption”. The language of the market is clear; it focuses on efficiency, effectiveness, flexibility, low disruption and low cost.

#### 5.1.4.1 Employment rights and entitlements - UK

Focusing first on the UK, the Employment Rights 1996 (ERA) requires employers to provide employees with a written statement of particulars of employment within two months of starting employment setting out, for example, the applicable rate of pay, place and hours of work, holiday entitlements and application of any applicable collective agreement. The ERA sets out various additional statutory rights and protections afforded to employees, such as other types of leave (parental, adoption) and redundancy pay, but there is no obligation on an employer to inform its employees about these. While UK employers may be covered by a collective agreement, this will only exist if a trade union is recognised in the workplace and a collective agreement has been agreed (trade union membership is dealt with below). Collective agreements may set out some of the matters covered by legislation, but also add additional benefits beyond the legislated

minimum. Davidov (2016) comments that union presence in the workplace and union collective agreements have been crucial to the enforcement of labour standards in the UK, as unions have the knowledge, resources and interest to enforce the agreements they have negotiated. However, UK statistics regarding the number of private sector employees covered by a collective agreement indicate the numbers have been consistently falling, and in December 2016 stood at 14.9 percent (compared to 59 percent in the public sector) (DBEIS, 2017). Accordingly, collective agreement coverage in the private sector is limited, as may be UK HR practitioner experience of negotiating and working with this type of agreement.

#### 5.1.4.2 Employment rights and entitlements - Australia

Turning to Australia, the National Employment Standards (NES) cover maximum working hours, various leave entitlements (annual, carer's, parental, adoption, community service and long service leave), notice of termination, redundancy, the right to request flexible working and the right to receive a copy of the Fair Work Information Statement (FWIS). The FWA (s124) requires an employer to provide each new employee a copy of the FWIS as soon as practicable after starting employment (Fair Work Ombudsman (FWO), 2017). The FWIS is a standard form prepared by the FWO and includes, for example, a list of the NES, potential coverage by a modern award, the right to freedom of association, the role of and contact details for the Fair Work Commission (FWC) and the Fair Work Ombudsman (FWO) (both discussed in more detail below) and how employment may be fairly terminated (FWO, 2017). As a result, employees in Australia are provided with details about their legal rights on commencement of employment; this knowledge is in stark contrast to the position in the UK, where employees would have to actively search for details regarding specific rights to which they are entitled. In addition to the NES, Australian employees are entitled to various other rights and protections set out in the FWA. Employees may also be covered by a 'modern' award (successor to the industrial awards discussed above; there is no such comparable instrument in the UK) or an enterprise agreement (a collective agreement that may be negotiated by an employer with a union or directly with the employees).

Modern awards contain a more detailed and comprehensive set of minimum terms and conditions of employment than the FWA, and may contain, for example, detailed requirements regarding payment of overtime, shift-loadings, enhanced redundancy and dispute resolution procedures. While awards may apply to named employers they generally apply automatically to employees in particular industries or occupations, regardless of whether the employer is aware of their existence. Depending on the nature of the business and work undertaken by employees an employer may be covered by a number of different awards. Consequently, identifying the terms and conditions of employment that apply to a particular employee in Australia can be complex. As noted, an enterprise agreement is a collective agreement often entered into by an organisation to vary application of an applicable award(s). However, it must leave the employees covered 'better off overall' than under the relevant award(s) and it must also be formally approved by the FWC (see FWA, Part 2-4). In June 2017 a total of 14,497 enterprise agreements were in force in Australia, with 13,968 of those in the private sector (Department of Employment, 2017). These figures contrast with the position in the UK, where it is much more unusual for a private sector employee to be covered by a collective agreement than one in the public sector. It can be argued, therefore, that the level of engagement organisations need to have with the employment law system in hiring employees on the right terms and conditions of employment in Australia is greater than that required in the UK.

#### 5.1.5 Unfair dismissal rights

As unfair dismissal laws should govern how an organisation terminates employment it is an area that most, if not all, HR practitioners will be familiar with. In both the UK and Australia an employer must have 'just cause' - a fair reason - and also follow a fair procedure before terminating employment. Before turning to the unfair dismissal laws in force in the UK and Australia, it is worth briefly exploring the purpose they play and some of the tensions they may give rise to. Labour law scholar, Davidov (2016), argues that despite differences in how countries specifically legislate for particular protections and rights, the general goals pursued are the same. He goes on to argue, however, that these goals are often forgotten. The HRM literature could serve as a case in point here, as it does not generally deal with the goals of specific employment laws that HR

practitioners may handle. Davidov (2016) argues in detail that unfair dismissal laws provide both economic and social-psychological security to employees. Economic security through a regular and agreed income, and social-psychological security in terms of the contribution employment makes to an individual's identity, self-esteem and the potential impact job loss can have on health and well-being. These benefits are also discussed in the IR literature, with Budd and Bhawe (2008) referring to the importance of work for psychological fulfilment, dignity and social identity. The emphasis individual countries place on these different goals may lead to differences in the remedies offered to affected employees, with Davidov (2016) noting that where the social and psychological aspects of employment are of concern unfair dismissal laws provide reinstatement as a potential remedy. (Reinstatement is a potential remedy in both the UK and Australia, but the extent to which it is awarded in practice is different - see below).

However, proponents of the free-market challenge the purpose and existence of unfair dismissal laws on the basis they are anachronistic, inefficient, inflexible, constraining effective management of the workforce and impeding competitiveness (Davidov, 2016). The OECD (2013) similarly refer to the potentially time-consuming nature of carrying out a fair dismissal, which adds to the cost of dismissing employees. Combined with poor enforcement of labour/employment laws, pressure to cut costs within business, a decline in union membership and possibly a view amongst some employers that non-compliance with some laws is now acceptable, Davidov (2016) argues that there is a crisis in terms of compliance and enforcement of labour law. However, he also persuasively argues that unfair dismissal laws are, or should be, a societally imposed, non-negotiable requirement that employers, "...adhere to minimal standards of justice [and] fairness.." (Davidov, 2016: 105). Exploration of how HR practitioners perceive and approach dismissal of employees within their organisations has the potential to highlight how the balance between efficiency and equity is being managed in practice.

#### 5.1.5.1 Unfair dismissal rights - UK

Employees with at least two years' service have the right not to be unfairly dismissed (s108 and s98, ERA); the only protection for employees with under two years' service is

not to be dismissed for an automatically unfair reason, such as maternity, health and safety or trade union activity. It is worth noting that the 'qualifying period' employees must serve before they can claim unfair dismissal has varied over time. When unfair dismissal rights were introduced in the UK in 1971 the qualifying period was two years. This period was reduced to one year in 1974, six months in 1975, increased to one year in 1979, two years in 1985 (which was eventually held to be indirect sex discrimination, but justifiable given the recession at that time), reduced to one year in 1999 and then increased again to two years in 2012 (Parker, 2012). Employees with at least two years' service may be fairly dismissed for one of five potentially fair reasons, namely capability (including dismissal for poor performance), conduct, redundancy (where the employer no longer requires anyone to do the job), illegality or 'some other substantial reason' (s98, ERA 1996). The employer must have also acted reasonably in all the circumstances, which includes consideration of the employer's size and resources (s98, ERA). An individual has 3 months' in which to make a claim of unfair dismissal to the employment tribunal. The claim would be brought against the employer, with individuals only ever sued if the claim involves discrimination (in contrast to the position in Australia - see below). The tribunal has the power to make an order requiring the employer to reinstate or reengage the employee (although Smith (2017) notes these remedies are rarely ordered) and award compensation. There is now no cost to make a claim to an employment tribunal, but this has not always been the case (see discussion above).

There is no formal statutory disciplinary procedure that an employer must follow in order to fairly dismiss, however the Advisory, Conciliation and Arbitration Service (ACAS) has produced a non-binding guide (ACAS, 2019) and code of practice (ACAS, 2015) on how to handle workplace discipline and grievances. While the code is not legally binding, employment tribunals will refer to it in determining whether the dismissal is fair and whether a fair dismissal procedure was followed and failure to follow the code can result in a 25 percent uplift in the amount of any compensation payable. The guide makes it clear that any disciplinary procedure must be fair, and it must also be applied fairly and consistently, which means taking into account how similar cases have been handled previously and any relevant circumstances impacting on the employee such as health, domestic problems or previous inconsistent treatment

(ACAS, 2019). Smith (2017) notes an employer may act unreasonably if it inconsistently treats employees differently for similar offences, which is likely to render any resulting dismissal unfair. If an employer is concerned about an employee's performance, case law requires (Smith, 2017) and the ACAS code states that employers should ensure the employee understands the nature of the problem, expected standards of performance, any support or training needed to reach the appropriate standard, how their performance will be reviewed, over what period and what the consequences of failure will be (ACAS, 2015). Only after taking these steps can an employer then fairly dismiss an employee, if dismissal is warranted in the circumstances.

In requiring that employers act 'reasonably' and follow a 'fair' procedure, the legislation sets out what Davidov (2016) refers to as open-ended standards as opposed to clear and specific rules regarding the action that must be taken. As such, it may be more difficult to identify a failure to meet the required standards in a particular situation as this would require the individual to have knowledge of the procedure that should be followed in relation to the reason given for dismissal (for example, whether redundancy, performance or conduct), knowledge of their rights, and the ability and means to enforce those rights. Employees (and employers) may contact ACAS for advice, but if they want to enforce their rights they need to bring a claim against the employer to an employment tribunal. If the employee is a member of a union they could approach them for advice and legal assistance (however, see union membership statistics below). While standards are seen as more flexible, they also involve the exercise of managerial prerogative (Davidov, 2006) with respect to the nature of the standards actually applied. Balanced against this is the time-consuming and costly nature of following a fair dismissal process, as noted above (OECD, 2013). In certain circumstances employers and employees can engage in confidential 'pre-termination negotiations' (s111A, ERA; introduced in 2013) with a view to entering into a settlement agreement and amicable termination of employment. A settlement agreement contains the terms on which the parties agree to terminate employment - usually in exchange for a financial payment, agreement by the employee not to make a claim to an employment tribunal or court and often agreement to keep the details of the agreement confidential (ACAS 2018). However, an employee may still be able to bring a claim if the employer has engaged in 'improper behaviour' (s111A, ERA), such as undue pressure to agree to a settlement or



if the dismissal would be automatically unfair, such as dismissal for a discriminatory reason, pregnancy or as a result of taking statutory leave entitlements. ACAS has also published a code of practice and guide to settlement agreements (ACAS, 2013; ACAS, 2018), which makes it clear that settlement agreements should not be used in place of good management practices, including performance management processes in accordance with the ACAS code and guide to workplace discipline. However, how good practice gets balanced against managerial prerogative and costs-concerns is unknown.

#### 5.1.5.2 Unfair dismissal rights: Australia

As referred to above, the shifting nature of unfair dismissal rights in Australia has produced a lot of public interest, in particular through its association with Work Choices. It could be argued that this level of concern has led to what the OECD (2013) describe as a re-regulation of unfair dismissal protections; for example, in 2009 the FWA introduced the requirement for employers to first explore the possibility of redeployment of an employee before they are dismissed for redundancy. The FWA also made changes to the Work Choices exemption from unfair dismissal provisions, leading to an increase in unfair dismissal rights coverage of the workforce from fifty to ninety percent (Productivity Commission, 2015).

Turning to the unfair dismissal protections currently in place, the FWA states the objective of the procedures and remedies provided are to ensure the employee and employer have a, “fair go all round” (FWA, s381). Employees employed for at least six months - or one year if the employer has fewer than fifteen employees - have the right not to be unfairly dismissed if they are also covered by a modern award or enterprise (collective) agreement and do not earn over the high income threshold (FWA, s382). The high income threshold is set at AU\$145,400 for the period 1 July 2018 to 30 June 2019 - equivalent to approximately £79,311. Employees without the required period of employment can still make a general protections dismissal claim if they believe they were dismissed because they engaged in particular types of activity, such as claiming or exercising a workplace right (FWA, s340) or industrial or trade union action (s346), or because they possess a protected characteristic, such as political opinion or social origin (FWA, s351). An individual has 21 days to make an unfair dismissal application to the

FWC. The individual must pay an application fee, which is currently AU\$71.90 (FWC, 2019) - equivalent to approximately £39.00. If any employee is found to have been unfairly dismissed an order may be made for reinstatement, or compensation to a maximum of half the high income threshold, or 6 months' wages, whichever is less (FWA, s392).

A dismissal will be unfair if it was harsh, unjust and unreasonable and not a genuine redundancy (FWA, s385). The FWA (s387) sets out what should be considered in determining whether the dismissal was 'harsh, unjust or unreasonable', including whether there was a valid reason due to capability or conduct and whether the employer followed specific procedural steps - such as warning the employee first if dismissal was due to performance, notifying the employee of the reason for dismissal and providing an opportunity to respond. Accordingly, the procedure that must be followed in order to fairly dismiss an employee is seemingly slightly clearer than is the case in the UK. Employers with less than fifteen employees must also comply with the 'Small Business Fair Dismissal Code' (Code), unlike the ACAS code that is non-binding. The Code (FWO, 2011) sets out when an employer can terminate employment without notice, and the procedure that must be followed in all other circumstances. In relation to performance, the Code requires an employer to give an employee a warning that dismissal may occur if performance does not improve, give the employee an opportunity to respond to the warning and the chance to improve. The employer may also have to provide extra training and information to help the employee. Employees at risk of dismissal also have the right to be accompanied by another person. The employer must keep evidence of the procedural steps followed in order to demonstrate it has complied with the Code. Accordingly, it could be argued that the Australian legislation sets out more detail about the procedural steps that employers must follow, leaving less room for choice and interpretation, when compared to the UK. There is no statutory provision in Australia for 'pre-termination negotiations' as exists in the UK, but employers and employees may settle any potential claim through a deed of release - similar to the UK settlement agreement.

A claim of unfair dismissal will be brought against the employing organisation, as in the UK, but it may also name personally name individuals within the organisation relying

upon the accessorial liability provisions in the FWA (s550). These provisions stipulate that a person will be in contravention of the FWA if they are involved in its breach, which may occur if they aid, abet, conspire with others, induce or are in any way concerned with the breach. HR practitioners are seen as a key compliance gatekeeper, able to monitor and control the conduct of organisations (Howe et al, 2014). Consequently, HR practitioners are being held personally liable for organisational non-compliance with employment laws. A magistrate in one case held that the HR manager, "...should have been aware of, and at least attempted to give advice on" the relevant law (Fair Work Ombudsman v Centennial Financial Services Pty Ltd & Ors, 2011: 13). It is also no defence for HR practitioners to argue they were following the instructions or orders of directors (Fair Work Ombudsman v NSH North Pty Ltd, 2017). The shifting focus to the role of individual officers within organisations to ensure compliance has led to offer (as of July 2014) professional indemnity insurance, providing cover to its members if they are sued as a result of their HR activities (AHRI, no date-b; Goodear, 2014).

## **5.2 Meso level: field-level actors**

Discussion of the societal-level approach to employment regulation has necessarily highlighted the existence and role of actors at the meso or field-level. Macro-level institutional influences will shape the nature and strength of these collective field-level actors, that include professional associations, the media (Greenwood et al, 2011) and also unions. While individual HR practitioners will be subject to influences from the national macro-level, these influences may be amplified or weakened as a result of the involvement of field-level actors. Accordingly, this section will briefly refer to some of the actors that could play a role in transmitting specific logics and influencing individual HR practice.

### **5.2.1 Statutory bodies**

In relation to institutions, Greenwood et al (2010) argue that the way organisations respond to institutional influences are also shaped by the associated enforcement and compliance mechanisms in place. Turning to employment rights, the mere existence of

rights does not necessarily mean that employees know about them, understand when they have been infringed or have the ability and resources to enforce them (Davidov, 2016; Dickens and Hall, 2006). The approach taken in the UK and Australia toward dissemination of information about employment rights and the perceived importance of compliance and enforcement is potentially relevant to how HR practitioners approach legal matters.

#### 5.2.1.1 Statutory bodies - the UK

The main organisation engaged in provision of information about employment laws in the UK is ACAS, a statutory body. ACAS' website describes its aim as: "To drive sustained organisational effectiveness and productivity and improve the working life across the economy through practical advice and expert support" (ACAS, no date; no pagination); there is no reference to ensuring organisations comply with their employment law obligations. ACAS provides information and advice to employers and employees on all aspects of employment law, and if an individual wants to make a claim to an employment tribunal he/she must first inform ACAS, which will then offer conciliation services in an effort to get the parties to settle and avoid litigation. ACAS does not carry out any investigations into allegations of breach of employment law, and has no enforcement powers.

There is no central and single body in the UK that is concerned with ensuring compliance with all employment laws. However, the HM Revenue & Customs (HMRC) does have a team focused on ensuring employers pay the minimum wage, with powers to investigate and enforce relevant legislation (DBIS et al, 2015). In 2017 the UK government announced creation of a new post, the Director of Labour Market Enforcement, with the remit of providing strategic direction to state enforcement bodies and to spearhead a, "...crackdown on exploitation in the workplace" (Home Office et al, 2017; no pagination). However, this crackdown is limited to specific areas of employment law, namely payment of the minimum wage and exploitation of workers by employment agencies and gang masters. The aim of this new post and initiative appears to be two-fold, to protect the weakest employees whose employment conditions are, "...vulnerable to competitive pressures", but also to ensure, "...law-abiding firms are not

undercut by the non-compliant” (Metcalf, 2017: 3; 4). The connection to market pressures is clear, they have seemingly led to non-compliance with employment laws but compliance is also required to ensure a fair competitive environment for compliant businesses. That this position is only focused on specific (and arguably more market-related) employment protections suggests that other employment rights and entitlements are perceived by the (state) government to be of less value and importance.

#### 5.2.1.2 Statutory bodies - Australia

In Australia, the statutory office of the Fair Work Ombudsman (FWO) provides information and advice regarding employment issues and conducts mediation to assist in the resolution of employment disputes. However, it is also required to: “...monitor, inquire into, investigate and enforce compliance with relevant Commonwealth workplace laws” (FWO, 2016; no pagination). In addition, in its compliance and enforcement policy the FWO states that it: “...wants to promote a culture of compliance by equipping workers and businesses in Australia with the information and support they need” (FWO, 2016; no pagination). The role of the FWO in ensuring compliance with workplace / employment laws is also expressly referred to in the FWIS (FWO, 2017), and the vision of the FWO, published on its website, refers to, “... support[ing] Australian workplaces so they can be compliant, productive and inclusive...” (FWO, no date; no pagination). Ensuring compliance is one of the main roles of the FWO, which has the power to make inquiries and investigate allegations of non-compliance with workplace laws (FWO, 2016).

The investigations launched by the FWO may be significant, with Fair Work Inspectors empowered to inspect records and documents, enter workplaces and interview people. If the FWO finds that a breach of workplace laws has occurred it has the power to require an ‘enforcement outcome’, including issuing infringement and compliance notices and fines, entering into public enforceable undertakings whereby the offending party admits the breach agrees to cooperate, or prosecution. The role and focus of the FWO, in contrast to ACAS, is seen in descriptions of it as a viable alternative to unions in terms of provision of advice and support (Hardy, 2014; Howe, 2014). The FWO also appears to reach out to HR practitioners, which, as noted above, may be because Australian HR

practitioners can be held personally liable for breach of employment laws by the organisation. In a speech to AHRI members, the incumbent FWO recognised the tension and role conflict HR practitioners face, but simply stated, "...above all, you must explain the rules to your clients, make it clear when they are in danger of breaking them and not become involved in breaches of the law yourself" (James, 2016: 2), and recommended they, "...build a culture of compliance" (James, 2016:12).

### 5.2.2 Unions

Unions are recognised to be a potentially powerful field-level actor when it comes to compliance with and dissemination of information about the content of employment laws (Boxall and Purcell, 2016; Davidov, 2016). The rights and standing of trade unions also reflects on the national employment relations system, and how the state government has balanced 'voice' and 'equity' against the demands of efficiency. While the role of unions is not addressed in detail in the HRM literature in terms of compliance, the IR literature has explored how, for example, trade union representation was a significant factor in whether organisations complied with holiday entitlements (Goss and Adam-Smith, 2001). Non-compliance was associated with poorly unionised, low paid workplaces and was connected to the weak bargaining position of employees (Goss and Adam-Smith, 2001). These findings are echoed in the labour law literature, with Davidov (2016) arguing decline in union density and power has contributed to widespread employer evasion of and non-compliance with labour laws. In terms of union membership levels, as at December 2016 the number of UK private sector employees that are also members of a trade union was 2.6 million (compared to 3.6 million in the public sector), with the proportion of trade union members in the private sector falling to 13.4 percent (compared to 52.7 percent in the public sector) (DBEIS, 2017). Membership levels in Australia are even lower. As of August 2016, the proportion of Australian private sector employees who were also members of a trade union was 9 percent, compared to 38 percent in the public sector (Australian Bureau of Statistics, 2017).

While union membership levels are lower in Australia than the UK, this does not do justice to the presence and platform that unions enjoy in Australia. Unions have a

certain degree of power through their legal standing to sue organisations and enforce statutory rights (Hardy, 2014). The lobbying power of the trade unions in Australia is also noted to have led the government to link procurement with workplace standards, requiring all contractors and tenderers for government work to demonstrate compliance with certain workplace 'Principles' (Howe, 2014). The Australian Council of Trade Unions (ACTU) also ran a (successful) eight million dollar advertising campaign to raise awareness of and encourage challenge to the Work Choices legislation discussed above (O'Neill and Kuruppu, 2007). In response to Work Choices the ACTU organised workplace stoppages and protest marches across the country, which drew over 100,000 on one day in Melbourne alone (O'Neill and Kuruppu, 2007). After the legislation had come into force a national day of protest was held against changes to workplace rights and tens of thousands of people were reported to have attended rallies around the country (The Age, 2006). This level of interest and concern for workplace rights not only demonstrates a degree of union influence in Australia, but also arguably the level of engagement Australians have with both unions and workplace rights.

### 5.2.3 HR practitioner associations

The institutional literature highlights the importance of professions in maintaining, carrying and potentially disrupting institutions (Moorhead, 2015; Muzio et al, 2013). Muzio et al (2013) argue professions act both as cultural-cognitive and normative agents, by transmitting the principles used to frame issues and providing the norms, standards and benchmarks of expected behaviour. HR practitioner associations (the CIPD and AHRI) occupy the position between macro societal-level institutional logics and individual HR practitioners and the organisations they are employed by, and the message they convey may influence the practice of HRM. A systematic review of material on the CIPD and AHRI websites is beyond the scope of this thesis, however, it is helpful to give a broad indication of how each HR association presents and comments on employment law issues and the role that HR practitioners should play.

### 5.2.3.1 The UK: Chartered Institute of Personnel and Development (CIPD)

The potential role that may be played by the CIPD in influencing HR practice has been explored by Francis and Keegan (2006: 238), who argue that the CIPD shapes, "... normative HR discourses" and, consequently, individual HR practitioners' understanding and attitudes toward their role, practice and identity. The CIPD had promoted and framed the role of HR in terms of being a 'business partner' (Francis and Keegan, 2006), which emphasises alignment of HR with organisation's strategic objectives and contribution to business performance. As a result, Francis and Keegan (2006: 231) argue HR practitioners had become locked into, "...business speak", framing all HR practice and outcomes in this way and thus limiting how they understood and resolved tensions between business demands and employee needs. Turning an institutional logics perspective on this presentation, the logic of the market is arguably dominant in the notion of HR practitioners as 'strategic business partner', discussed in more detail in chapter 2. Also discussed above is how some of these aims may be in tension with employment law requirements (originating from the state) that seek to impose restrictions on managerial flexibility and autonomy when it comes to management of the workforce (see Boxall and Purcell, 2016). Accordingly, how HR practitioner associations present and discuss HR practitioner responsibilities - and whether a market logic or compliance goals are emphasised - has the potential to influence individual HR practitioners.

The CIPD website advertises a range of courses and CIPD qualifications regarding employment law and includes links to various articles primarily focused on transmitting the content of relevant laws (for example, S. Taylor, 2018). However, the content of employment law does not relate to the role that HR practitioners are expected to or should play in relation to that law. While there is little explicit direction regarding the approach HR practitioners should take, the 'spin' given to and discussion of particular laws arguably draws more heavily on a market logic. Some examples are covered in chapter 2, including references in material on the CIPD webpages and magazine that: too much time spent on employment law leads to a perception that the HRM function is slow and reactive (CIPD, 2013); HR practitioners should focus on finance and strategic management rather than employment law (Holley, 2015); HR practitioners should first



understand the organisation's approach to employment law risk and consider the likelihood of being sued before acting (Gibbons, 2010); and the general emphasis on the need for HR practitioners to be 'commercial' (Jeffery, 2019; Whitelock, 2016).

#### 5.2.3.2 Australia: Australian Human Resources Institute (AHRI)

The dominance of the business partner concept is not limited to the UK, with AHRI also defining what 'good HR' is through its HR certification programme, emphasising the need for HR practitioners to operate as business partners and have the right 'professional behaviours' (AHRI, no date-c; AHRI, no date-d). The AHRI website also advertises courses focused on legal requirements and contains information and details about specific aspects of employment related law. Similar to the CIPD profession map, the AHRI 'model of excellence' also makes no reference to the legal aspects of HRM practice (AHRI, no date-a).

However, the AHRI website also includes references to and coverage of cases where HR practitioners have been held personally liable for breach of workplace regulations; for example, Goonrey and Wescott (2018) emphasise the penalties HR practitioners may face if they do not take action to effectively challenge and report - both internally and externally - a breach of legislative requirements. The first article listed in a search of AHRI websites for the topic 'legislation' is simply titled: 'This is why you need to comply with workplace legislation' (Woodard, 2016). The AHRI website also contains a report on the speech delivered by the incumbent FWO to members of AHRI (Sheedy, 2016), quotes from which are included above, which focuses on the importance of HR practitioners as involved in compliance. While the topic of HR legal liability is likely to be of interest to HR practitioners in Australia, the reiteration of this message may also help reinforce a state engineered focus on compliance. The AHRI website also considers the interaction between HR and trade unions, asking whether decline in union influence and membership may increase pressure on HR to represent all stakeholders (Dorney, 2017).

#### 5.2.4 The media

The media may play an important role in the transmission of societal-level values (Khaire and Hall, 2016) to individuals, in both their personal and professional capacities. Khaire and Hall (2016) persuasively argue that media discourse surrounding a particular topic can translate and shape social norms. The media diffuses particular frames of reference, vocabularies and ways of perceiving particular phenomena, helping shape discourse around and beliefs and opinions (Khaire and Hall, 2016), which could include, for example, the appropriate organisational treatment of employees. In the IR literature, Budd and Bhave (2008) similarly argue that particular ideologies and frames of reference can be seen in how labour and employment practices are reported in the media. Whether the media is concerned to report organisational breaches of employment law and how any such coverage is presented may also be relevant to the level of attention and concern given to the associated risks by individual HR practitioners; for example Metcalf (2017) refers to the ‘watchdog’ role that can be played by the UK media in exposing poor employment practices.

Again, this thesis is not the place for an in-depth analysis of the level of media attention and nature of the coverage given to employment laws and their breach in the UK and Australia. However, it is worth highlighting the negative media coverage of AWAs (individual contracts, discussed above) in Australia. Various employers sought to legally offer employees new contracts following removal of the AWA no-disadvantage test under the Work Choices legislation. Spotlight, an Australian fabric/homewares store, unwittingly became infamous for offering an employee an AWA that removed penalty rates in return for a salary increase of two cents an hour (Hartcher, 2006). The resulting media attention and negative publicity reportedly led to Spotlight withdrawing the AWA and retaining the employee on their previous terms (Hartcher, 2006). Coverage in the mainstream press included a newspaper article titled: “... the monster is unleashed” (Hartcher, 2006; published in *The Sydney Morning Herald*). Hartcher (2006) expressly condemned the policy objectives that failed to balance concern for generating growth on the one hand with protection of employment conditions on the other. Looking at this article through the lens of institutional logics lens, this coverage arguably

prioritised employee interests and rights over the values and demands of the economy and a market logic, with the use of AWAs seen to infringe the values upheld.

### **5.3 Summary and concluding remarks**

This chapter has provided relevant contextual background regarding the outer levels (macro and meso) of the institutional environment in which HR practitioners in the UK and Australia operate. The relevant context includes the way employment regulation has historically developed in the two countries, including the relative importance accorded to voice and equity and how these are balanced against the demands of efficiency (Budd, 2004). While the UK and Australia are often presented in similar terms regarding the extent and strength of employment rights (Deakin et al, 2007; Harvey and Turnbull, 2017), this chapter has highlighted how the experience of these two countries may differ in this respect. As Mitchell et al (2010) argue, these assessments understate the ‘strength’ of protections offered by Australian collective bargaining rights. The comparative lack of labour market flexibility in Australia when compared to the UK is also highlighted in the WEF Global Competitiveness Report (Schwab, 2018). A further important difference in the legislation between the two countries is the potential, in Australia, for HR practitioners and senior management to be held personally liable for non-compliance with employment laws. The way in which the state government regulates the employment relationship and accords importance to compliance with employment laws arguably has consequences for the field-level actors present. This chapter has highlighted differences in the express role and intention of the main statutory bodies involved in employment rights in the two countries, the rights and standing of trade unions, and the apparent relevance of compliance to the respective HR practitioner associations. The background context provided in this chapter is necessary in order to better understand the findings presented in the next two chapters, as participants from each country referred to influences from these outer levels of the institutional environment during the interviews.

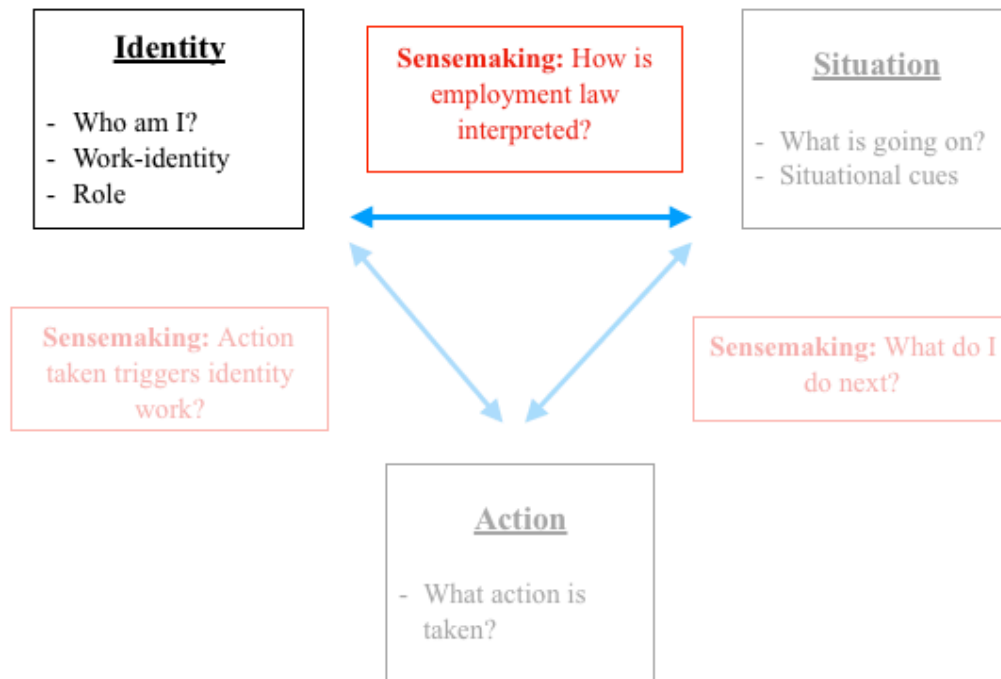
## **CHAPTER 6**

### **Findings: UK**

This chapter presents the findings from the UK using the conceptual framework presented in chapter 4, which was developed from Weber and Glynn's (2006) model of institutionalised typifications in sensemaking. The framework focuses on the interconnected concepts of identity, situation and action, and these findings are used to also examine the influence of different institutional logics. This chapter is divided into four main sections. Each section addresses the presence (and/or notable absence) of different institutional logics, identifying the logic(s) that seemingly shaped and influenced the way in which UK HR participants made sense of and applied employment laws. The first section presents findings regarding the work-identity indicated by the HR participants and how they interpreted employment laws. It then examines the situational cues participants perceived and experienced as relevant to how they made sense of situations covered by employment laws. The third section is concerned with the action reportedly taken by participants and the way they made sense of this action in terms of their work-identity. Finally, this chapter draws together the findings to illustrate the multi-level and inter-institutional influences on this group of participants from the UK.

## **6.1 Identity and sensemaking**

This section sets out findings that address the highlighted aspects of the conceptual framework (Figure 3), set out below:



**Source:** Adapted from Weber and Glynn (2006: 1645)

As discussed in chapter 3, the way in which and with whom HR practitioners identify has the potential to shape the role(s) they then adopt and how they perform their duties. In summary, the findings suggest a remarkably consistent work-identity amongst the UK HR participants, which appeared one-dimensional and closely connected to meeting the demands of the business. This group of HR participants all occupied senior positions, either the head of HR or, for some of the larger organisations, one step down. At this level the HR participants saw themselves as needing to be - and seen to be - aligned with the business, which can also be connected to HR career progression, and the language (vocabulary of practice and motive) used by the participants. The strength of identification with the organisation under a corporate-based logic appeared to eclipse the influence of other institutional logics. This one-dimensional work-identity can then

also be linked to the way these participants interpreted the requirements of employment law.

### 6.1.1 Identity

#### 6.1.1.1 Identifying with the business (and management)

This group of HR participants clearly saw themselves as central to the business, with the purpose of the HR function described as “*enabling*” (HR28; HR29) and “*facilitating*” (HR4) the efficient achievement of business objectives. The HR function was seen as interwoven with the business and a head of HR at an international law firm emphasised how this meant HR practitioners:

*“...are part of the business, you're not a business support person who sits there just preaching policy, you need to understand what we're trying to achieve as a firm. And if you're not interested in that, you're never going to be successful”* (HR29).

A close identification with the business appeared to have been reinforced through devolvement of employee related tasks from HR practitioners to managers. A HR director at a property services organisation described her experience of the changing focus of the HR function, arguing that:

*“...when you're employee centric you can't be strategic, can you?.. it's only with that shift to being very focused on.. helping managers that you can be strategic... I think the move to strategy and the move to support management have probably gone hand in hand”* (HR4).

Identification with the business appeared connected to meeting the needs and expectations of these managers. There was remarkable consistency amongst the participants in their emphasis on satisfying managers, whether line managers or senior management, such as the board or executive committee. No other group or body (whether employees, unions, regulators or the public) appeared to have such influence

over the UK HR participants, with perceptions regarding HR internal legitimacy and influence seemingly dependent on meeting management expectations. Reference was made to ensuring managers were confident and comfortable about contacting HR for support and advice (HR4; HR5; HR26). One participant referred to this as, “...*earning their stripes*” (HR5; law firm) in terms of the approach taken toward employment laws. Another referred to gaining management respect through how she:

*“...handled something, and you’ve got the outcome that they wanted, they, yeah, they trust you, as you move forward, to do the same for them, so it does get easier”* (HR26; accountants).

By achieving the outcomes that managers wanted HR practitioners appeared to receive internal approval and affirmation of their corporate-based and business focused identity. When it came to handling legal matters, reference was made to negative personal consequences for HR practitioners that did not adopt a corporate-based identity and who were: “...*too focused on the law*” (L24). This lawyer explained that she had seen HR practitioners struggle and lose their jobs quickly if they were:

*“...maybe getting a bit too focused, if I say too focused on the law, ‘what’s the law, what’s the legal obligation here’, rather than looking at the fact the MD has said, ‘I just need this person out of the organisation... and then we maybe get a call from the MD, or normally the FD, saying, ‘we need to exit this person [HR], how do we do it?’”* (L24).

The approach taken by management in this example would arguably delegitimise a compliance focused work-identity or approach.

HR participant identification with the business was also evident in the roles they described themselves as taking. All of the UK HR participants indicated that they advised the business (and managers) on matters involving employment laws, but did not make the final decision about what action would be taken. In order to provide this advice participants emphasised the need to know what employment laws require (HR4;

HR5; HR25; HR26; HR28). If managers were unwilling to follow HR advice some of the participants indicated that they would push-back (HR4; HR5; HR28). For example, when talking about the performance management of employees a HR director claimed to have:

*“...pushed back, or at least ensured that a clear process is followed.. it might just be completely unfair on the individual from an employment law perspective and the answer just has to be no, unfortunately you need to go, you need a performance conversation... So yes, umpteen examples of needing to ensure the proper judgement is used and the individual is respected from a proper employment law perspective”* (HR28; manufacturing).

However, there are reasons to be circumspect about this statement. This participant also described his experience of dismissing employees without fair reason and not treating senior employees in accordance with the law. These discrepancies may reflect differences in the approach taken depending on the situational cues; see also section 6.2 below. Alternatively, they may also indicate the provision of socially desirable responses, as this participant also emphasised his role in advising and helping the business achieve its goals even if these were incompatible with employment laws. He explained:

*“The business needs to make decisions, restructuring is a fact of life, we do need to be prepared to take some risk for the benefit of the organisation. We need to balance that with rigorous process and understanding- at least understanding, of employment law”* (HR28; manufacturing; emphasis added).

The correction this participant made is telling. HR practitioners and the business need to ‘understand’ the requirements of employment laws, but that does not necessarily mean they will then be followed. Other participants indicated a similar approach, for example, a HR manager at an accountants referred to dismissal of a senior employee with twenty years service. Her approach was to work out: “...*what, you know, we need to do and this*



*is the way that we'll manage to get around what we need to do for the benefit of the business*" (HR26; emphasis added).

The blending of a business-first, corporate-based logic with legal requirements was also expressed by some participants as a paradox, of not wanting to break the law but at the same time not wanting to be bound by it. The HR manager at the accountants described her role as:

*"...to say, you know, this is what you can and can't do in terms of the boundaries of the law, but obviously I need to be aware of what we need to do as a business and to find a way round that but without breaking the law"* (HR26).

This was achieved, in part, by creative interpretation of what the law requires discussed further below.

Participants also emphasised the need for HR to prioritise business goals by distancing themselves from seemingly incompatible HR roles. A couple of participants (HR29; L1) saw the role of HR in facilitating and enabling the business as incompatible with a 'police' type role. A head of HR at an international law firm emphasised her view that HR practitioners should focus on supporting management (and senior management):

*"...it's not about being the police, it's not about enforcing rules, it's about enabling managers to do the best they can for their people"* (HR29).

Negative terminology was also used to describe those that took a compliance focused approach to employment laws, with a lawyer referring to them as, *"...slaves to the procedure, slaves to compliance"* (L1; emphasis added); he also added that such clients were few and far between. The head of HR quoted above also connected compliance with slavery. When talking about the role and approach she has taken in relation to employment laws she emphasised the importance of not: *"...being slaves to it. Without being slaves to the letter of the law"* (HR29; law firm).

#### 6.1.1.2 Identity and HR career trajectory

The findings set out above suggest that the work-identity and roles adopted by the HR participants were heavily influenced by the goals and demands of the organisation and expectations of senior management. In addition, the findings also suggest that prioritisation of what the business wanted in matters governed by employment laws was also connected to HR career progression (HR4; HR5; HR29; L1).

Promotion through the HR ranks reportedly involved a move away from a compliance focus to a closer connection and identification with the business under a corporate-based logic that prioritised organisational values and outcomes. A head of HR at an international law firm complained that junior HR practitioners: “...*can't operate without following the rules. They have to follow the letter of the law*” (HR29); by implication indicating she was more comfortable with not following the rules or letter of the law. Emphasising the need to meet the expectations of management, and the paradox of doing what the business wants without breaking the law, she considered the problem with junior HR practitioners:

*“...if we promote someone.. into the adviser space, where actually it's more about a dialogue and building relationships, there is a real step change for them to actually work out where they are allowed to use discretion, because they've never had to do it before. And that, more than anything else, that takes experience to get a sense of what is and isn't appropriate when you're starting to build a relationship with somebody and do something that works for the business but doesn't put HR at risk of doing something they shouldn't be doing. It's that step that takes, probably more than any other part in your career, takes longest to get your head around”* (HR29; law firm).

The idea that HR practitioners with experience and knowledge may then ‘avoid’ compliance was raised by a lawyer, who explained that some clients comply:

*“...because it’s the legal thing to do, and those with a little bit of knowledge do it and then understand where they can avoid compliance” (L1).*

The need for senior HR practitioners to demonstrate their identification with and alignment with the business can also be seen in the language considered suitable and necessary for communication with management. Making it clear that a straightforward compliance approach is unacceptable, a head of HR at a law firm (HR5) explained that, *“...it cannot just be, ‘the process says’, ‘the law says’. Absolutely not”*. She and others in the HR function need to:

*“...demonstrate that you are trying to be commercial about it as well, and not, like I say, going back to not just ‘the process says that we need to do that’, because that is the biggest turn off in the world, because nobody will do that” (HR5; law firm).*

Being ‘commercial about it’ appears linked to consideration of the financial benefits for the organisation. When asked to explain what he meant by ‘commercial’, one lawyer simply said *“profit”* (L1). Similarly, a head of HR referred to how the partners in her organisation:

*“...want you to care about what they care about, and they care about their clients and the market and being profitable. And you add the human element to that, but you still need to care what they care about” (HR29; law firm).*

These concerns and influences can be seen reflected in the language used by the participants, and the way they interpreted employment laws.

### 6.1.1.3 Identity and language

The section above highlights some of the language that UK participants indicated they could and could not use, and the way in which they described themselves and their role

also helps indicate how and with whom they identified. As discussed in chapter 3, this language can also provide a vocabulary of practice or motive, guiding attention to the values and goals of the connected logic. The accounts provided by the UK participants contained clear similarities in the language used. Consistent with findings regarding the one-dimensional nature of work-identity, participants described themselves and framed matters in terms of what was best for the business rather than in terms of obligation and legal requirement. The UK participants rarely, if at all, used the terms ‘compliance’, ‘legal requirement’ or ‘obligation’.

Given the apparent strength of a corporate-based logic in terms of UK HR practitioner work-identity, it is unsurprising that all UK participants emphasised the need to be ‘commercial’ in the approach taken to matters covered by employment laws. Participants either made use of this term directly, or if they did not use the term they still described themselves, the practice of HR and their approach to employment laws in what were recognisably commercial terms. Being ‘commercial’ appeared to be a euphemism for prioritisation of the business’ interests and goals over the requirements of legislation if and where they conflicted. Examples of use of this term can be seen throughout this chapter in relation to identity and career trajectory, how employment laws were interpreted, perceptions regarding senior management attitude to employment laws and the importance of compliance, and the use of settlement agreements. However, additional examples include:

*“So quite often people will take a perfectly sensible commercial decision and ignore the law” (L1);*

*“They dismiss knowing they are going to be sued, but because they have to take the commercial view that they need to sack now” (L2);*

*“...it’s about thinking, ‘yeah, it [internal policies, e.g. sickness, performance management, disciplinary] might say that, but lets have a, lets think about this from a commercial sense as well, in terms of what’s best for the business” (HR5; law firm);*

*“I suppose the juggling act sometimes is between this is what the law says and this is a commercial decision that we want to make” (HR25; consultancy); and*

*“...that’s what I mean about being commercial, understanding that actually the time and money you spend trying to do the right thing, if you’re not going to get to the place where you need to be, should you be doing that?” (HR5; law firm).*

These quotes emphasise how participants appeared to see ‘being commercial’ as opposed to taking a compliance approach. The strength of influence of a corporate-based logic could also be seen in what participants indicated they could not say to managers and senior management. A HR director explained she could not recommend a course of action to the Board, “...because it’s just the right thing to do” (HR4; property services). Similarly, a head of HR at a law firm referred to her dealings with partners and emphasised that, “...it cannot just be, ‘the process says, the law says’. Absolutely not” (HR5). Emphasising the position that HR practitioners are in when it comes to employment laws, a HR director stated: “You know, it’s, in the end it’s what the business wants” (HR28; manufacturing). This vocabulary of HR motives and practice and focus on ‘what the business wants’ can be connected to the way these participants interpreted employment laws, with the form of interpretation taken helping justify the goals and outcomes sought.

#### 6.1.1.4 Identities eclipsed?

The strength of identification with the business amongst the UK HR participants in this study may account for the apparent absence of other dimensions to their work-identity.

None of the participants made any reference to identification as a ‘professional’ HR practitioner in terms of this supporting a compliance approach, suggesting a disconnect between this potential sphere of influence and compliance. Interestingly, a head of HR at an international law firm (HR29) actively disassociated herself from the CIPD, perceiving it to promote a compliance approach that is not relevant or appropriate to

senior HR practitioners. She complained that junior HR practitioners at the firm had all completed their CIPD qualifications, but:

*“...what they seem to then approach HR with is this incredibly simplistic model of there being a right and wrong answer to everything, and you think that's just not how the world works! You can't.. yes, that's my opinion of the CIPD, it seems to be very, very black and white”* (HR29; law firm).

Combined with the findings above regarding HR career progression, this suggests the idea of what it means to be a senior HR practitioner is being determined by and within the business according to a corporate-based logic as opposed to an independent sense of what it could mean to be a ‘professional’. Indeed, the only reference made by a UK participant to being ‘professional’ was in the context of how employees should be treated when the proper processes and procedures are not followed:

*“...sometimes there might need to be some navigation, different processes and procedures that you need to go to get to the right point and having a sensible conversation about that, but nevertheless dealing with people in a professional and fair way”* (HR5; law firm; emphasis added).

The emphasis added to the quote above also highlights the vocabulary used, in terms of what is considered ‘right’ and ‘sensible’. These terms were used to describe and justify use of the ‘procedure’ the business wanted to follow, rather than the processes and procedures in place internally. They highlight whose perspective the HR participant approached the matter from. Departure from internal policies may be ‘right’ and ‘sensible’ for the business, but it is questionable whether it would be for the employee involved.

None of the UK participants appear to identify with the employees in the organisations where they worked to the extent they would prioritise their interests over those of the business. This lack of identification with the employees may be explained in the quote

set out above (p.134), as this HR director (HR4; property services) connected an increased focus on being strategic with a decreased focus on the employees.

### 6.1.2 Sensemaking: interpretation of employment laws

The sections above emphasise how the UK HR participants appeared to identify with their respective businesses in accordance with a corporate-based logic, but also how they advised management on the application of employment laws. Provision of this advice involved interpretation of those laws. Findings regarding the way HR participants interpreted employment laws are set out first, followed by findings regarding the way lawyers were used to help with this process of interpretation.

#### 6.1.2.1 Interpretation: HR

Where participants referred to the nature of UK employment legislation it was to highlight how they are not ‘black and white’, and how HR practitioners need to be comfortable with working in the ‘grey areas’ (HR26; HR28; HR29). A head of HR explained that senior HR practitioners need to be:

*“...able to adapt to the grey areas, and we say it quite a lot, myself and the managers I work with, our life is involved around, we operate in the grey areas pretty much most of the time. You know, rarely is anything black and white” (HR29; law firm).*

Reference to operating in the ‘grey areas’ indicates that a process of interpretation is taking place, and whose interests are prioritised in that process provide some insight into which institutional logics influenced the approach taken. That the participants in this study generally framed matters involving employment laws in commercial and pragmatic terms rather than in terms of legal obligation and compliance suggest that a corporate-based logic is of significant influence. This influence is particularly evident in a statement made by a head of HR at an international law firm, who explained HR has to:

*“...follow the employment law guidelines that have been set out for organisations in the UK as best we can.. without, I’m glad this is anonymous! Without being slaves to it” (HR29; emphasis added).*

Describing laws as “*guidelines*” positions them as something that is optional. This approach to employment laws and prioritisation of what the business wants may also lay behind the following statement by a head of HR at a consultancy firm:

*“...wherever I work as an HR person it’s part of my job to advise the company. I suppose the juggling act sometimes is between this is what the law says and this is a commercial decision that we want to make.. but I don’t, I don’t see that as a conflict situation, I think that’s just sort of taking a range of factors into account and then, you know, trying to get to your end solution as quickly as you can” (HR25).*

The influence of a corporate-based logic can also be seen in the paradox referred to above, of wanting to avoid the requirements of employment laws without having to actively choose to not comply. Taking this approach requires a particular type of interpretation and manipulation of the law, and it also enables the HR practitioner to present itself and the organisation in (relatively) socially desirable ways; for example, a head of HR explained:

*“...it’s about making sure that we are compliant with the law, but actually bend that in a way that suits the business as well, and sometimes that might not always match up... I appreciate and understand that we absolutely have to reach this end goal [as determined by the business].. Sometimes we might have to tip the balance so the business wins, and that’s just the way it works” (HR5; law firm).*

The ability to take the law and creatively implement in ways that suit the business was variously described as, “...a bit of an art” (HR29; law firm) and, “...a bit of a black art” (HR28; manufacturing). The focus appeared to be on moulding the law to the business’ demands. However, (only) one participant (HR4; property services) also



indicated how she would creatively interpret the benefits and potential consequences associated with different employment laws in an attempt to influence a compliance approach. She explained how she has to translate her advice on legal matters when presenting it to the board of directors:

*“...you have to do it in tables and graphs and numbers and money because that’s how the Board think. You can’t say to them we’re going to do it because it’s just the right thing to do. A lot of HR, a lot of my team are like that. Um, so they’ll use those words and then I go away and put the numbers in because they just don’t think in the way that accountants think”* (HR4; property services).

In order to get the attention of the board and ensure compliance was taken seriously, this participant explained how she had to effectively ‘sell’ the need to comply and use the correct terminology. She provided the example of diversity, explaining that the board may understand the benefits of having a diverse workforce but it does not see how diversity impacts the ‘bottom line’. As a result she has to, “...*get creative*” (HR4) to prove how diversity can bring financial benefits. Emphasising the dominance of corporate (and market) based goals over the approach HR practitioners can take toward employment laws, she also described having to overstate the financial consequences of failure to pay the minimum wage:

*“I keep talking these sc-ary numbers. So for us if we get it wrong it’s worth about thirty six million quid and I purposely calculated that in a really big number kind of way to keep saying ‘doing nothing is not an option’... So I do signpost quite scary, I purposely do it and make it sound bigger and more problematic than it is”* (HR4; property services).

This HR director was the only participant to indicate falsifying the penalties that could result from non-compliance with employment laws; other participants indicated that the business’ goals may be prioritised instead. That she felt the need to do this suggests the extent to which the approach of the UK participants in this study was dominated by a corporate-based logic, as this was the only way to get the attention of the board. It also

highlights the arguable ‘weakness’ of the state-determined consequences for non-compliance.

#### 6.1.2.2 Interpretation: legal advice

The HR participants in this study did not always interpret employment laws in isolation and referred to taking legal advice on what a particular law requires and/or how to apply it in a particular situation (HR4; HR5; HR25; HR26; HR27; HR28; HR29). Participants referred to receiving a range of different types of legal advice from strict obligatory interpretations to more flexible interpretations of the law focused on achieving the outcome desired by the organisation.

Where HR participants had taken legal advice and where that advice was at the strict interpretation and compliance end of the advice spectrum, they were universally disappointed with it (HR26; HR28; HR29). That disappointment seemingly arose from the advice not drawing on and consequently being incompatible with corporate-based goals and demands. A head of HR at a law firm referred to advice from:

*“...employment lawyers that you just think, that’s not practical, that’s far too risk averse, it’s not going to achieve what we need to achieve” (HR29).*

Similarly, a HR director referred to compliance-focused legal advice as, *“...a little bit unrealistic”* and, *“...just incredibly blunt and therefore doesn’t always have perfect utility”* (HR28; manufacturing). To illustrate how such advice may be problematic, a head of HR at an international law firm (HR29) described a situation where an employee had sought disclosure of all relevant documents regarding a potential claim. These documents included: *“...an extremely unprofessional chain of emails saying things about the employee that you would never want to have in writing!”* (HR29). She received conflicting advice from two internal employment lawyers:

*“I had one employment lawyer saying you must disclose everything, you must print out all of those incredibly inflammatory emails and send them.*

*I had another employment lawyer internally saying, no, don't send them. It doesn't change the reality of this situation and all you're going to do is offend somebody unnecessarily... Needless to say, I didn't include those emails!"* (HR29; law firm).

Later in the interview this participant described the lawyer who recommended disclosure of the emails as, "...*legally correct. Course they were..*" (HR29), but the outcome was one that made sense to and was in the interests of the organisation. In distinguishing herself from a 'legally correct' approach, which the employee concerned may have considered the best outcome, she saw and approached this matter through the lens of a corporate-based logic.

Another participant also referred to similar problems with advice from ACAS (HR26; accountants). Describing her experiences with ACAS, and how they do not help resolve the paradox of complying without complying, a HR manager explained that she does not:

*"...find them particularly help- well, it's not that they're not helpful, they tell you the law, but they're not commercial in.. well, you know, the way they think things through. They're [ACAS] very black and white, and.. they will just say, 'well the law says you can't do this'. I'm like, 'yeah, I know, but can you suggest a way that we might resolve the situation without breaking the law?'. And I find them really difficult to- well they can't come up with any good ideas in that situation"* (HR26; accountants).

While it was beyond the scope of this study to explore the nature of the relationship between HR practitioners and their legal advisers the UK findings suggest that participants would 'advice shop'. Participants sought the advice that best suited their identity and the role(s) played, blurring the lines between whether it is lawyers who suggest a game-playing approach to compliance or whether HR practitioners (and senior management) expect or demand this type of guidance and interpretation.

In relation to interpretation of laws by the lawyer participants in the UK, a corporate-based logic also appeared to dictate the approach taken. If compliance was the focus, then it may be expected that attention would be given to meeting legal requirements. Any ambiguity in the law may then be interpreted and framed in terms of satisfying the ‘spirit’ of the law concerned, however, this approach was not evident. In relation to unfair dismissal laws, a lawyer explained:

*“...it’s not like compliance as in have I got the right wiring in my office, it’s compliance in the sense of.. have I actually actively not complied with a legal requirement? It depends how you frame what a legal requirement is in the dismissal context” (L2; emphasis added).*

Another lawyer pointed out that this type of approach to interpretation was necessary to meet, “...*commercial pressures*” (L1), clearly indicating the heavy influence of a corporate (and market) based logic. Meeting the needs of the business - not the requirements of legislation - appears paramount and taken for granted. The norms of business seemed to take priority over legal institutions. Similar to the HR practitioner quoted above, who explained ensuring the business “wins” is, “*just the way it works*” (HR5; law firm), this lawyer described:

*“...the realities of running a business, it’s not that they don’t like women, but that they don’t want to bother with maternity leave” (L1; emphasis added).*

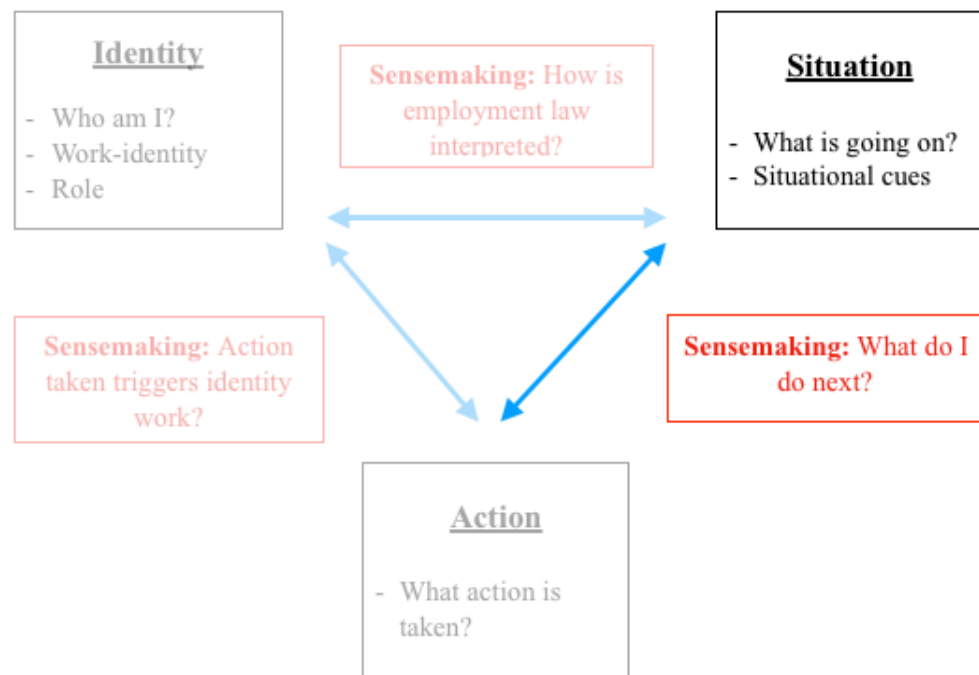
These ‘realities’ and the prioritisation of business goals and demands appeared to be accepted and arguably supported by the wider institutional environment. A lawyer participant emphasised how both HR practitioners and legal advisers need to be proactive, because:

*“...you have that inherent tension which employment lawyers face as much as HR practitioners, is that if you are perceived as ‘no you can’t do that’, and everything gets the answer no, that’s not necessarily a way to*

*build a productive, commercial, pragmatic business relationship internally or externally” (L2).*

## **6.2 Situation and sensemaking**

This section sets out findings regarding the highlighted aspects of the conceptual framework (Figure 3), set out below:



**Source:** Adapted from Weber and Glynn (2006: 1645)

If the work-identity of the UK HR participants in this study was predominantly influenced by a corporate-based logic, and the way in which employment laws were interpreted was to enable and facilitate the business rather than hamper its operations, then the approach taken toward employment laws by HR practitioners may be conceived of as potentially heterogenous, depending on what the business requires, not homogenous. The findings support this view, with participants indicating they would take into account specific situational cues that primed and led to determination of what norm to follow and how to act. These cues varied case by case and may explain the inconsistent and contradictory accounts given by participants regarding their approach and action taken.

The situational cues included factors related to the organisation, the employee involved, the consequences that may flow from non-compliance, and a perception that the public and media were not particularly interested in non-compliance.

#### 6.2.1 Situational cue: the organisation

As indicated above, the organisation and senior management appeared to exert a strong influence over the approach taken by the HR participants in the UK. However, the findings suggest the tensions and challenges of managing legal requirements and organisational expectations may be experienced differently, depending on the organisation. A lawyer explained:

*“So HR wanting to go down a process, at what stage do they have that force, to force the business into following procedure. When, who has more power, the business manager who is making profit or the HR person who is seen as a cost? And that balance depends on the business”*  
(L1).

The following aspects of the organisation were revealed as relevant to how HR practitioners approached employment laws: senior management attitude toward HR and the importance of compliance; unionisation; industry sector; and whether the organisation was insured against the costs of defending claims for breach of employment laws.

##### 6.2.1.1 Senior management attitude

As indicated above, in the experience of the participants in this study, HR practitioners generally advised the organisation on the approach that should be taken toward matters governed by employment laws and did not make the final decision. Some of the lawyer participants referred to HR practitioners sitting beneath the main or executive boards, which meant they may be pitted against and unable to influence those reportedly focused on financial outcomes. A lawyer explained that if the HR function is not

perceived to be as important or consequently as powerful as sales, “...*you’re not going to get compliance in situations where the commercial pressures are stronger*” (L1). The commercial needs and reality of the business were described as taking priority over straightforward compliance, illustrated by the experience of a HR director who explained she had to, “...*do a business case for everything*” (HR4; property services). Another lawyer also pointed out:

*“I would say that money talks, doesn’t it... no matter how competent the HR professional is or how loud a voice they have within the organisation, at the end of the day, you know, the business is more important. They are the ones generating the money, and in my experience it is usually them calling the shots”* (L3).

Accordingly, the attitude of senior management toward the HR function and the importance of compliance appeared to dictate the degree to which HR practitioners could support a compliance approach. HR participants also indicated problems in getting managers to follow the necessary procedures (HR26; HR29). A HR director at an international law firm described the response of partners to her advice that employees need to be performance managed: “...*they’re like, ‘no, no, too expensive, waste of time, waste of money, I’m not doing it’*” (HR29). A head of HR at a consultancy (HR25) also described working in different organisations and how the attitude of senior management toward legal matters would vary, impacting the approach she could take. (She added that her current employer was eager to foster a two-way honest, open and fair culture). While this study did not involve interviews with senior management, participants indicated that it was easier to deliver compliance-focused advice if he/she was perceived to be a credible and ‘trusted adviser’ (HR5; L24). However, while the degree of influence of the HR function may increase it is unclear what impact this would actually have on promotion of a compliance focus. As discussed above, gaining that influence and, “...*earning your stripes*” (HR5) may result from obtaining the outcome the business or manager wanted, which was not necessarily the same as that required by law.

With the devolvement of employee facing duties from HR to managers, the approach taken by the organisation toward the need to ensure its managers have the necessary skills to manage staff in accordance with legal requirements also becomes important. Some participants referred to HR only getting involved after a manager has done or said something that is unhelpful from a legal compliance point of view (HR4; HR29; L3). In turn, this was seen to limit the range of action available to them, particularly where the focus was on maintenance or improvement of relationships between management and the HR function (HR4). The approach taken and importance placed by each organisation on management skills may differ as it requires a commitment in terms of cost and time to ensure that managers are appropriately trained. A HR manager (HR26; accountants) explained how her organisation had traditionally focused on technical ability and had not trained its managers to manage people. The organisation was currently in the process of providing this training to enable managers to handle employee issues.

A small number of participants also referred to working in or with organisations that had adopted structures or practices that appeared to help enable a compliance approach (HR27; HR28; L1). Two participants referred to the transfer of compliance and law-related responsibilities from HR practitioners to specialist employee relations (ER) staff (L1; HR28). The organisations where this had occurred were both large and, in one case, unionised (HR28; manufacturing). It is therefore difficult to establish what may have contributed to the perception that compliance was more effective when handled by this specialist staff and in these organisations. However, these findings may support an argument that there is a degree of incompatibility between the role undertaken by UK HR practitioners and a compliance-related function.

A single participant (HR27) also referred to working in a large, US-owned telecommunications organisation that had adopted very clear reporting and governance structures. She described how those in the HR department could report directly to the global HR vice president rather than the locally based general manager, which she perceived as enabling them to: “...*say some of the things which are unspeakable, or people don't want to hear, or are unpalatable*” (HR27). This participant's experience may reflect influences from the US, the organisation's home country. It may also reflect the potential advantage of working in a multi-national organisation, as aspects of



different institutional environments may be combined to produce an approach that would be more difficult in a single country; all areas for future study.

#### 6.2.1.2 Unionisation

While a number of the HR participants in this study had experience of working with unions (HR4; HR27; HR28; HR29), only one currently worked in a unionised organisation (HR28; manufacturing). However, he had no direct contact with unions as he primarily dealt with senior, non-unionised staff.

In terms of the influence unions could have on the role and approach of HR practitioners, participants referred to the need to more clearly know and understand the law, and to take a more consistent approach in how it was applied to employees. The presence of a union was seen to result in differences in the way that legal matters were approached, as a lawyer explained:

*“Generally if you had employees with union representatives you were more compliant because otherwise you were picked up more often” (L1).*

Another lawyer added that HR practitioners in unionised organisations have to be on top of the law, *“...because a union will soon point out if they think you’ve got it wrong” (L24)*. Union presence also meant that HR practitioners may be less able to ignore or obfuscate the requirements of employment laws and developments in case-law. Employees with union representation were seen as more likely to know and demand their legal rights and entitlements (L1; L24). A lawyer explained that:

*“...in non-unionised environments [HR practitioners] are less aware and in some cases not aware at all [about changes to employment law]... and in many cases they have literally ignored it because their staff haven’t picked it up. Now in a unionised environment that is not possible” (L24).*

Two of the participants provided interesting examples of how this could work in practice. The lawyer quoted above (L24) referred to a recent legal case that meant

employers had to include overtime payments in holiday pay. She referred to HR practitioners and managers from unionised organisations who had read the case, done research and wanted advice about how unions were likely to respond. In contrast, while a head of HR at a non-unionised law firm was aware of this case, her concern related to, “...*bloody hell, how far are we going have to go back, what’s this going to cost us?*” (HR5). She described how the HR team managed to secure the agreement of all affected employees to accept, “...*not a buy out payment*”, which would reflect what they would be entitled to as a result of the case, “...*but a payment in recognition that, actually, that’s something that should have been happening but it wasn’t*” (HR5). In a way that may not have been possible in a unionised organisation, this participant referred to how the HR function constructed and created a sense of what the case meant for the employees, in terms that were favourable to the business. She described how the payment was offered via the employee forum and was presented as:

*“...’you know the finding could be that we need to make a payment but actually you’re going to have to wait however many years, but let’s try and be sensible about it’, and it was absolutely fine. And once again its about how you pitch that.”* (HR5; law firm; emphasis added).

Union presence was also referred to as influencing a more consistent approach in the application and implementation of employment laws (HR4; HR28). It is worth noting that consistency was generally disliked, and a HR director complained that, “... *consistent says you treat everybody exactly the same*” (HR4; property services) and, “... *process becomes too important*” (HR4). If HR practitioners have to be consistent it means that there is less potential to “*tweak*” the law so that it, “...*would work for us*” (HR5; law firm). ‘Tweaking’ the law and internal policies and procedures was referred to in positive terms and reportedly used to help employees who had personal issues (HR4; HR29). However, it also enabled protection of misbehaving employees because of their perceived value to the organisation; see below for findings regarding the different treatment of employees.

### 6.2.1.3 Industry sector

While this study was deliberately designed to explore the experiences of HR practitioners across a range of industries, the findings suggest differences in the experience and approach of HR practitioners depending on industry sector.

One of the lawyer participants had worked with clients in the pharmaceutical and banking industries, which he perceived as having relatively strong compliance cultures connected to the nature of the work undertaken. He perceived organisations in these industries as more structured and compliance based, and described their HR practitioners as, “*regulated specialists*” (L1). In contrast, HR practitioners in industries more closely focused on financial and profit motives and objectives may be expected to and take a more ‘business first’ approach to compliance. The lawyer quoted above explained:

*“...those that are in an inherently compliance based industry, I think, are more aware, see it as part of their obligation.. they are reporting regularly, they are complying etc. Sales operations will be driven by sales, first and foremost... and you see HR being designated against sales”* (L1).

Similarly, another lawyer referred to clients that do not appear to care about the law or their employees’ feelings. When asked what kind of clients these are he replied: “*money brokers!*” (L2).

The differences between industries may be explained in a number of ways. As referred to above, unionisation may play a part with some industries more heavily unionised than others. In organisations that are heavily regulated, such as pharmaceuticals and banking, senior management may already appreciate and be convinced of the need to comply with laws. It may also be that the industries in which compliance was perceived to be taken seriously generate large profits, particularly when compared to labour and compliance-related costs. Accordingly, it may be easier for HR practitioners in these organisations to pursue a compliance focused approach than it is for those in

organisations where the profit margin is tighter. Examination of the differences between industry sectors and the reasons for those differences may be the subject of future research.

#### 6.2.1.4 Insurers

Relevant to consideration of how a compliance approach by HR practitioners may be encouraged, one HR participant (HR27) referred to the influence of an insurer over the approach taken at a former employer (it should be noted this was a charitable organisation, not in the private sector). This organisation was insured against the costs of employment related litigation. While the insurer was not directly concerned with the approach taken by HR practitioners and the organisation toward employment laws, it reportedly had an indirect influence through provision of a financial incentive to comply. The insurer would only cover the legal costs if the probability of successfully defending the claim was greater than fifty percent, meaning a compliance approach became more important. The participant explained:

*“...clearly you had to be able to evidence that you had done all the right stuff up until that point..” (HR27).*

The ‘right stuff’ being action that an employment tribunal would consider compliant with the relevant legislation.

#### 6.2.2 Situational cue: the employee

The UK findings suggest that as the situational cues present differed, HR practitioners interpreted and approached employment laws in different ways. The findings suggest these cues were also connected to the employee(s) involved, in particular their: presumed level of knowledge about legal rights and entitlements; seniority; and perceived value to the organisation.

### 6.2.2.1 Presumed (lack of) employee knowledge

The majority of participants emphasised the importance of treating employees with fairness, dignity and respect, which sounds positive. However, a couple of UK participants indicated that employees may not know what their rights are, and if they believe they have received fair treatment they are less likely to seek legal advice to find out what their rights and entitlements actually were. A HR director made this point in stark terms:

*“If you treat people with dignity and respect such that they never go and get advice you can do what you want. Um, you know, so we’ve got one line manager who might dismiss somebody and that person might say ‘oh thanks for that, you know you’ve really treated me well through this process’. That person’s never going to go and talk to a solicitor to find out what we’ve done wrong. So you treat people with dignity and respect and you can get away with murder”* (HR4; property services).

Similarly, a head of HR at an international law firm explained that you do not have to, *“...jump through every [legal] hoop”* if you treat, *“...people with a bit of human dignity”* (HR29).

There were also examples of HR practitioners taking advantage of a lack of knowledge amongst (unrepresented) employees to achieve outcomes considered more beneficial for the business. An example of this is given above in section 6.2.1.2, where a head of HR described ‘pitching’ the business’ interpretation of a recent case to the internal employee forum (HR5; law firm). As a result, she described how the the forum helped secure the agreement of employees to payments in settlement of any claims arising from that case. Another head of HR at a different law firm also worked with an internal employee forum, describing the elected representatives as, *“I guess similar to a union, but not quite”* (HR29). Emphasising the focus on achieving outcomes that make sense to the business, she added:

*“...that type of body can add, if they approach it in a sensible way, they can add an incredibly important different level to firm wide decisions”* (HR29; emphasis added).

Accordingly, this employee forum appeared acceptable provided it concurred with the organisation’s view of what was ‘sensible’ and helped contribute to the business’ objectives. These findings raise questions about the level of legal knowledge amongst the employee representatives, and the extent to which they are able to influence and ensure prioritisation of a compliance approach by the organisation. The only field-level actors referred to and perceived by participants to enhance employee knowledge of their rights were unions, but the extent of union involvement amongst these organisations was limited (see section 6.2.1.2 above). These findings point to an apparent weakness in the UK institutional environment from a compliance perspective, but arguably a strength in terms of promotion of the goals of a corporate-based logic.

#### 6.2.2.2 Seniority of the employee

The findings also suggest that a different approach may be taken to different employees depending on the position of the employee in the organisation.

As mentioned, all the HR participants occupied senior roles and consequently tended to be involved with only senior-level employees. None of these senior-level employees were reportedly unionised (even if other groups of employees were unionised, such as in the manufacturing organisation (HR28)), and the findings suggest the approach taken toward them could be inconsistent and was heavily influenced by a corporate-based logic. A HR director at a manufacturing company explained:

*“...the more senior you get the more you, as an individual, you need to accept that you know you’re subject to a different set of rules potentially, it just comes with the territory really. But it’s still not legal!”* (HR28).

One reason for senior employees being subject to a different set of rules appeared to be the power and influence of those responsible for directly managing them. With

devolution of responsibility for such management from the HR function to managers, HR practitioners appeared to be at the mercy of those managers when it came to ensuring the necessary procedures were followed. The findings suggest it could then be difficult for the HR practitioner to enforce a compliance based approach. Indicating the tension between corporate and market influenced demands and the procedural requirements necessary to fairly performance manage employees, a head of HR at a law firm described how partners regularly complained about having to follow such procedures: “...they're like, 'no, no, too expensive, waste of time, waste of money, I'm not doing it'” (HR29). Similar concerns were raised by another HR manager, who appeared to actively prioritise the importance of managers making money as opposed to managing staff:

*“...you have to balance up between what's the right thing to do.. against actually do we want people to be spending a lot of time which they could otherwise be doing chargeable work on micro-managing somebody who we really don't think is going to get there... whilst we want to try and be fair to everybody, we need to be sensible because we are wasting a lot of people's chargeable time if we have to go down a process that we kind of know what the outcome will be, yeah” (HR26; accountants).*

Again, what was ‘sensible’ to this participant was what the business and managers wanted. In contrast, the findings suggest that these commercial pressures may be reduced where more junior employees are concerned, with the result that a compliance approach may then be more feasible. This can be seen in the perceived differences in approach by junior HR practitioners; see also section 6.1.1.2 above for findings regarding identity and career trajectory. Examples included: the HR director from a manufacturing organisation who indicated that procedural issues at unionised levels were handled well (HR28); a HR director at a property services organisation who described how her HR team have standard letters and efficiently deal with the similar issues that arise amongst the bulk of the 6,000 strong workforce (HR4); and a head of HR at an international law firm who said the shared services team:

*“...can't operate without following the rules. They have to follow the letter of the law, that's how a shared services team works, they have to implement processes and policies” (HR29).*

These findings suggest that different groups of employees may be treated differently when it comes to employment laws. The findings also suggest this may be explained by the close identification of these UK-based senior HR participants with the business, and apparent difficulty in being able to advocate for or enforce a compliance approach by senior management.

### 6.2.2.3 Perceived value to the organisation

The influence of a corporate-based logic over the approach taken by the UK HR participants was also evident in the reportedly inconsistent treatment of employees depending on their perceived value to the organisation. As discussed in section 6.2.1.2 (unionisation), a requirement to be consistent was disparagingly associated with union influence and seen to hamper the flexibility needed to enable and facilitate the interests of the business. A lawyer stated that inconsistency in treatment based on the financial contribution of the employee happens, *“all the time”* (L1). A HR director also explained that if a poor performer does something wrong that can be an excuse to get them out, whereas good performers would be sat down and coached. A reason for this difference came down to their financial contribution: *“...because it takes a brave line manager to dismiss their top performer in terms of sales result”* (HR4; property services). This type of scenario was also described by another HR director, who also suggested there may be a gender bias in the approach taken:

*“...there can be a tendency to focus on the individual who actually performs really, really well and is a great guy, typically it's a guy and they're going places, they're high potential, but they've just screwed up. Everybody screws up. As opposed to this other individual... this is our opportunity, they're gone. There's a bit of that sort of blue eyed boy thing”* (HR28; manufacturing).



Accordingly, an inconsistent approach to the application of employment laws appeared to allow for prioritisation of the business' interests and heterogeneity in the approach taken.

### 6.2.3 Situational cue: consequences for non-compliance

The findings above suggest the role and focus of UK HR practitioners was on provision of support to management and achievement of the business' objectives. Consequently, it is unsurprising that amongst this group of UK participants the emphasis was not on whether the proposed action was compliant with employment laws, but, as one lawyer explained, whether: “*HR [can] avoid the costs of non-compliance*” (L1; emphasis added). The demands and values of a corporate-based logic appeared to be strengthened by a lack or acceptability of the consequences for non-compliance in the UK context. The following sections present findings regarding the influence (or lack thereof) of the financial consequences of a proposed course of action, and the associated adoption of a risk-management approach to assessment of the situational cues present.

#### 6.2.3.1 Financial consequences

When faced with a matter covered by employment laws the findings suggest that the UK HR participants in this study would engage in a process of considering what is best for the business under a corporate-based logic. This process involved taking into account the financial consequences of non-compliance with different employment laws. Depending on the circumstances the appropriate approach may involve compliance, but that did not appear to be the default position.

The findings set out above regarding HR practitioner work-identity and career trajectory refer to the potential differences in the approach taken to employment laws by senior and junior HR practitioners. The participants that referred to these differences came from large organisations (the smallest of which had over 3,000 employees). In these organisations junior HR practitioners were perceived as handling transactional matters, following standardised procedures and the letter of the law for the bulk of the workforce (HR4; HR28; HR29). A HR director explained that the reason for this was because of

the costs and time that would be involved if compliance did not occur (HR4; property services). The workforce would be more litigious, the organisation would need staff to handle the claims and line managers would be distracted from their own work in order to handle, “...*that kind of noise*” (HR4). Accordingly, these findings may be interpreted as meaning compliance was motivated by costs concerns connected to the number of employees involved, rather than an inherent respect for following the law. This interpretation is further supported as each of these three participants also referred to situations where they had arguably been involved in non-compliance at the same organisation. One of these participants explained that if people are treated fairly they will never seek legal advice about their rights and entitlements (HR4; property services); another described the way senior staff were treated as “*not legal!*” (HR28; manufacturing); and the third referred to employment laws as guidelines and outlined how she was unable to get partners in the firm to performance manage legal staff (HR29; law firm).

Only one participant, a lawyer, referred to a UK employment law that contained such clear and significant financial consequences that compliance would 'make sense' to affected businesses. He described how the financial penalties for breach of statutory, collective redundancy consultation requirements can put: “...*a break on the business decisions to make sure that you jump through the right hoops*” (L2). (It should also be noted that breach of these consultation requirements can result in a criminal prosecution for which directors can be held personally liable (Trade Union and Labour Relations (Consolidation) Act 1992, s194)). This finding suggests that market-based incentives in terms of clear and substantial financial penalties for breach of employment laws may help influence a compliance approach. However, this was the only employment law referred to in this way by the UK participants.

#### 6.2.3.2 Risk-management approach

For other employment laws participants indicated that the costs that may result from non-compliance would be weighed against the risk of the employee making a claim, and the time that would be saved in, for example, not following a necessary procedure (HR4; HR26; HR27; L24). A HR director explained:

*“You need to think of it as a risk probability matrix, so um, before you put time and effort and resource into every tiny little thing you could possibly be getting wrong, you need to think about, well how much money will it cost us and is there a probability that’s ever going to be brought to the table, before you decide”* (HR4; property services).

Another HR director provided an example of how this may work, describing situations when she had been informed by management that an employee was no longer needed. In this scenario she would discuss the, “*trade-off*”, between risk, cost and time with the manager involved:

*“...if you want to circumvent a process you have to understand that that will speed it up, but the cost that you may end up paying will be significantly greater. Whereas if we do this by the book, in the right way, then yes it will take a bit longer but we will get a lower- so, so, where are you prepared to compromise? And you have that conversation up front, because actually then when you go into that process you both know, you and the manager, exactly where you want to get to and where the- where the compromise points are and how you manage it”* (HR27; charity).

Participants also indicated what may happen if the factors involved in this ‘trade-off’ changed, and how the balance may alter depending on the employee involved as discussed above. Lawyer participants referred to the system of employment tribunal fees that had been in place in the UK (see chapter 5; background context), and how this system had deterred low paid employees from making claims. As a result, the risks associated with non-compliance were reduced and a lawyer described her clients’ approach in these circumstances as, “*...more bullish*” (L24). She added that the advice she gave to clients had also changed, and she may recommend clients:

*“...take a risk on it, because they’ve [the employee] got to cough up and pay.. some of those claims would have been good claims”* (L24).

A HR manager also commented on how these fees had altered her assessment of risk:

*“...we might have been subconsciously a bit more willing to take a risk on things because we knew.. that, you know, I think it’s very unlikely that person might bring a claim because they would have to pay x amount of money” (HR26; accountants).*

The findings also suggest that perceptions of risk may vary depending on the level of sensitivity of the organisation to the issues involved, providing another reason why the approach taken by HR practitioners toward employment laws may be heterogenous. A head of HR at an international law firm referred to the approach taken to maternity leave: *“...under no circumstances does anybody get to flex our policy” (HR29)*. The reason for this was: *“...the risk is too high.. the risk of treating pregnant women differently is too big” (HR29)*. This participant’s perception of the risk involved may relate to the nature of two out of three claims made against the organisation and heard at an employment tribunal in the last ten years. These claims involved sex discrimination. However, for HR practitioners and organisations not exposed to such claims, taking a compliant approach to sex or maternity related discrimination laws may not hold such importance. A lawyer explained that:

*“...it is not unlawful to sack somebody who is pregnant, one just needs to have a fair reason or if you don’t have a fair reason for doing it you need to be able to pay” (L24).*

Framing situations and matters covered by employment laws in terms of risk appeared to concentrate attention on the business and its (financial) objectives, rather than seeing compliance as an end in itself.

#### 6.2.4 Situational cue: community expectations and the media

The HRM literature connects the goal of social legitimacy, in terms of societal expectations regarding how an organisation should operate, to a focus on compliance. However, the findings suggest that amongst the UK participants public opinion and

media interest played a relatively minor role in shaping the approach taken toward employment laws. The only participants who indicated that negative media coverage was a problem were a head of HR at a small consultancy (HR25), and a lawyer who described the concerns of a client in the media sector (L2). It is worth noting that none of the participants from larger organisations were particularly concerned about the risk of negative media coverage (HR4; HR28; HR29). A HR director explained:

*“...you know, the vast majority of employment cases, reporters don't turn up, it doesn't get reported on unless it's something horrendous, well, if its something horrendous you shouldn't be in that position... I don't think the public at large are that bothered about a little unfair dismissal case that sits in the Dundee Tribunal, for example”* (HR4; property services).

This quote highlights two issues; the first is related to perceptions that breach of different employment laws may have different consequences in terms of reputational damage; the second relates to how organisations can get out of, “*that position*” (HR4), by using a settlement agreement.

The HR director quoted above was not the only participant who perceived the public to have no interest in unfair dismissal cases. Findings regarding dismissal are set out in section 6.3.1.2 below, but a lawyer participant also stated: “*...you know, who cares about about a bog standard unfair dismissal claim?*” (L2). If the media was unlikely to be interested, HR practitioners could be more bullish in how they approached employees and claims. However, while discrimination cases were considered potentially more reputationally damaging than unfair dismissal (HR4; L2), this did not necessarily lead to a more compliance focused approach. A pro-active approach to the prevention of discrimination would involve provision of training to all employees about what constitutes discrimination and what behaviour is and is not permitted. Emphasising the focus on financial concerns rather than the law, a lawyer explained it can be hard to convince management of the benefits and need to pay for such training:

*“...not having done some training on an equal opportunities policy, well, it's, there's not so clear a causal link between failure to do something and*

*a specific quantifiable cash bill at a foreseeable point in time. Umm..” (L2).*

Notwithstanding differences in how the public may perceive non-compliance with different employment laws, non-compliance and/or a claim against the organisation could also be effectively covered up by making a payment to the (ex)employee through a settlement agreement. As one HR director put it:

*“...reputation sometimes comes at a price, you know, in terms of protecting your reputation. So there is, there is some pragmatism” (HR27; charity).*

She then added that settlement agreements may be used to make the, “...*right stuff happen*” (HR27) for the business. The role of the HR manager here again appears connected to risk management and protection of the organisation. Similarly, the head of HR at a consultancy who indicated negative media coverage could be an issue explained how she would:

*“...sort of read.. the signs and think.. maybe there’s something to be concerned about. Or you know, maybe this individual has certain features, characteristics, which whether they realise it or not could give them some leverage.. like the colour of their skin. Their gender. Sexual orientation” (HR25; consultancy).*

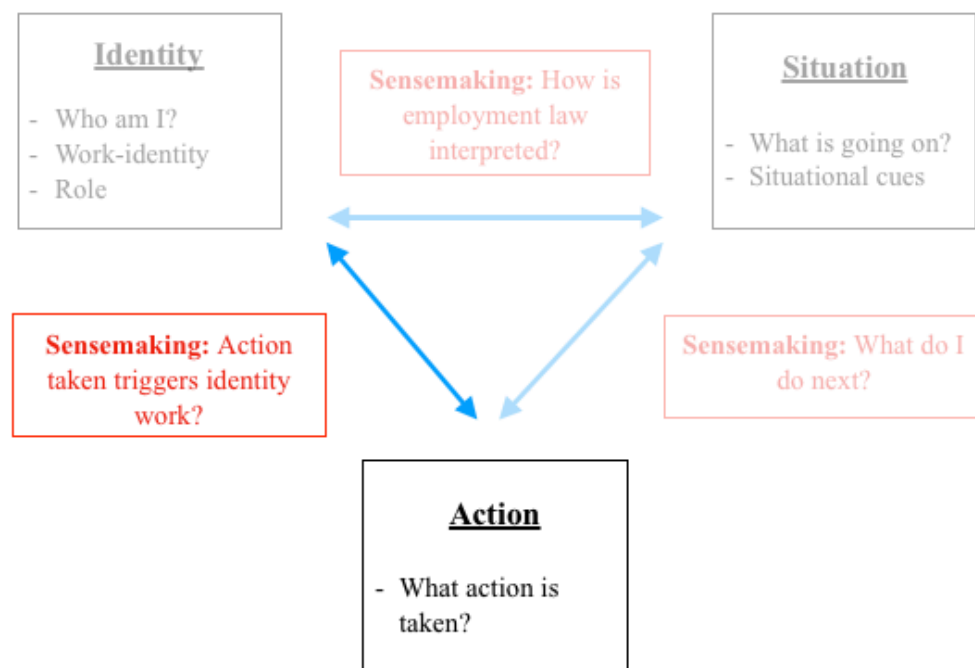
In these cases she would recommend that the organisation offers a settlement agreement.

It needs to be noted that not all claims that are settled would necessarily be successful; for example, a lawyer participant described how he had settled a claim against his client that he thought was, “*rubbish*” (L2). In his opinion the client paid £20,000 too much, but the client was willing to, “...*just throw anything at it.. commercially that was the right thing for them to do*” (L2). However, all of the UK participants in this study referred to using settlement agreements, whether in relation to current or potential

claims and whether those claims were perceived to be valid or disputed. In terms of the connection between social legitimacy and compliance, settlement agreements appeared to remove the need to comply in order to preserve social legitimacy.

### **6.3 Action and sensemaking**

This section examines the highlighted aspects of the conceptual framework (Figure 3) set out below, focusing on findings regarding the action reportedly taken by participants in the UK and how they made sense of it.



**Source:** Adapted from Weber and Glynn (2006: 1645)

#### **6.3.1 Action**

Due to the overlapping nature of the concepts in the above framework, many of the findings included above also relate to findings regarding action. This section summarises and expands upon those findings, examining the extent to which a compliance approach was indicated. It then looks at a specific example; the action taken in relation to performance management and dismissal. It also sets out findings regarding the apparently heavy use of settlement agreements by participants in this study.

The action reportedly taken highlights the importance of the broader and multi-level institutional context within which it occurs, but also the importance of the immediate situation in terms of triggering the form of action considered most appropriate in the circumstances. The participants indicated that a range of options were available to them, with the choice often determined by what the business wants under a corporate-based logic, rather than implementing what the law requires.

#### 6.3.1.1 Action: compliance?

The findings above emphasise the influence of corporate and market based logics focused on the goals and objectives of the business over the approach taken by the participants to employment laws. However, this did not appear to completely preclude compliance, and participants did refer to situations where employment laws were complied with. Examples are referred to elsewhere in this chapter, including where there were clear financial incentives to comply and in matters handled by more junior HR practitioners. In both of these examples the findings suggest compliance was motivated by concerns to avoid the costs of non-compliance, in line with the goals of a corporate-based logic.

None of the HR participants in this study indicated that they would prioritise compliance to the extent that they would leave their job, however, a small number indicated that they may attempt to influence a compliant approach in certain situations. One example includes the HR director who falsified the risks of non-compliance with minimum wage legislation to ensure non-compliance was not an option (HR4; discussed above in section 6.1.2.1). A head of HR at a consultancy also described how she had ensured an employee was paid overtime in accordance with company policy, despite being directed to deny him this entitlement because he already had flexible working arrangements (HR25). While she could see the commercial logic behind the director's wishes she reported complying with the policy. The reason for this appeared related to the clarity of the policy and its clear application to the employee. This head of HR was also the sole HR presence in an organisation with 350 employees and she dealt with all employees, not just the most senior. As a result, she may not have experienced the same type of socialisation that may occur in a larger organisation, and the acceptance of an



all-encompassing corporate-logic that appears to go with career progression in a larger HR function (see discussion above in section 6.1.1.2). She explained her view of the director's instruction:

*“So, of course, straight away I'm just reading this and going... So, employment law, we've got some principles of fairness and treatment here and actually we have some policies that say if you work overtime... And I do see that [the director's argument] because there's a common sense argument there as well, but I was like, 'umm, no, ok that's not how we're going to be managing this. It will be sorted out and he will be treated the same as other members of staff'”* (HR25; consultancy).

Other HR participants indicated that they may ensure action was compliant with legal requirements, but these were delivered as general statements rather than clear examples; such as the HR director quoted in section 6.1.1.1 who referred to, “*umpteenth examples*” of ensuring employees are, “*respected*” in terms of employment law (HR28; manufacturing). However, the accounts provided by these participants contained many inconsistencies and examples of where non-compliance had occurred. These discrepancies may be explained by different situations leading to different forms of action, and/or a concern by the participant to present a socially desirable account of themselves.

The findings also suggest that amongst this group of participants there may be a greater concern to act fairly, rather than to act compliantly. A HR director, quoted above in section 6.2.2.1, explained that treating employees ‘fairly’ was less likely to result in them seeking legal advice about their rights and entitlements. Also emphasising the business benefits of action that is fair-but-not-compliant, a lawyer indicated her perception that:

*“...the most successful HR leaders, directors.. tends to be those who themselves are fair, sometimes even firm but fair if you can use that, and that's not always about being legal. So some great workforces, really*

*positive, you know well motivated workforces aren't always the ones with the best or most legally compliant terms and conditions" (L24).*

The law is not complied with, but the business gets the outcome it wants and the employee feels fairly treated. This focus on the business' interests also appears consistent with findings regarding the one-dimensional work identity discussed above.

#### 6.3.1.2 Action: performance management and dismissal

A universal issue, raised by all UK participants without prompt, was non-compliance with the procedural requirements for a fair dismissal and/or necessary to fairly and properly performance manage employees. A lawyer simply stated:

*"...there has always been an approach by employers who are not 'complying', in the sense that they are not dismissing people in compliance with the law" (L2).*

The reason for this universal non-compliance can be connected to the entire multi-level institutional environment, in particular the nature of the law and penalties involved, the ease of using settlement agreements, and the extent to which organisations (and management) dictated the action taken.

In relation to unfair dismissal laws the legislation does not stipulate the procedural steps that must be followed. The resulting ambiguity leads to a need to interpret the legislation, and the findings set out above indicate how business interests may be prioritised when it comes to interoperation of employment laws. The influence of the organisation and management over the action taken was clear; HR practitioners may lack the power to challenge an instruction to dismiss and be pressured to not follow procedure. However, a lawyer laid the blame for non-compliance with unfair dismissal laws on HR practitioners:

*"HR have singly failed to show business managers the value of procedure. Every single company we deal with fails to performance*

*manage people properly. Almost 100%, it might be 98%, but no one goes through that process from a business management point of view, therefore HR are failing in terms of creating that compliant culture” (L1).*

One contributing reason for this failure may be the absence of support from the wider institutional environment that would enable HR practitioners to advocate for and champion a compliance approach.

Lawyer participants also referred to the seemingly irresolvable incompatibility between management and business demands and procedural requirements (L1; L2; L3). Management was described as wanting immediate outcomes, which meant any HR practitioner that pursued procedural compliance in the context of redundancy had a:

*“...battle with the business.. the business are always completely freaking out and saying you’ve got a week to do it and there’s no way we’re filling out that selection criteria matrix..” (L3).*

In terms of the impact of organisational and management demands on the action taken, a lawyer commented:

*“...very little performance management goes on, therefore performance dismissals are nine times out of ten probably unfair; and there is no compliance” (L1).*

While some of the HR participants were more circumspect about the regularity with which they were involved in procedural non-compliance (HR5), others were not. A HR manager at an accountants indicated that for under-performing employees or those who were not a good fit with the team, her role was to find: *“...an alternative way to end employment without having to go through a review process” (HR26)*. She justified this approach on the basis that following procedure would be a ‘waste’ of managers’ valuable time. Other participants referred to examples of when employees had been dismissed without fair reason, which simply meant there was no procedure to be

followed. A HR director explained the business may decide it does not need a particular employee, and:

*“...those appropriate steps don't exist because we've actually just changed our mind on Joe Bloggs, we've decided that we don't want him any more. But everything we've told Joe Bloggs would make him feel that he's fantastic and therefore this is going to come as a total shock”* (HR28; manufacturing).

A head of HR at an international law firm also referred to problems with, “*Joe Bloggs*” (HR29). She described how partners would fail to performance manage employees, but would also stop giving them work. She indicated that this happened, “*a lot*”, and that it places HR in an impossible position: “*...you think, well I can't performance manage somebody when they've done nothing for us for the last month!*” (HR29).

Finally, the findings also point to the lack of support for a compliance approach from elsewhere in the wider institutional environment. UK participants referred to the perceived lack of knowledge amongst employees about their rights (discussed above, section 6.2.2.1), and an absence of field-level actors that may promote the need to adopt a compliance approach, such as unions, the media or public interest groups. Accordingly, there appeared to be few influences or incentives that enabled or encouraged these participants to take a more compliance focused approach when it came to dismissal and performance management.

#### 6.3.1.3 Action: settlement agreements

The findings presented in this chapter highlight the apparent dominance of a corporate-based logic over the approach taken by the UK HR participants and a focus on delivering the goals and demands of business. Querying whether HR practitioners can have a role in compliance, a lawyer described how: “*...there will frequently be a conflict between following the letter of the law and following broad strategy*” (L24). This conflict appeared to be managed by the heavy use of settlement agreements, which

enabled HR practitioners and organisations to effectively avoid the employment laws that management did not want to be bound by. Lawyer participants were helpful in indicating the extent of settlement agreement use, with one stating that he: “...*does more settlement agreements than anything else... settlement agreements are indicative of non-compliance*” (L1). He expressed his view that the UK has:

*“...a sort of culture whereby there is almost formal non-compliance, which ends up in a settlement agreement or people resigning”* (L1).

Emphasising the dominance of a corporate-based logic, how this led to prioritisation of what the business and management want over (in this case) unfair dismissal laws and the action then taken, another lawyer stated:

*“...there has always been an approach by employers who are not ‘complying’, in the sense that they are not dismissing people in compliance with the law. They are reaching settlement agreements because that’s the commercial thing to do and that has always been the case”* (L2; emphasis added).

That settling a claim rather than facing a tribunal was the ‘commercial thing to do’ was also echoed by a head of HR at a consultancy (HR25). Despite spending her entire career in HR roles she had never been involved in a case at a tribunal or court:

*“So I’ve mostly worked in commercial organisations, commercial organisations that have no interest in going to tribunals. Why would you? If it’s that bad, you just, if you pay somebody enough money on the whole they will just go away and you sign a.. agreement and everybody’s like, gets out of it”* (HR25; consultancy).

It would seem that organisations with the resources to pay-off employees are able to avoid any of the potentially negative repercussions of facing a claim. This participant’s experience did not appear to be unusual; despite all the UK HR participants in this study occupying senior roles and having worked in HR for the majority if not all of their

careers, most of them had never been to a court or tribunal. The reason for this appeared to be the use of settlement agreements. A head of HR who had been at the same organisation for the last eleven years explained the organisation had never had to defend a claim at a tribunal:

*“Am I going to be naive and say that’s because we’re the most wonderful HR department in the world? Ish! But, its because, I suppose... you know, yes we deal with people properly and professionally, but we do know that we’ve got some options we can draw upon if we need to as well”* (HR5; law firm).

Those options being settlement agreements. While this participant went on to say use of settlement agreements was the exception rather than the rule, other participants indicated that they were very much the norm. A head of HR at another law firm explained that they use settlement agreements, *“more than we should”* (HR29), particularly with legal staff in order to avoid performance management procedures. The regularity with which this happened was also indicated by her having a ‘standard offer’ to make in these circumstances. She explained that in negotiations with lawyers about the level of the pay-out she has: *“...a standard where we usually start, you know, notice plus a month, and then see where it gets to”* (HR29). She added that these negotiations would be conducted by the partner, with HR advising on whether the financial settlement offered and finally agreed is comparable to amounts paid in similar situations elsewhere in the firm. A further indication of how taken for granted settlement agreement use was within this organisation, and potentially the legal industry, was the head of HR’s view that legal staff:

*“...know when it’s time to start the conversation. Because they know that in the culture and the industry that is the norm.. it tends to be when they can see that, they’ve had feedback that isn’t great and.. the work is drying up. They’re not being given the same level of work or the same amount of work..”* (HR29; law firm).

In a similar way, a HR director at a manufacturers explained settlement agreement use was:

*“...pretty much standard for all of our senior managers... just as good practice to make sure that, um, yeah, we settle in an effective way”* (HR28).

An ‘effective’ settlement was not expressed as one that involved compliance with employment laws, but a matter that was handled quickly, did not create, “...*noise in the system*”, and ensured the employee would, “...*leave peacefully, basically*” (HR28; manufacturing). Another HR director from the property services industry also reported regularly using settlement agreements at a senior level and before a claim had been made (HR4; property services). However, settlement agreements were not just used to avoid unfair dismissal laws. While participants openly discussed the use of settlement agreements to avoid dismissal laws, reference was also made to the use of agreements where there may have been discrimination (L24; HR25), and in relation to potential underpayment claims (HR5).

### 6.3.2 Sensemaking

The findings suggest that how the UK participants described and justified the action taken fed back into and supported the one-dimensional HR practitioner work-identity discussed at the start of this chapter. This was evident in the description of settlement agreement use as ‘commercial’ (L2; HR25). The relevant law may not have been followed and the HR practitioner may not have the power to ensure managers follow procedure, but the outcome is one that is consistent with the goals and values of the business under a corporate-based logic. The findings also suggest the participants justified and rationalised non-compliance, the inconsistent treatment of employees and the failure of managers to performance manage on the basis of it being ‘fairer’ for the individual employee concerned (HR4; HR5; HR25; HR29). Justifying the use of settlement agreements and failure to follow procedure, a head of HR stated:

*“...they’re going to ultimately end up here and it’s going to cost us time and money to get here anyway. So let’s be fair to them, and fair to the team leader of the team and deal with it in a professional way..”* (HR5; law firm).

Other participants pointed to the potential inability of managers to properly performance manage their staff (HR25; HR29). In these circumstances an unfair dismissal with a settlement agreement may be conceived of as a ‘fairer’ outcome. A head of HR explained:

*“I can’t think of anything worse myself than going through a nine month process where your performance gets shredded on a regular basis”* (HR25; consultancy).

Exaggerating the procedural requirements of the law - that a nine month procedure is needed - may also help excuse their avoidance. Consequently, justifying non-compliance in terms of it being fair for the individual may help to make sense of involvement in action that should be influenced by a compliance logic, but is actually influenced by the demands of a corporate-based logic.

The findings also suggest that the heavy use of settlement agreements may have sense making implications, through reinforcement of a business focused HR practitioner work-identity and removal of the need to question or reassess the action taken. As indicated in the section above, most of the HR participants in this study had never attended a tribunal or court. They had never been cross-examined on their advice, the role(s) adopted, and the legality of the action taken. They had never been held accountable and the work-identity adopted never appeared to have been challenged. Similarly, the lack of powerful or influential actors at the field-level, such as unions or the media, involved in the promotion of compliance means there is also no need to adjust the approach taken. The potential for a claim to alter the approach and action then taken was indicated by a lawyer participant. She explained that when her clients have wanted diversity training: *“...it tends to be a claim that’s triggered it, I must say”* (L24). It appears that the heavy use of settlement agreements means there is little need for HR



practitioner attention to be re-directed toward meeting the requirements set out in employment laws.

#### **6.4 The UK multi-level, inter-institutional environment**

The findings set out in this chapter centre on the concepts of identity, situation and action, and how these are connected by the sense making process. These findings focus on the micro-level of individual HR practice, but they also indicate factors from the wider multi-level and inter-institutional environment that appeared to influence and shape participants' experiences and perceptions. The external influences indicated by the participants are shown in Figure 4 (p.178). The relative size of the individual 'bubbles' shown in Figure 4 are intended to convey their apparent importance according to the findings.

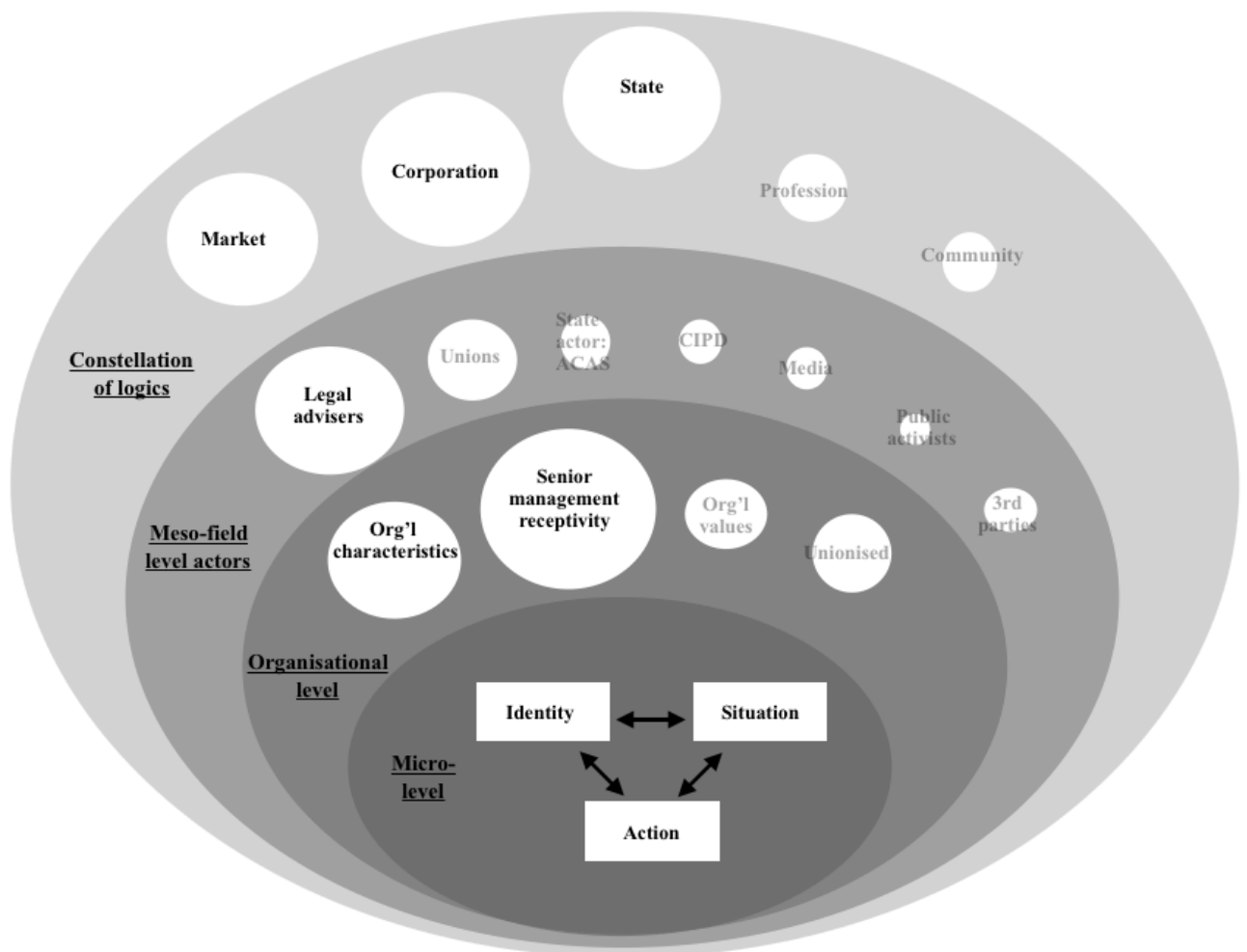
The state is shown slightly higher than the other institutional logics, as the way in which the state balances the demands of efficiency, equity and voice (Budd, 2004) is connected to the content of employment laws, the financial penalties for non-compliance, and the rights of field-level actors such as trade unions and regulatory bodies. Amongst the participants in this study, a corporate-based logic appeared to have most influence over the approach taken by HR practitioners to employment laws. A market-based logic was also relevant in terms of the apparent emphasis on financial outcomes by senior management. UK participants did not refer to the positive influence of a professional-based or community-based logic over the approach taken, but this does not mean these logics do not exist; accordingly, these bubbles have been faded. The findings suggest that at the point-in-time of this study the influence of these logics was weak, but this could change in the future.

At the field-level, participants made more reference to contact with legal advisers than any other group so this is shown as the largest bubble. The union bubble is shown as slightly larger than those of other actors, given the influence they were perceived to have where they had a presence. The other bubbles that are faded indicate the actors that could play a part in influencing the approach taken by HR practitioners (particularly

when compared to the Australian findings in the next chapter), but were not referred to in this way by the participants in this study.

All of the HR participants were employed by and worked within organisations and the findings point to the embeddedness of HR practitioners within those organisations. In particular, the attitude of the senior management team toward the HR function and the importance of compliance appeared crucial to the identity, role and approach that HR practitioners could take. The combined multi-level and inter-institutional influences all help explain the findings set out above, and how the UK participants in this study made sense of employment laws.

*Figure 4:* The UK multi-level and inter-institutional environment



## **6.5 Summary and concluding remarks**

The findings presented in this chapter point to a one-dimensional work-identity amongst this group of UK based senior HR participants, that centred on ‘being commercial’ and focused on enabling and facilitating business and management objectives. The strength of this identity, which may be traced to a corporate logic, was evident in the way it seemed to preclude other identities. It also suggests the clear influence of the organisation over the work-identity of these participants, which could be seen in how they approached interpretation of employment laws. Employment laws were often seen as ambiguous and ‘grey’, which meant there was scope to interpret them in the interests of and to achieve the goals desired by management and the organisation.

The situational cues referred to by the UK participants as relevant to the approach taken to interpretation of employment laws and in shaping the action taken help indicate the nature of the multi-level and inter-institutional environment in which they work. These cues point to the apparent strength of a corporate logic. In advising managers and senior management on the approach that ‘should’ perhaps be taken in matters involving employment law, participants referred to how they could not simply refer to the law or internal policy. Some participants referred to the difficulty of getting senior management to, for example, follow the procedures and processes necessary to properly performance manage employees or to enact a fair dismissal. While participants did refer to taking the financial consequences of non-compliance into account when working out to handle a particular situation, these did not appear to present a deterrent to non-compliance in the situations that they handled. The potential damages that would be payable to an (ex)employee appeared to be more of a cost associated with taking the approach desired by management. The UK participant accounts were also striking in terms of the general lack of reference to field-level actors in terms of imposing pressure on the organisations or individuals within it to adopt a more compliance focused approach. Some HR participants indicated that they would advocate for a compliance approach (and tailor their advice to management accordingly) in certain situations. However, an issue raised by all of the UK participants concerned failure to follow the procedural requirements necessary to properly performance manage or dismiss employees. Consistent with a one-dimensional HR work-identity, the ‘commercial’

action taken in these circumstances was to pay-off the employee through a settlement agreement. The next chapter follows a similar format, and presents the findings from Australia.

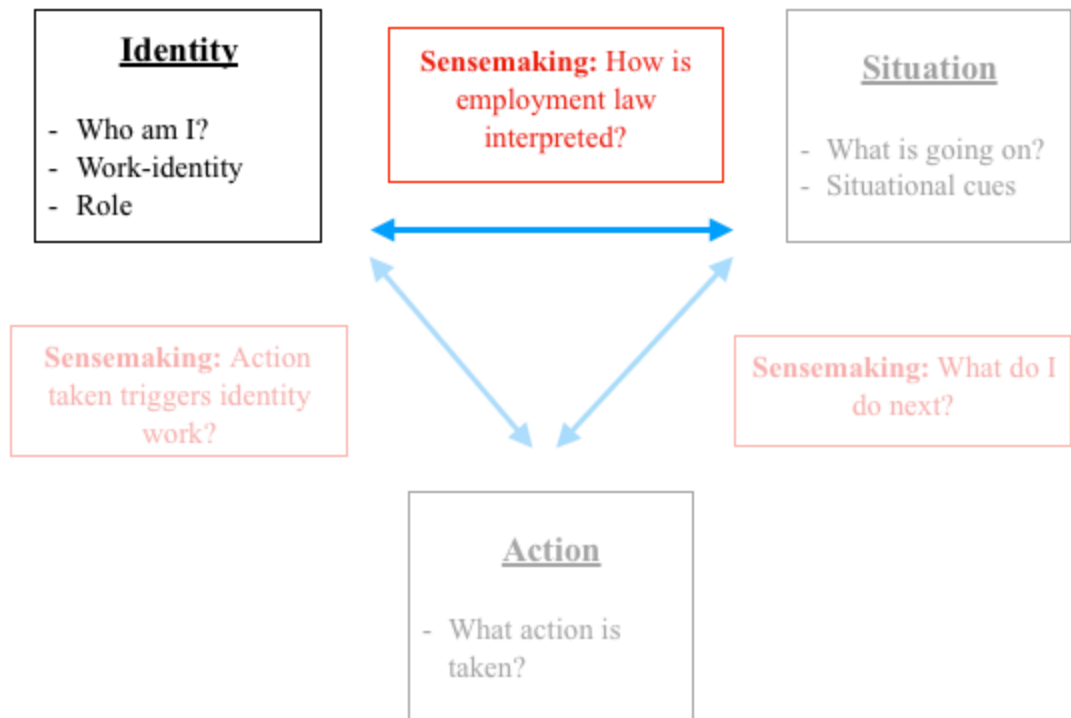
## **CHAPTER 7**

### **Findings: Australia**

This chapter presents the findings from Australia using the conceptual framework presented in chapter 4, developed from Weber and Glynn's (2006) model of institutionalised typifications in sensemaking. Similar to chapter 6, this chapter is divided into four main sections. It starts with findings regarding the work-identity indicated by the HR participants and how they interpreted employment laws. It then presents findings regarding the situational cues participants perceived and experienced as relevant to how they made sense of situations covered by employment laws. These cues included factors specific to the organisation and the consequences that could flow from non-compliance. The third section is concerned with the action reportedly taken by the participants and the way they made sense of this action in terms of their work-identity. The final section draws together findings regarding the multi-level and inter-institutional Australian context, illustrating the range of field-level actors and source of the different logics that appeared to influence the participants.

## 7.1 Identity and sensemaking

This section sets out findings that address the highlighted aspects of the conceptual framework, set out below:



**Source:** Adapted from Weber and Glynn (2006: 1645)

The work-identity indicated by the Australian HR participants in this study appeared multi-dimensional, including identification as a professional, with the employees and also with the business. The roles the participants saw themselves as playing were linked to these identities, including legal / compliance expert, challenger and educator. This section also examines findings regarding the language used by participants to describe themselves and roles undertaken. Finally, this section examines how this multi-dimensional identity appeared to influence the way participants interpreted and made sense of employment laws.

### 7.1.1 Identity

#### 7.1.1.1 Identifying as a professional HR practitioner

Amongst this group of Australian HR participants there was a clear emphasis on being a ‘professional’ HR practitioner, associated with knowing the law and using that knowledge to support and influence a legally compliant approach within the organisation. Participants described themselves as ‘professionals’ (HR6; HR9; HR19), and as specifically employed and paid to advise on the application of employment laws (HR6; HR9; HR10; HR13; HR16; HR19; HR23). A HR manager explained that if an organisation has employed a professional HR practitioner it should be confident that it will not, “walk into” non-compliance (HR19; business services). Clearly emphasising the nature of this professional HR identity and linking it to a role in compliance, a senior HR BP stated:

*“So, even from a professional reputation perspective is it HR’s job to keep companies compliant? Very much so, because we’re like doctors in the sense that we are protecting our professional reputation..”* (HR6; automotive retail).

For this participant, her professional reputation and the pride she conveyed in having a detailed knowledge of employment laws appeared to form the core of her work-identity. She described how she left employment with a global car manufacturer / retailer because management had instructed her to roll out a non-compliant redundancy programme. Indicating how she was not prepared to be involved with non-compliant activities she explained:

*“I wasn’t prepared to put my professional reputation on the line and put my name against rolling out that particular activity .. it was the first time in my career where .. commercial activities could have impacted my professional reputation”* (HR6; automotive retail).

As a result of seeking advice about how to handle the situation from her professional insurer she added that the Australian HR association, AHRI, asked her to write an article

about her experience and how senior HR practitioners may face such situations. While she was the only participant to refer to AHRI, this example suggests AHRI may promote awareness of how senior HR practitioners can practically manage the tension between legal and commercial demands.

Other participants also indicated prioritising the requirements of employment laws over demands of the organisation. A HR manager with over twenty years experience explained that if his advice on employment laws was not followed he would resign in order to protect his professional reputation (HR15; health services). These examples suggest that a professional identity may have enabled the Australian participants to prioritise compliance over acquiescence to demands from management and being ‘commercial’. Similarly, a HR / legal consultant (HR9) described how he was effectively dismissed after he refused to endorse or participate in a non-compliant redundancy programme. He explained how he had sought to get senior management to, “*see sense*” (HR9) and comply with the relevant legislation. The meaning of ‘sense’ in this example defined in terms of legal compliance, not in terms of what the organisation wanted.

Consequently, identification as a HR professional appears connected to the roles of legal and compliance expert, challenger, and also educator. A role as educator may apply to the entire workforce, such as ensuring all employees understood how they should behave. Examples given included training programmes around bullying, harassment and health and safety (HR6; HR9; HR10; HR19). However, participants also emphasised their role in educating managers and senior management groups about why what they may want to do is not legally possible or advisable (HR6; HR10; HR13; HR16). In relation to the importance of this role participants pointed to the potential consequences for non-compliance, including legal claims, media coverage and reputational damage. That directors and senior officers within an organisation could be held personally liable for breach of legislation also influenced the importance of this role, with a people and culture manager explaining:

*“...in terms of my role educating others that weren’t sitting up and listening before, there’s even more reason to now”* (HR10; retail / manufacturing).



### 7.1.1.2 Identifying with the employees

Participants in this study also identified with, and saw their role as being there to represent, protect and act as a voice for the employees in the organisation. Participants from a range of industries and organisations described how they needed to assist employees and see matters from their perspective (HR6; HR7; HR13; HR19; HR23). The vocabulary used by participants helps indicate this focus; for example, a HR participant from a consultancy firm explained:

*“...absolutely we are there to protect. Yeah, I’ve spoken a lot about having to protect the reputation of the company, but yes, we are there to protect the employees as well- well, to be a voice for them” (HR23; consultancy; emphasis added).*

Protecting and acting as a voice for the employees can also be seen reflected in the roles adopted by participants as referred to above, suggesting they may see themselves as ‘legal experts’ and / or ‘challengers’. HR practitioners needed to know the law to assist the business, but also to assist employees, and they needed to challenge management in order to fulfil their duties to both. Participants referred to how performance of these roles required HR practitioners to balance the interests and demands of the organisation on one hand, and those of employees and employment laws on the other (HR6; HR10; HR13; HR15; HR19; L17). A HR manager at a commercial law firm indicated that this balancing act was not always easy, explaining:

*“...staff confide in me, I’m their, in some ways, their advocate. You know it’s a balancing act, HR, being the employee champion and, you know working for the business. So, I’m sort of like this sometimes, I’m on that balancing board and my legs start to go a bit weak and I’m thinking this is weighing me down” (HR13; emphasis added).*

Use of the phrase ‘employee champion’ clearly draws upon an aspect of Ulrich’s model for HR business partners that has, according to studies discussed in chapter 2, fallen out

of use and favour. Her choice of words may also reveal the identity she is more closely connected to. She describes herself as “*being the employee champion*”, an arguably more personal identification and description than “*working for the business*”. Throughout the interview this participant also emphasised her responsibility for the people in the organisation, providing various examples of how she had supported employees over management. In one example she combined the roles of challenger and legal expert while also drawing on organisational values and commitments to support her argument. She described how the Managing Principal of the firm had approved the purchase of stand-up (rather than seated) desks for high-billing senior lawyers on request, but initially refused to approve one for an assistant who made the request on health grounds. The Managing Principal reportedly raised the matter at a shareholder meeting, banged the table and shouted:

*“[HR] won’t agree with me, but I think it’s ridiculous! Why should we have to worry [about stand-up desks]’... so everyone looks at me. And I said, ‘well I think, yeah, I’ll say a couple of things.. if you’ve got a health problem or injury a workplace has to adapt.. second thing I’d say is I think you’re treading on very, you know, you have to be careful about how you tread here because you are in breach of the Discrimination Act’.. and I said, ‘well, thirdly, we have an assistant who has been with us for 15 years and from a moral and ethical point of view I don’t understand you guys when you tell me that you’re a B-Corps, and to me it doesn’t align’. So they all just shut up. So she got the stand-up desk” (HR13; law firm).*

For this participant, and others, employees were seen to have rights and entitlements that should be honoured rather than minimised or avoided. (For detail about what being a ‘B-Corps’ means and entails, see section 7.2.1.2 below). However, while additional participants referred to challenging management, the extent to which they were willing to pursue a challenge appeared to vary. The HR manager from the law firm quoted above contrasted her approach to that of her predecessor. She disparagingly described how the previous HR manager had simply followed management demands to, for example, dismiss an employee for what she perceived to be an unfair reason.

Accordingly, the findings suggest that the extent to which individual HR practitioners are willing to challenge directions from management may vary.

#### 7.1.1.3 Identifying with the business

Despite identifying as a professional and with the employees, all participants emphasised that the overall purpose of the HR function was to also contribute to the delivery and achievement of business objectives and outcomes. However, it appears that these participants could retain an interest in the commercial activities of the organisation without it becoming their sole and primary focus and overshadowing compliance.

The HR manager from the commercial law firm quoted above referred to putting on her, “*business hat*” (HR13) in her role as head of the HR function. The senior HR business partner who left her job in order to protect her professional reputation also emphasised that she is:

*“...genuinely really interested in the commercial environment in which HR is operating and I don’t think you can give good HR advice unless you have that strong commercial understanding”* (HR6; automotive retail).

The connection with the business was emphasised through the need for participants to support and advise managers on how to handle employees and matters covered by employment law. These situations included those involving performance management processes and disciplinary procedures. The HR participants generally advised on the approach that should be taken, but were not responsible for making a final decision about the action that would be taken. Accordingly, these HR practitioners supported managers and had to be responsive to manager needs. A HR participant explained that the HR function responds:

*“...to the needs of the managers and the business all the time, so there is a lot of demand from the business coming to you saying this is what we need, this is what the business needs...”* (HR23; consultancy).

Participants referred to managers pushing back on their advice and the need for HR practitioners to understand manager frustrations (HR9; HR19). As explained by a HR / legal consultant, managers are:

*“...busy and this is a real pain in the neck.. nearly all of them hate dealing with employee issues.. because it’s hard, it’s awkward. That’s the law, it’s awkward and it’s difficult interpersonally and they don’t like doing it”* (HR9).

As suggested from the examples in the sections above, these participants perceived that managers were not always willing to follow legal requirements or their advice. A lawyer participant described the difficulties faced by an HR manager at a national retailer. She highlighted the tension and discord between, in this case, the CEO who was focused on business performance and sales results and the HR manager who was focused on compliance. The lawyer received a call from the CEO, who:

*“...viewed [HR] as an obstacle to getting things done... [and had] steam coming out of his ears with HR doing something stupid again.. [the CEO] is not interested in anything other than commercial outcomes and what he considers sort of common sense in the circumstances”* (L12).

However, this HR manager reportedly retained a focus on compliance, even if the action eventually taken was dictated by the CEO. There was also no suggestion that as Australian HR practitioners progressed through their career they increasingly identified with the business and the values and goals of a corporate-based logic at the expense of compliance. A HR / legal consultant described how he had led the HR function at an organisation with thousands of employees, and that this role included ensuring compliance with all relevant laws and agreements (HR9). A senior HR BP (HR6; automotive retail) also emphasised that she saw it as the role of senior HR practitioners to provide the organisation with a range of, “*commercial solutions*” when handling matters governed by employment laws, but all those solutions had to comply with legal requirements. It appears that as identification with the business only formed one dimension of Australian HR practitioner work-identity it was not all consuming. Nor did it appear to lead to a singular focus on achievement of business objectives and outcomes

at the expense of legal requirements. Managers and senior management were not the only powerful groups whose expectations needed to be met.

In addition, participants indicated that because of the nature of the Australian institutional context it was possible for HR practitioners to mount a strong argument that the interests of the business were best served by adopting a compliance approach to employment laws. Managers may want to achieve a particular outcome or avoid procedure, but they would not necessarily want the consequences associated with breach of employment laws; see below for findings regarding how these consequences could help 'cue' a particular response. A HR participant from a global recruiter referred to situations where management may want a certain outcome, but she is able to explain:

*“...that it may be in their best interests to choose another... they're aware of an outcome that they want and they may not necessarily be aware of the risks of doing that... So the business is pushing back because they want one thing, and [HR is] pushing back because they need to do it another way... once they sort of hear the worst case scenario I think a lot of them are, kind of, you know, it opens their eyes a bit and they understand why we are recommending this certain course of action” (HR20).*

Consequently, the findings suggest that despite the apparent tension between the demands of the business and legal requirements, the HR participants could align these demands and goals and influence a compliance approach. An example of this was provided by a national HR manager at a retailer / manufacturer who also sat on the executive team. He identified with the business and wanted, *“...to do the right commercial thing”*, but made clear this takes:

*“...into account all the parameters of what commercial means. You want to do the right thing from a moral point of view, you want to do the right thing from a business point of view, and you want to do the right thing to protect your brand and public perception” (HR16; retail / manufacturing).*

The multi-dimensional nature of the HR work-identity expressed by the Australian participants may be connected to the language they used and have implications for how employment laws were then interpreted and the action taken by HR participants.

#### 7.1.1.4 Identity and language

The language used by the Australian participants to describe themselves helps indicate how and with whom they identified. This language also provides a vocabulary of practice or motive that focused attention on certain goals and priorities, in particular, the language used appeared connected to the way the participants interpreted employment laws as explored in the next section.

When talking about employment laws and their role in relation to them, all of the Australian participants used the language of obligation, referring to the need to ‘comply’ with and ‘adhere’ to legal ‘requirements’ and ‘obligations’. A national HR manager connected poor employment practices with the term, “*exploitation*” (HR16; retail / manufacturing), and did not refer or allude to any situation where non-compliance with employment laws would be deemed acceptable. He emphasised the role of the executive team in setting an example in terms of acceptable behaviours and conduct, how this helped create a particular culture and how, “...*you can't take your eye off the ball from making sure that we're doing things properly*” (HR16; retail / manufacturing).

Australian participants did also use the term ‘commercial’, which was connected with a closer focus on the organisation. While the national HR manager (HR16) referred to above defined ‘commercial’ as including doing the right thing from a moral point of view, most of the Australian participants used it to describe an approach or activities that focused on the (often financial) goals of the organisation (HR6; HR10; HR13; HR15; HR19; HR20). However, where commercial demands or activities were in conflict with a focus on compliance they were not referred to approvingly. Participants referred to placing themselves in opposition to non-compliant ‘commercial’ demands from senior management in order to protect their professional reputation (HR6; HR9; HR15). In this way, it appears that the professional dimension of the work-identity

indicated by these HR participants helped them counter demands to be ‘commercial’ and pressure to accept a non-compliant approach to employment laws.

The connection between a greater identification with the business and willingness to accept a ‘commercial’ approach to employment laws was indicated by the HR participant from the global recruitment organisation (HR20). She was the only Australian participant to openly refer to taking commercial factors into account when making sense of how to act in relation to procedural matters covered by employment laws. She explained these demands stemmed from:

*“...the commercial and the financial factors.. from the perspective of tying up resources internally.. tying up executives and managers within the business in terms of their time, and the actual value that that time holds within the business, they don’t necessarily equal out. So it’s definitely a big consideration”* (HR20).

The way in which she referred to commerciality in the approach taken appeared to excuse prioritisation of financial outcomes over following legally required procedures. While this participant did talk about compliance, which was also echoed by the in-house lawyer from the same organisation (L22), she also appeared influenced by an overarching focus on serving the business. The in-house lawyer confirmed this:

*“...the reality is that they [the HR function] represent the employer. So, I’m not saying that HR prof- people are not ethical or anything like that, but their advice will be swayed towards what their employer wants to do. Within, you know, what’s allowed under the relevant law”* (L22).

That this HR participant stood out amongst the Australian participants for the way she described her role and approach to employment laws may suggest the influence of the type of organisation (global recruitment; sales focused; multi-national) she was employed by; future research could focus on examination of these factors.

### 7.1.2 Sensemaking: interpretation of employment laws

As indicated above, the roles of legal and compliance expert, educator and challenger required HR participants to advise on legislation and how it applied to the organisation and workforce. Provision of this advice involved interpretation of and the ability to navigate the business through the relevant legal requirements. This section first explores how the HR participants interpreted employment laws, and then examines how they used lawyers to help with that process of interpretation.

#### 7.1.2.1 Interpretation: HR

Some participants perceived Australian employment laws to be generally clear, ‘black and white’ and not optional (HR6; HR19; HR23). One example given related to retirement age, which a people and culture manager explained was proving difficult to manage at her organisation (HR10; retail / manufacturing). However, she made clear that regardless of whether the legislation conflicted with business goals and objectives it would be followed and not re-interpreted in a way that suited the business. Other HR participants referred to redundancy laws in a similar way (HR6; HR9), with the senior HR BP who left her employment to avoid involvement with a non-compliant redundancy programme explaining:

*“I was not prepared to compromise because it was such a clear compromise, this is not even a grey area. And I know that sometimes compliance can raise grey areas and decisions may be based more on ethics or bending ethics rather than anything else, but this was just a clear non-compliance”* (HR6; automotive retail).

This quote also indicates that some employment laws were perceived as presenting ‘grey areas’ that required interpretation, and that the interpretation taken may be perceived as an ethical issue. Other participants (HR13; HR15; HR16) also referred to having their own ethical and moral standards that they would follow regardless of ambiguity in the law. These participants referred to a desire to do the right thing in order to be a good business, and this did not appear to involve interpretation of the law in a



way that suited the business at the expense of employee rights. As a HR / legal consultant (HR9) bluntly explained: “...*you have to comply or exceed minimum compliance*”. Interpretation of grey areas in legislation in these terms is also arguably consistent with findings regarding the multi-dimensional work-identity referred to above, which included identification with the employees and as a professional.

In relation to employment laws that presented ‘grey areas’, reference was made to ambiguity regarding the procedural steps necessary to properly and fairly performance manage and / or dismiss an employee (HR23; L11; L14; L17; L22). Lawyer participants also referred to industrial awards as presenting a particular challenge. Difficulties in interpretation of awards included identifying which award covers a particular employee or how the terms and conditions should be applied (L12; L14; L17). A Principal lawyer with over fifteen years experience explained:

*“...with the best will in the world, it can be very difficult to comply with awards.. because they’re so complicated.. and sometimes the legal advice is it could be this or it could be that”* (L12).

How this ambiguity was resolved was also connected by some participants to the influence of field-level actors, such as unions and the media. A lawyer participant indicated that if legislation is ambiguous and the organisation is unionised, the interpretation taken will be the one:

*“...that favours the employee because they know that if they favour the other way the union’s going to be all over it and they’ll be knocking on their door”* (L17).

The findings also suggest that the media took a keen interest in reporting non-compliance with employment laws and / or situations where organisations had failed to meet community expectations regarding treatment of employees. (For further findings regarding the influence of the media, see below). The risk of negative media coverage reportedly had a similar effect on interpretation as the presence of a union, with a

lawyer referring to: “...where there’s a media focus.. that can have the same effect as having a union looking over your shoulder” (L12).

#### 7.1.2.2 Interpretation: legal advice

The Australian HR participants in this study did not interpret employment laws in isolation and referred to regularly obtaining legal advice on the meaning of different laws and how to apply them in specific situations (HR6; HR7; HR10; HR13; HR20; HR23). Aside from one participant (HR15; discussed below), the way HR participants described using legal advisers suggests it was to ensure the approach they were taking was the ‘right’ or ‘correct’ one and within legal requirements (HR6; HR10; HR20). References to ‘right’ and ‘correct’ appeared connected to understanding what the law required in order to comply, as opposed to what managers may initially consider to be the ‘right’ approach (see also findings above regarding identification with the business). Emphasising the value of obtaining legal advice, a HR participant explained that lawyers could be expensive, but it could be much more costly to be faced with a claim (HR23; consultancy).

Only one participant (HR15; health services) referred to being dissatisfied with legal advice received. He explained that the advice concerned how and when to dismiss a particular employee in circumstances when he believed the employee would always make a claim regardless of how they were treated. In this case he had advised the CEO to act contrary to legal advice and dismiss knowing a claim was always going to be likely. Accordingly, this does not appear to be a question of interpretation or the straightforward prioritisation of the goals and values of the business and the CEO over those set out in employment legislation. It appears to be the outcome of an assessment of the situational cues present, and a perception that a claim by the employee may be unavoidable.

The lawyer participants were able to provide some insight into how they helped HR practitioners interpret employment laws. These lawyers made it clear that they would not support HR practitioners or organisations that intended to take unlawful action, such

as dismissal of an employee because of pregnancy (L11) or underpayment of wages (L18). An in-house lawyer at a global recruitment organisation also explained that she:

*“...can't twist the advice to, you know, meet the requirements of the business. So if there are minimum pay rates for example that apply, then that's what applies”* (L22).

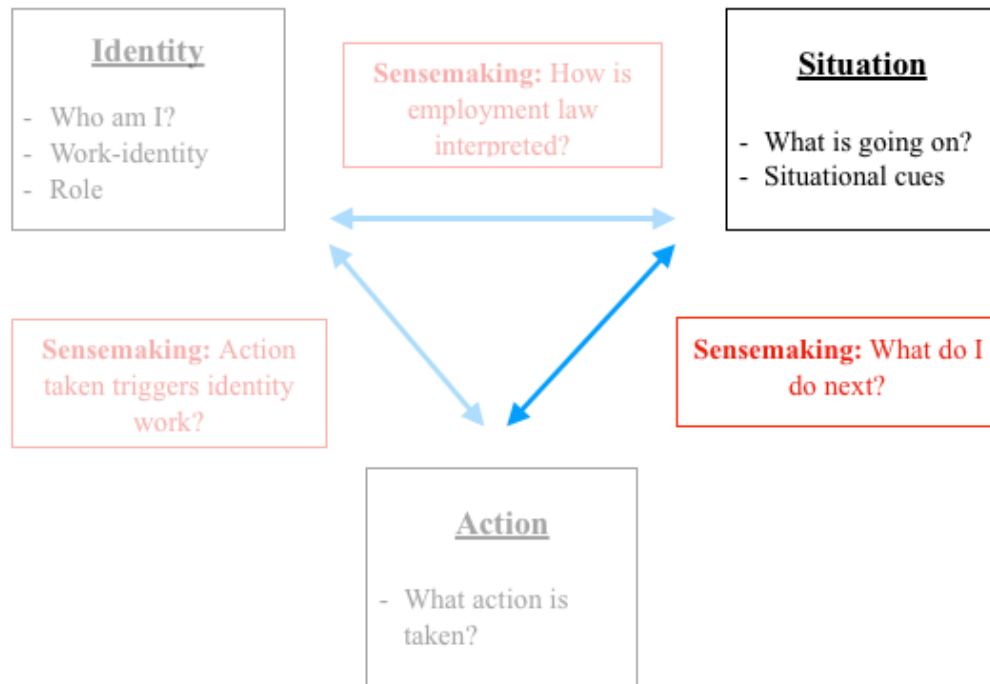
The potential for lawyers to be held personally liable for non-compliance with employment laws by client organisations was also reported to have influenced how they gave legal advice (L11; L12; for background to personal liability, see chapter 5). A Principal lawyer explained that the risk of being held personally liable meant her:

*“...advice is much more carefully caged when you're talking about giving, in inverted commas, 'commercial advice'”* (L12).

Another lawyer defined commercial advice as that related to: *“...what the goal of the organisation is, and cost effectiveness, more than anything else”* (L17). However, other lawyers made it clear that action that would be considered unlawful did not fall within the auspices of commerciality (L11; L18). The only clear example given of when a situation might be approached commercially related to dismissal and performance management. Failure to follow the necessary procedural requirements in these cases did not appear connected to taking a particular interpretation of the legislation, but rather the outcome of an assessment of the costs and risks involved.

## 7.2 Situation and sensemaking

This section sets out findings that address the highlighted aspects of the conceptual framework, set out below:



**Source:** Adapted from Weber and Glynn (2006: 1645)

The findings suggest that the HR participants noticed and took into account various aspects of the situation, situational cues, which shaped how they then made sense of the matter and the action taken. These cues included factors related to the organisation, the employee involved, and the consequences that may flow from non-compliance with the law concerned. Participants also referred to key influences from the wider institutional environment, including community expectations and the role played by the media.

### 7.2.1 Situational cue: the organisation

Contrary to the assumptions in the HRM literature that all HR practitioners (and organisations) respond to employment laws in the same way (see discussion in chapter

2), an Australian lawyer explained, “...*everyone from the outside looks at HR in the same way.. but the reality isn't the same*” (L18). HR reality may differ, in part, because the organisation and others within it can influence the scope of the HR role and duties, and exert pressure over expected outcomes. The accounts provided by the Australian participants highlighted the following aspects of the organisation as relevant to how HR practitioners approached employment laws: senior management attitude toward HR and the importance of compliance; organisational values; unionisation; and industry sector.

#### 7.2.1.1 Senior management attitude

As indicated above, the HR participants generally advised the organisation on the approach that should be taken where employment laws were involved and did not make the final decision. Lawyer participants also indicated that not all organisations or senior managers cared about the HR function or the importance of compliance in the same way (L11; L14; L17; L18), with one explaining:

*“HR are expected to.. kind of be the gatekeeper in terms of compliance.. just the extent to which they can fulfil that job really depends on the organisation that they're in, where they sit in the food chain and what sort of support they've got”* (L17).

However, the majority of the HR participants in this study reported that they were listened to by senior management and were able to have a positive (and compliant) impact on the action taken. Some HR participants were part of executive or senior management committees (HR6; HR13; HR16), which was seen to give them greater credibility and influence. Participants also emphasised how they actively fulfilled the roles of legal / compliance expert and challenger, discussed above. These roles involved providing guidance on the risks and consequences of non-compliance, which in the Australian context were reported as sufficiently powerful to convince management of the need to comply. Emphasising how managers did not necessarily start with an appreciation of the legal issues and risks involved, a HR participant explained:

*“...you can see why it happens because they are obviously very operationally focused and they’re in their business and it is all about their business. And they’re not necessarily sitting back and thinking of the bigger picture”* (HR20; global recruitment).

As referred to above, this ‘bigger picture’ included the risks associated with non-compliance in the Australian context, which enabled this group of HR participants to argue that compliance was in the interests of the business. In this way, senior management did not appear to present an intractable obstacle to taking a compliance approach. While senior management were not interviewed as part of this study, these findings suggest that senior management in the organisations in this study may be receptive to and see sense in taking a compliant approach.

#### 7.2.1.2 Organisational values

Participants indicated that if the organisation had made a specific commitment to uphold certain values or standards then these could be used by HR practitioners to support arguments for a compliant approach to employment laws (HR6; HR13; HR19; L18). A HR manager explained that organisational values can be used to underscore the need for compliance, and added: *“...if an organisation is fair dinkum about its values then that can be a powerful point of influence”* (HR19; business services). Organisational values appeared to be relevant because of the potential public backlash or negative media coverage that may result from failure to abide by them (see also the following sections: 7.2.4, regarding community expectations, and 7.2.5, regarding the Australian media).

The HR manager at a commercial law firm (HR13), quoted above regarding how she identified with the employees, emphasised how she used the firm’s certification as a B-Corporation to challenge senior management and influence a more positive (and compliant) approach toward employees. (Becoming a certified B-Corporation involves independent assessment of the organisation’s social and environmental performance and balance between “purpose and profit” (B-Corps, no date: no pagination)). Invoking and drawing on a combination of goals and values from different institutional logics this HR manager explained certification meant:

*“...that we’re in business to do good. We’re in business to make a profit, but we’re in business to give back to our workers, the environment and the communities that we work in” (HR13; law firm).*

She added that there were commercial benefits to being a ‘B-Corps’, in terms of relationships with other B-Corps businesses, recruitment and in attracting clients. However, rather than these financially oriented goals being in conflict with those required by employment laws, compliance with legislation could be presented as simultaneously meeting B-Corps requirements and business objectives.

#### 7.2.1.3 Unionisation

The role played by unions in Australia is discussed in chapter 5, and most of the Australian HR participants had worked with unions at some point in, if not throughout, their (private sector) careers (HR6; HR7; HR9; HR10; HR16; HR19). In terms of the influence of union presence on the role and skills required of HR practitioners, a senior HR BP referred to the need to know and understand employment law, *“...inside out and backwards”* (HR6). A HR manager at a retail / warehousing organisation also explained that while the proper procedures would be followed for all employees, if the employee was represented by a union all the t’s would be crossed and the i’s dotted (HR7). Additionally, union presence and oversight were connected to increased senior management interest in compliance and awareness of the issues and risks associated with employment laws (L12). A HR participant explained that in unionised organisations:

*“...your functional leaders and your Board are normally very savvy around knowing what applies and why it applies. What the cost is to the business, what the benefit is to the business.. there’s a lot more visibility.. you often find your functional leads have almost as much knowledge as your HR personnel”* (HR6; automotive retail).

The experience of a people and culture manager at a retailer / manufacturer also suggests that the extent of union influence was not necessarily connected to high levels of union membership in the organisation (HR10). She explained that less than 5% of the workforce were union members, but she did not know who these union members were. Accordingly, she emphasised all employees were treated the same and that internal procedures and laws were always followed. She had also negotiated two separate collective agreements with two different unions, and referred to a, “...*bit of a to-do*” (HR10) with a union over one of these agreements, to be heard in the Fair Work Commission (FWC) that week. Despite relatively low levels of union membership in this organisation, the statutory right for unions to independently bring a claim to the FWC appeared to reinforce their presence and influence. This right was enshrined in state-made legislation and arguably supported by the reported political and community interest in the protection of collective rights (findings regarding community expectations are detailed below).

#### 7.2.1.4 Industry sector

Participants also indicated that the industry sector of the organisation may influence the approach taken toward employment laws and perceived importance of compliance.

Lawyer participants referred to organisations in the engineering, mining and construction sectors as subject to detailed OHS regulations (L14; L21). As these organisations needed to demonstrate compliance and have detailed internal systems to meet the requirements of health and safety regulations, they were perceived to apply the compliance mindset across employment (L21). A HR manager with experience of working at a superannuation (pension) organisation also described how that industry was heavily regulated and focused on long-term performance. As a result, he described the organisation (and senior management) as:

*“...very, very much compliance driven.. they wouldn't dream of breaking the law in any area whether it be employment law or anywhere else” (HR15).*



If the core business of the organisation is already heavily regulated, then it appeared easier for HR practitioners to convince senior management and managers of the need to take a compliant approach in relation to employment laws. In addition, it may be that the businesses in these industries had larger profit margins and more resources to dedicate to compliance. Given the comparatively lower labour costs and skilled nature of the work involved, organisations in these industries may also have an interest in ensuring employees are treated well and in accordance with the law. Further examination of the differences between industry sectors could be the subject of future research.

Conversely, for organisations with a tighter profit margin and in industries that are not as heavily regulated, the findings suggest the organisation (senior management) may have different expectations of the HR function and it may be more difficult for HR practitioners to drive the need for compliance. One of the HR participants (HR20) was employed by a global recruitment organisation built on a sales-focused business model. She was the only HR participant from Australia to regularly and clearly refer to ‘being commercial’ in terms of achieving what the business wanted. Clearly drawing on the language of a commercial logic focused on financial outcomes she explained that:

*“...you are always reminded of.. the bottom line and the commerciality of the company and why we are here, which really helps to, it helps to solidify that relationship back to the business... we [HR] are really understanding how they are going as a business and how they are going financially” (HR20; global recruitment).*

In terms of how this focus may alter the approach of the HR function she added that she and the other HR staff rely less on internal policies and approach each matter on a case-by-case basis, *“...just working out what’s best for the business”* (HR20). It should be noted that this participant also referred to the need to comply with legislation and did not see legal requirements as negotiable. However, she was the only HR participant in this study who used the vocabulary of a corporate-based commercial logic to the extent and in the way indicated. Consequently, her account may be interpreted as suggesting

that in an organisation focused on financial outcomes, the vocabulary, values and goals of a corporate-based logic may be of greater influence.

### 7.2.2 Situational cue: the employee and risk of claims

A general principle of employment law is that all employees should be treated consistently, unless specified in the legislation (see chapter 5 for further background). The Australian HR participants in this study did not indicate their involvement in breach of this principle. However, they did suggest that managers and senior management may treat employees inconsistently, with HR only finding out after the event (HR6; HR9; HR10; HR16; HR23). The reason these participants gave for manager inconsistency related to the perceived value of the employee to the organisation. This suggests that absent HR influence, managers may focus on the goals of market and corporate-based logics rather than compliance. Examples given related to high performing employees and those making a considerable financial contribution to the overall business. Connecting why managers may take an inconsistent approach to factors linked to the organisation, a senior HR BP explained:

*“...often those kind of people, they are bringing in dollars. So they are contributing to the bottom line significantly and often that will be in companies that maybe aren't doing so well and desperately need that contribution. And that then leaves say a CEO's or an MD's hands tied in the circumstance that if it had been performing well there might have actually been a different outcome”* (HR6; automotive retail).

In line with the work-identity and roles outlined above, HR participants indicated that in these situations they would then go through a process of re-education with the managers involved (HR6; HR9; HR10; HR16). In addition to focusing on the need to be consistent, this may also involve, *“ethical learning workshops”* (HR6).

Where HR participants were involved in advising management before action was taken, a factor that reportedly helped influence a compliance approach was the likelihood that employees were aware of and would pursue their rights and entitlements. The Fair Work

Ombudsman (FWO), the state funded body concerned with enforcement, compliance and provision of information, was seen to play an important role here (for further details about the FWO, see chapter 5). A senior HR BP (HR6) described interactions with management who believed un-unionised and un-represented employees may not know their rights. Her response in these situations would be to: “...*sell the fact that.. yeah they do, they’ve got access to Fair Work Ombudsman... staff are well informed*” (HR6; automotive retail).

Employee awareness of rights was also connected to the increased risk of a claim being made if employment laws were not complied with (HR7; HR16; HR19; HR23; L12; L14). Again, HR practitioners reported challenging management and explaining that the organisation will face a claim and will be in trouble if employees are not treated properly (HR7; retail / warehousing). A national HR manager explained:

*“...if people are aware of their rights they will stand up for them if they are being exploited. I think we’re in a reasonably mature market for that now”* (HR16; retail / manufacturing).

The ‘maturity’ of that market arguably connected to state provision for dissemination of information about employment rights. Participants also perceived there to be an increasing emphasis by the state on the importance of organisational compliance with employment laws (HR6; L12). A lawyer participant considered claims by employees to be, “...*largely unavoidable*” (L12), and connected this to the evolution of what is now the FWO. She stated that fifteen years ago the state body involved in compliance:

*“...was about, you know, three guys across the nation. The inspectorate was nothing.. That changed enormously when the big bang changes happened in these laws in 2006 with Work Choices.. there was a massive beefing up of the government’s enforcement arm.. we’ve got a very well-resourced enforcement arm who go out enforcing laws”* (L12).

### 7.2.3 Situational cues: consequences for non-compliance

This group of participants raised a number of factors that could be used by HR practitioners to support and cue an argument for compliance, which appeared connected to the, “*nasty*” (HR7; retail / warehousing) consequences that may flow from non-compliance. These factors or influences were all external to the individual HR practitioner and organisation and appeared to reflect the wider multi-level and inter-institutional Australian system in terms of community expectations and media coverage (both discussed below). The factors included the risk of being held accountable, personal liability and the financial consequences that may result from breach of employment laws.

#### 7.2.3.1 Being held accountable

The risk that HR practitioners and senior management may be called on to explain and account for action taken reportedly strengthened arguments for a compliance-focused approach to employment laws. This factor overlaps with the perceived high risk of claims referred to above, and also the environment in which those claims are heard. A HR manager emphasised that:

*“...you just don't want to be that person who is being called into, you know, external jurisdictions and being called to account”* (HR19; business services).

He went on to explain that the risk of being held to account meant he would challenge managers who, for example, wanted to avoid procedure. As both he and the managing director would be the ones called upon to justify and defend the action taken he described needing to ensure the necessary procedures had been followed. The potential unpleasantness of being questioned about and required to justify action taken was referred to by a number of participants (HR7; HR15; L22). Indicating how the potential tension between a compliance approach and management desire to avoid procedure may be resolved in favour of compliance, a lawyer explained:

*“I think it just takes one time having to give evidence in the witness box, defending the decisions that you’ve made to focus the mind a little bit more sharply for a CEO in that sort of a [commercially focused] business” (L12).*

Participants also described the Fair Work Commission (FWC), the national workplace relations tribunal where most claims would be heard, as a hostile environment for employers. A lawyer participant (L14) believed that a particular commissioner had never found in favour of the employer in any matter brought before him. A senior HR BP also described how employers need to seek leave to be represented when appearing in matters heard at the FWC. When she recently attended the FWC in a dispute over a collective agreement she felt it was:

*“...incredibly unfair because they [the FWC] didn’t allow us to have legal representation. So I was representing the company by myself against five representatives from the Union, two of which were actual lawyers, and I just felt like that was very unbalanced... if you were a HR practitioner that did not have that IR or legal piece as part of your toolkit, I think you could find yourself very ill equipped to represent the company in that forum” (HR6; automotive retail).*

The approach taken by the commissioner in this case did not appear to be unique. A lawyer participant (L14) referred to the same problem, and had taken attending FWC hearings without a representative from the organisation to force the FWC to deal with her.

These findings suggest that the desire to not be held accountable or cross-examined and to stay out of the FWC helped focus attention on what the law required and supported a compliance approach.

#### 7.2.3.2 Personal liability

Participants also referred to the risk that HR practitioners and senior management could be held personally liable for non-compliance with employment laws helped guide and concentrate attention on compliance (HR19; business services). The risk of personal

liability was connected to an increased emphasis on the legal and compliance expert and challenger roles of HR (HR6; HR7; L12). Indicating how a compliance approach helps avoid liability, a people and culture manager explained:

*“...and now, of course, there’s also, far more than what there used to be, is personal accountability and jail time. That kind of brings a few things to people’s attention.. I don’t think you need to deal with the consequences so long as you’re doing the right thing..”* (HR10; retail / manufacturing).

A head of workplace and media law (L11) suggested that personal liability could be a strong influence on the approach taken. He described his experience of advising HR practitioners and members of senior management, and that after he has:

*“...point[ed] out their personal liability.. that usually, well, I have not seen anyone yet proceed notwithstanding that advice”* (L11).

Lawyer participants in this study were also conscious of the extension of personal liability to themselves (see findings discussed above), and claimed that this had impacted the way they gave advice (L11; L12). They described warning clients against taking action they perceived to be unlawful (L11) and taking a much more cautious approach to giving ‘commercial advice’ (L12). Accordingly, these findings suggest the risk of personal liability may help influence a more compliant approach within organisations.

### 7.2.3.3 Financial consequences

Participants also indicated that a cost-benefit assessment may be performed, which took into account the financial consequences of non-compliance (HR9; HR10; HR15; HR16; HR19; HR20). These consequences were not just limited to legal penalties for breach of employment laws, but included the legal costs of defending claims and the potential financial ramifications of negative media publicity and public backlash (see also findings set out below). In the Australian context, the HR participants indicated that these costs could be significant and outweighed any benefits to the business in not

complying. Accordingly, these financial risks - market based incentives, some of which were stipulated in legislation - could be used to strengthen arguments that compliance was in the best interests of the business and help align the goals of corporate and state-based logics. Indeed, a HR participant (HR23; consultancy) explained that while it was costly to get legal advice about how to handle employees and matters covered by employment laws, it was even more costly to get it wrong and face a claim. A HR / legal consultant also referred to the considerable legal penalties that could flow from non-compliance:

*“I don’t want to get fined a quarter of a million dollars or whatever. I don’t want to get hauled up before the Federal Court because I’ve broken the law, that’s a no-brainer, no-one wants to do that. That’s your compulsion for compliance”* (HR9; HR / legal consultant).

A HR manager explained that while he would always seek to do the right thing it was not always easy to convince his CEO to approve a compliant course of action. In these cases he would seek the help of the CFO to present the financial arguments for compliance (HR15). He reported that this approach was often successful and based upon:

*“...a commercial rational reasoning that the cost to the business is going to be substantial, whether it’s lost opportunity, lost customers.. reputation.. things like reputation are very hard to quantify but they’re very important to CEOs”* (HR15; health services).

A lawyer participant also referred to HR ‘selling’ a compliance approach to matters governed by employment laws. However, it appeared that the focus was not just on saving the business money, but using these arguments as a tool to achieve the objectives of the legislation. This lawyer described and perceived HR practitioners as able to, *“... kind of achieve good social justice outcomes, but via a compliance framework”* (L12). Other lawyer participants also indicated limits to the extent to which financial considerations could and should govern the approach taken by HR practitioners and organisations. This group of lawyers drew a line between the legitimate management of

risk and action they simply categorised as unlawful, such as underpayment of wages (L11; L18). Paying employees their minimum entitlements was considered part of the cost of doing business, and a lawyer made clear:

*“...if you’re not profitable you have no business doing business.. if you can’t operate in accordance with the minimums because it would make you go bust, then you have to go bust” (L18).*

This lawyer was describing interactions with a HR practitioner who was having difficulties convincing her organisation to pay the minimum wage. Accordingly, there are clearly organisations in Australia that prioritise business and economic goals over compliance. However, for the HR practitioner concerned, and this legal adviser, a compliant approach appeared necessary regardless of the cost-benefit calculation. This perspective on compliance may be explained by findings regarding the perceived importance of community expectations to the treatment of workers.

#### 7.2.4 Situational cue: community expectations

Participants also referred to the influence of community expectations as contributing to the need to take a compliant approach to employment laws. Community interest and expectations can be divided into two, albeit overlapping, areas. The first is concerned with what appear to be political and cultural norms about the appropriate treatment of workers and employees by business / organisations. The second relates to smaller groups of members of the public, that participants referred to as willing to take action against organisations seen to breach these expected norms. Also connected to these two areas were references to the role played by the media in promoting these norms and exposing organisational wrongdoing; findings regarding the influence of the media are set out in the following section.

In relation to perceived political norms, a lawyer participant highlighted the historical development of employment rights and centrality of the industrial union movement in Australia:



*“...the role of the ‘working man’.. has been at the heart of our politics. I mean, the move towards federation in Australia came out of strikes, out of the union movement in the 1880s. That was one of the big drivers towards federation and becoming our own nation. So historically there’s always been a big focus on it.. both political parties, one of, if not the most significant difference between the two of them is their position on industrial relations. So it defines the key political parties in the country. And people are passionate about it.. people have strong opinions on the system that we operate under” (L12).*

Throughout the interview this lawyer referred to the need for HR practitioners and organisations to take into account community expectations in their approach to employment laws in order to avoid what she described as, “...*moral outrage*” (L12). Participants suggested this moral outrage was a possible consequence of non-compliance, but may also flow from the lawful breach of community norms. Various lawyer participants (L12; L18) provided the example of the lawful removal of penalty rates for working irregular and / or unsociable hours in collective agreements entered into during the Work Choices era (see chapter 5 for background regarding the unpopularity of the Work Choices legislation). These participants referred to the example of Grill’d, a fast food chain, that had been exposed in the media for operating under this type of collective agreement. Penalty rates were described as, “...*very close to the heart*” (L12) of a lot of Australians and the left-leaning media. As a result, while Grill’d was not legally wrong, the media coverage was described as presenting the organisation as involved in an ethical or moral wrong. A lawyer explained:

*“...reputationally I don’t think many people can weather that storm now. That because it’s legal it’s ok. I don’t think that sits well with people.. it would have a major impact on the way people viewed them, but it would have a big impact within their own organisation.. people that would see it and say, ‘well, you’ve lost my business’” (L18).*

This quote also indicates the form of action that may be taken against organisations seen to breach these community norms. Another lawyer participant (based in Melbourne, Victoria) explained that there is a significant proportion of the community who will

make abusive phone calls, make signs and placard store fronts (L12). A concern to avoid protests by the local public / community was also echoed by HR participants, who referred to the financial ramifications of such activity. A people and culture manager (based in Adelaide, South Australia) explained:

*“...the potential damage to [the organisation], for example, doing the wrong thing and getting exposed on a Today, Tonight [TV news programme], something like that, the damage would be significant to sales. People would boycott our stores or those types of things”* (HR10; retail / manufacturing).

In addition, the ‘community’ that the organisation is concerned with may also include the business community. If an organisation does not comply with employment laws this could impact on its relationship with those it does business with, whether other organisations or the government (L11; HR13; HR19; HR23). A HR manager at a business services organisation (HR19) perceived other businesses and the Australian government to be increasingly concerned about the practices of those in their supply chain. Both he and a HR participant from a consultancy organisation (HR23) indicated that to win work from these entities they need to confirm in tender documentation that they have not been prosecuted for breach of various employment laws. Both these participants also indicated that this helped influence a compliant approach.

#### 7.2.5 Situational cue: the media

As indicated above, the media was seen to play a key role in exposing non-compliance with employment laws or activity seen to breach community expectations, and participants were keen to avoid such negative coverage and the damage it could inflict. In addition to the example of Grill’d, referred to above, participants named other organisations that had suffered negative media coverage for a non-compliant approach to employment laws. These included 7:Eleven (convenience stores), Coles (supermarket chain), and Gloria Jeans (cafes). That participants had remembered and named these organisations arguably suggests the extent to which negative media coverage resonated with them. In reference to the example of Coles and how it had underpaid staff, a HR manager commented:

*“Coles must look at that now and go, ‘how did we get into this, you know, how did we not...’. I just think there’d be senior people in that business thinking we do not want those sort of headlines”* (HR19; business services).

While the organisations named by participants were all large national companies, HR participants from small organisations were also concerned about negative media headlines. The HR manager quoted above was from a business with 250 employees. A HR manager (HR15) from a health services organisation with less than one hundred employees also indicated how the risk of negative media coverage would influence the approach taken. In relation to any proposed course of action he asked himself how it would look if it was covered in the Victorian tabloid paper, the Herald Sun, and whether it could be justified and defended.

Lawyer participants also referred to clients taking potential media coverage into account when deciding how to handle matters covered by employment laws. The extent of this influence was evident in one of the lawyers’ position as head of the employment and media law groups at his firm (L11). While he indicated that different organisations may care in different ways about the risks associated with negative media publicity (see findings set out above), he perceived litigation as always of interest to the media. He explained how adverse coverage was a factor taken into account by HR practitioners and organisations in their approach to employment laws. Another lawyer (L18) also referred to clients acting on headlines about other organisations, as they did not want to risk attracting similar coverage. She gave the example of a retail client that had a valid collective agreement but, like the agreement used by Grill’d, it did not include penalty rates. She explained how the organisation was considering entering into a new collective agreement with penalty rates, which would add approximately one million dollars to the annual wage bill. Also emphasising the importance of organisational values to the approach that should be taken, she added that the organisation needed to:

*“...keep in mind that the minute you have an employee who goes to, you know, the press, you will be in the spotlight like a Grill’d.. and I don’t think someone*

*like [retailer] really could weather that, because.. they talk the talk, you know, about people being so important, it's going to even look maybe worse..” (L18).*

As noted above, the consequences for organisations that suffer negative media coverage included public boycotts and brand damage (HR10; HR16; HR19; HR20; HR23), tying a compliance emphasis to financial and market-based concerns. While financial implications appeared to be an important driver of a compliance-focused approach, the way participants described negative media coverage appeared to also include a wider set of concerns. A lawyer participant (L12) described how such coverage could have, “*intangible*” consequences. She referred to how the CEO of a client company was: “... *on the front page of the paper every day being called an ‘exploiter of the vulnerable’.* *It’s dreadful*” (L12). If a member of the senior management team is personally named in the media it could arguably alter his / her perception of the importance of taking a compliant (if not over-compliant) approach to employment laws, and expectations regarding the role HR should play.

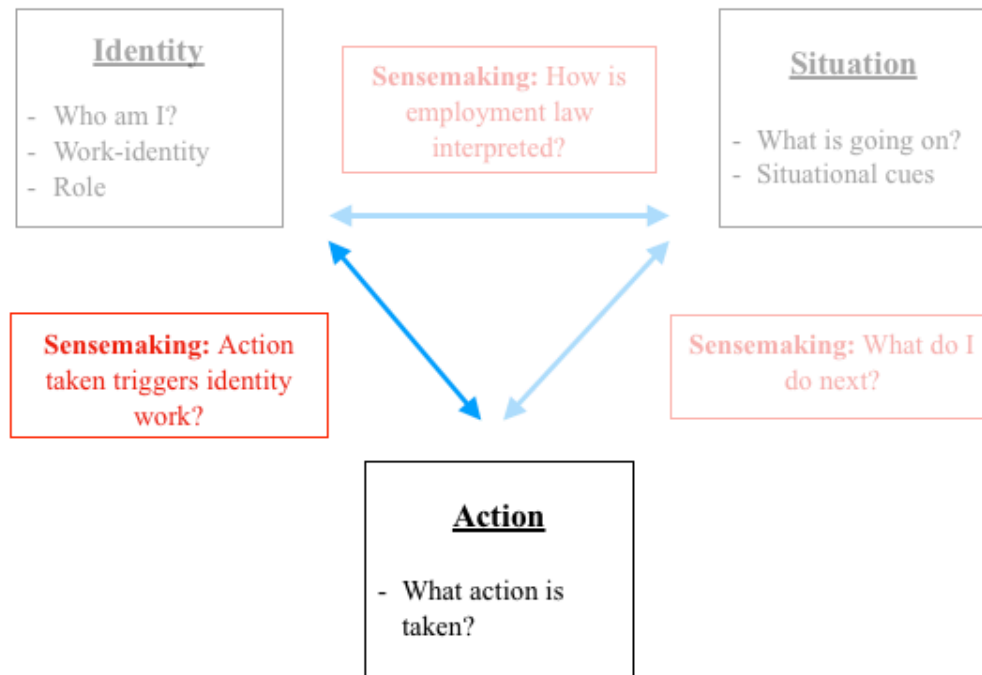
Association of non-compliance with employment laws with ‘exploitation’ also suggests the extent of media and community distaste for such action. The lawyer quoted above was not only one to use this term, with a national HR manager stating:

*“...we don’t want to be associated with exploitation from a moral point of view.. we don’t want our brands to be exposed to that negative publicity.. if [the brand] has been tarnished by poor employment practices, then that would put us at a disadvantage to attract good employees.. and obviously push customers away as well, ‘we’re not going to go in there, those people are exploiting their employees’.. it’s extremely important to us in regards to how we employ and treat our people within the workforce.. the era of exploitation and mistreating people is self-defeating now.. it’s everywhere very quickly!.. And the damage it does is untold” (HR16; retail / manufacturing; emphasis added).*

This participant’s choice of language and reference to exploitation highlight the way he perceived non-compliance, and how it may be construed by others. In turn, the nature of

the language used by these participants also appeared to contribute to how they made sense of employment laws and situations governed by them.

### 7.3 Action and sensemaking



Source: Adapted from Weber and Glynn (2006: 1645)

This section examines the findings regarding the action reportedly taken by the Australian participants and how they made sense of it, addressing the following highlighted aspects of the conceptual framework:

#### 7.3.1 Action

Due to the overlapping nature of the concepts in the framework, many of the findings set out above include examples relevant to this section. This section summarises and elaborates on these findings, first examining HR participant focus on compliance and the reported divergence between HR practitioner and organisational action. It then looks at a specific example; the procedural steps participants described taking in relation to management of under-performing employees and prior to dismissal. It also examines the

circumstances when participants referred to using a deed of release (see chapter 5 for background on deeds).

#### 7.3.1.1 Action: compliance

Aside from the examples given below, all of the Australian HR participants in this study indicated that they would take a compliant approach to employment laws.

The multi-dimensional work-identity displayed by these participants appeared to provide them with an inherent motivation or reason to pursue a compliance approach. Compliance was consistent with a professional HR identity and a focus on supporting and advocating for the employees. The roles associated with these identities included challenging management and questioning instructions that appeared to prioritise managerial autonomy and flexibility at the expense of compliance. The findings also suggest the existence of various situational cues that recommended and enabled a compliance approach by these HR participants. These cues included a claims environment that was seen as hostile to employers, the risk of being held accountable and also personally liable, reputational damage, negative media coverage and public backlash. While the presence of these cues may differ between organisations and according to the precise circumstances faced, overall they appeared to support a focus on compliance as reported by these participants.

Some of these participants also provided examples of where their actions and approach had diverged from those of the organisation. While the organisation (in other words, senior management) was perceived as pursuing financial and commercial objectives, these HR participants indicated a focus on compliance with the demands set out in employment legislation. Examples included where HR participants referred to challenging management, in some cases successfully, such as a HR manager at a commercial law firm (HR13), and others not, such as the senior HR business partner (HR6; automotive retail) who left her employment in order to avoid association with non-compliance and protect her professional reputation. In these cases the form of action taken by the organisation may have differed, but the HR participants referred to

the same approach - of challenging management and advocating for a compliance approach.

### 7.3.1.2 Action: performance management and dismissal

Despite ambiguity regarding the precise nature of the procedural steps required to properly performance manage employees and prior to dismissal, all the Australian HR participants generally indicated that the necessary procedures would be followed in these circumstances. Consistent with identification as the voice and protector of employees, HR participants described performance discussions as supportive and the first step in helping the employee improve with the aim of avoiding termination of employment (HR13; HR19; HR20; L22). Two HR participants (HR13 (law firm) and HR16 (retail / manufacturing)) also referred to following performance management procedures with employees who fell outside the list of those legally protected from unfair dismissal. In these cases the participants appeared to be influenced by concern for the fair treatment of employees rather than demands from management. A national HR manager referred to following performance management procedures with senior staff who could not bring a claim for unfair dismissal, stating that: “...*you don't just turf people out because you don't like them one day*” (HR16; retail / manufacturing). Similarly, a HR manager at a commercial law firm described how she refused to follow an instruction from senior management to legally dismiss an employee during his probation period. She explained:

*“...he's a kid who has relocated to Melbourne from the country, he's left his family, we're going to talk to him and tell him what he needs to improve, but we're not getting rid of him.. I was really angry at them [senior management]... So I stood up to them and he's still working with us six years later.. There's heaps of times when I've had to stand up for what I believe in”* (HR13).

This HR manager was not the only one to describe challenging management, as almost all HR participants referred to standing up to managers who sought to avoid procedural steps in relation to performance management (HR6; HR7; HR9; HR10; HR13; HR15; HR16; HR19).

Nevertheless, the only clear example of when employment laws were not followed also involved the procedural steps required to properly performance manage and / or dismiss an employee. Despite emphasising that procedures would be followed and employees supported, five of the HR participants referred to situations where procedures may be cut short (HR6; HR13; HR15; HR19; HR20). HR participants referred to difficult employees who they believed would always make a claim no matter what action was taken (HR6; HR13; HR15). The HR manager at the commercial law firm quoted above referred to there being, “...*a few psychos out there*” (HR13). Both she and another HR manager (HR6; automotive retail) indicated that in these cases they would construct a redundancy rather than dismiss for performance or conduct. Redundancy was seen to present a safer option, as it did not attract the same risk of an adverse action claim by the employee (HR6); see chapter 5 for background on these claims, also known as ‘general protections’ claims. Participants emphasised that in these cases the legal requirements surrounding redundancy would be carefully complied with, as a HR participant explained:

*“...well, you are being compliant, because you are making sure that it is a bona fide redundancy, that the role remains unfilled or doesn’t exist for a period of time. Yes, so I think technically it then becomes your role to make sure it is legitimate and there is not an advert placed next week for that particular role..”* (HR6; automotive retail).

This focus on ensuring there is a ‘compliant’ redundancy appears to be a way of rationalising and making sense of the situation in a way that is consistent with the professional dimension of work-identity.

Only one of the HR participants (HR20) indicated that avoidance of procedure involved taking into account the time spent by the manager involved in following that procedure, and the value of that time to the organisation. This HR participant was employed by the global recruitment organisation referred to above as commercially and financially focused. A link can be seen in this participant’s account between the nature of the organisation, the perceived expectations of management, and an apparent willingness to



discuss prioritisation of management demands over the procedural steps that should otherwise be followed.

### 7.3.1.3 Action: Deeds of release

A focus on compliance amongst the HR participants was consistent with the way they talked about using deeds of release. Deeds are binding agreements whereby the (ex)employee agrees not to make any claims arising out of their employment or its termination. Five of the HR participants referred to using deeds, but these were not the same five who described avoidance of the required procedures in the section above. Highlighting the connection between the organisation and the action taken, a HR participant (HR23) from a consultancy firm explained deeds were always used with departing employees in order to protect the organisation from claims. This organisation was reliant on winning tenders, which required disclosure of any claims that had been made. However, this participant also indicated that the proper procedures leading to dismissal would still be followed.

Another HR participant was adamant that the proper procedures would be followed, but a deed may be offered to ex-employees who then make a claim because the costs of defending the matter outweigh the cost of settling. This people and culture manager described this as:

*“...one of my all time greatest niggles in terms of HR practice, is that it doesn't matter how well you've done your process... you've got all of the paperwork to prove you've done the right thing, but at the end of the day a settlement's going to happen.. to spend two days in court battling this out is going to cost \$30,000, but you can make it go away for \$10,000..”* (HR10; retail / manufacturing)

This participant also explained that she would not use deeds for current employees or before a claim had been made because it had the potential to incriminate. She described how an employee on sick leave had asked (via a lawyer) for a settlement, which she refused because, *“...it's got the potential to come back and [for the employee to] say there was an agenda”* (HR10).

Only three of the HR participants who referred to using deeds of release made any indication that they may be used in circumstances where the the right thing had not been done. Two of these participants (HR6 (automotive retail) and HR19 (business services)) were circumspect in how they referred to the use of deeds, claiming elsewhere in their interview accounts that the correct procedures would be followed. These participants appeared cautious in how they talked about the use of deeds in these circumstances, perhaps indicating that it was not such common or acceptable practice. The only participant (HR20) who appeared open to talking about using deeds was from the global recruitment organisation. While she did say that compliance was not negotiable, she also made it clear that the cost of managers' time and the importance of brand reputation meant that deeds would be used: "...if we see that it's just not going to work out for whatever reason" (HR20).

There was also the suggestion that deeds may be used to handle other potentially more damaging claims. Only two participants referred to this, including the HR participant from the global recruitment organisation. She described use of a deed to effectively silence an employee who had made allegations against a manager that the organisation apparently did not believe, but also did not want aired in a tribunal / court. One of the lawyer participants (L14) also referred to a client that made a payment to an alleged victim of sexual harassment, subject to confidentiality, in order to keep the 'important' male employee. Accordingly, there is some indication that deeds may be used to silence complaints about non-compliant (if not criminal) behaviours, but only these two examples from these two participants.

### 7.3.2 Sensemaking

On the whole, the HR participants described taking a compliant approach toward employment laws, which was consistent with findings regarding the different dimensions of work-identity. However, where employees were dismissed for reason of redundancy rather than performance, reference to these employees as, "*psychos*" (HR13; law firm) and the focus on ensuring that the redundancy was compliant (HR6; automotive retail) may be interpreted as a way of justifying the action

taken. These HR participants could still claim to be complying with legal requirements in line with a professional and employee focused work-identity, just not the ones that should apply.

In some cases participants also appeared to rationalise action taken by management, which they indicated diverged from their advice and recommendations. These examples centred on differences in treatment of employees based on their perceived value to the organisation (findings in relation to which are set above). While the HR participants stated they were not involved in nor approved of this action, references were made to the commercial reality and pressures faced by the CEO or MD (HR15; health services), and how their hands were tied (HR6; automotive retail). Excusing management action in this way may be interpreted as the HR participants demonstrating commercial awareness and support for senior management, while simultaneously distancing themselves from the action taken. Again, this rationalisation supports findings regarding the different dimensions of work-identity indicated above.

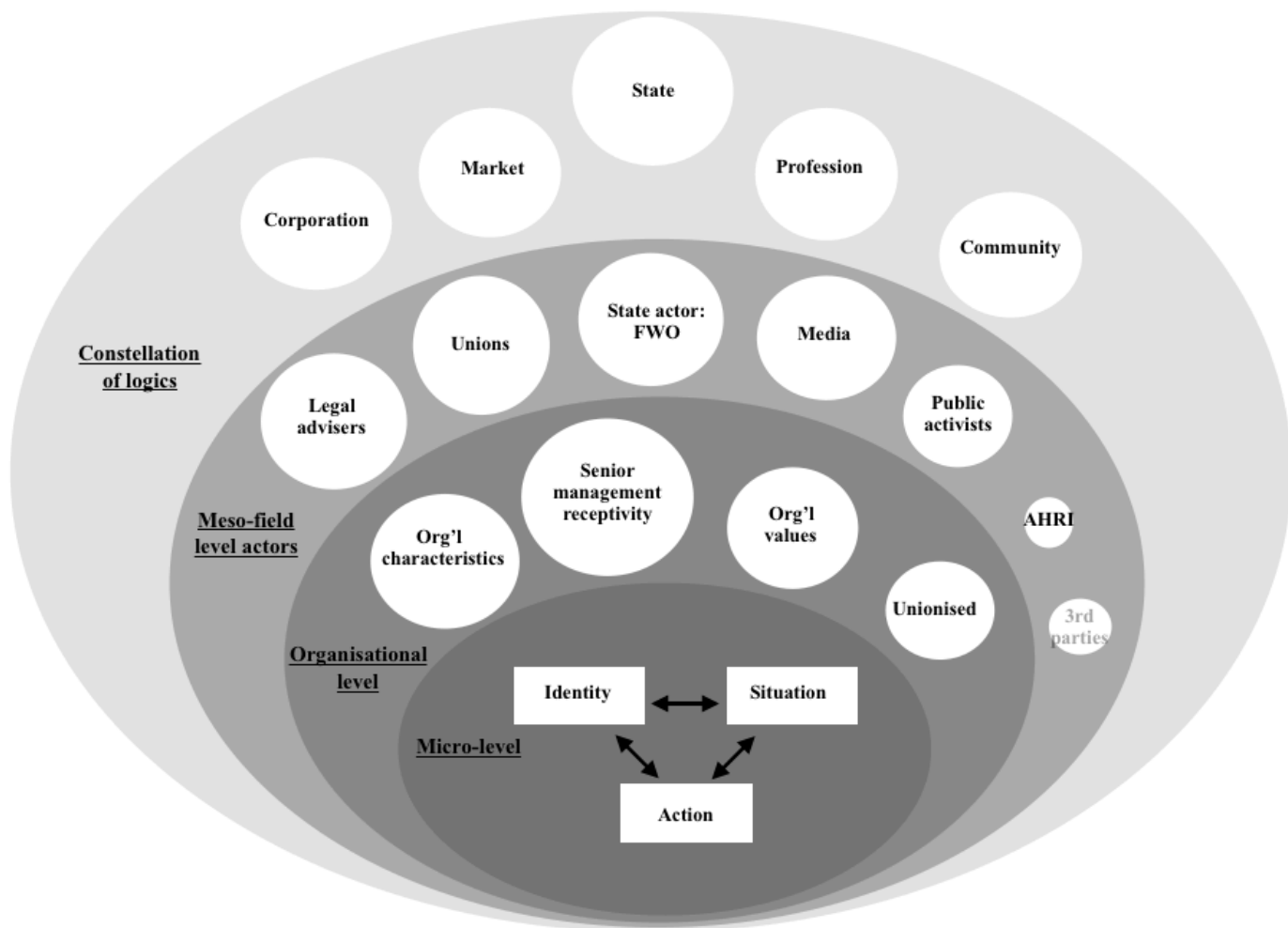
#### **7.4 The Australian multi-level, inter-institutional environment**

The findings set out in this chapter centre on the concepts of identity, situation and action, and can also be used to capture and indicate factors from the wider multi-level and inter-institutional environment that seemingly influenced and shaped the participants' experiences, perceptions and understandings.

The institutional logics and multi-level influences indicated by the participants are shown in Figure 5, set out below. (The relative size of the individual 'bubbles' shown in Figure 5 are intended to convey their apparent importance). The state is shown toward the top, as the way in which the state balances the demands of efficiency, equity and voice (Budd, 2004; see discussion in chapter 5) is connected to, for example, the statutory role of and funding provided to the FWO, the relative influence and rights and standing of trade unions and the extent and nature of collective bargaining. The state is also responsible for senior management and HR practitioner personal liability for breach of employment laws, and the financial (market-based) penalties for non-compliance. Participants also referred to a clear community-based logic in terms of political interest

in employment and collective rights, which appeared to fuel public activism against organisations seen to breach community expectations in these areas, if not legislation. The HR participants also referred to a professional-based logic that provided them with an important facet of their work-identity and appeared to support their apparent focus on taking a compliant approach to employment laws. All of the HR participants were also employed by and worked within organisations. Attributes of the organisation and attitude of the senior management team toward the HR function and compliance seemed crucial to the identity, role and approach that could (and should) be taken by these HR participants. Accordingly, these multi-level and inter-institutional influences all help explain and account for the findings set out above, and how the Australian participants in this study made sense of employment laws.

**Figure 5:** Australian multi-level and inter-institutional environment



## **7.5 Summary and concluding remarks**

The accounts provided by the Australian HR participants point to a multi-dimensional (or hybrid) work-identity, and included identification not only with the business, but also the employees and a clear sense of being a ‘professional’. Linked to these identities were a range of roles and duties, including legal/compliance expert, challenger and educator. The importance of having a multi-dimensional work-identity can be traced to the outer levels of the institutional environment and the presence of multiple logics, as indicated by the participants. These logics included the influence of the organisation and the need to take the interests of senior management into account. However, participants also emphasised influences from field-level actors, including unions, the media, state-agencies and the public. These actors appeared to help carry and amplify the need for the organisation to also attend to the goals and values of state-based and community logics.

The state determined consequences for non-compliance also enabled these Australian participants to argue that a compliance approach made sense not only in terms of satisfying the demands of employment law, but also in terms of satisfying the demands and needs of the business. Participants referred to the damaging consequences of non-compliance, which included financial concerns in terms of legal costs and penalties and reputational damage. However, these consequences could also be more intangible, such as the risk of being held to account and required to justify action taken whether in a legal setting or in the media. The findings presented in this chapter indicate some clear differences to those from the UK. The next chapter compares and discusses the findings in more detail.

## **CHAPTER 8**

### **Comparison and discussion of findings**

This study applied the sensemaking and institutional logics perspectives to examine the institutional influences on HR practitioner approaches to employment laws in the UK and Australia. Chapters 6 and 7 presented the findings and interpretive analysis of the interview data using the conceptual framework presented in chapter 4, which focuses on the concepts of identity, interpretation, situation and action. This framework was developed from Weber and Glynn's (2006: 1645) model of institutionalised typifications in sensemaking. Through examination of these concepts this study also sought to 'capture' the institutional logics (Reay and Jones, 2016) and influences from the wider institutional environment that were drawn upon by participants and helped shape the way they made sense of and approached employment laws. The constellation of logics (Goodrick and Reay, 2011) and multi-level institutional environment suggested by participants' responses in each country are illustrated in the figures set out at the end of the preceding two chapters; Figure 4 (UK, chapter 6; p.178); and Figure 5 (Australia; chapter 7; p.220).

This chapter compares and discusses the findings from the two countries, highlighting areas of similarity and difference. Contrary to assumptions in the mainstream HRM literature that HR practitioners are involved in straightforward compliance with employment laws, all the participants in this study had to contend with multiple and conflicting institutional logics in this area of practice. This chapter starts by examining the existence of institutional complexity in both the UK and Australia, and how the findings from this study impact the way the relationship between HR and employment laws is currently theorised in the HRM literature. It then examines the similarities and differences between the constellation of logics indicated by participants in the UK and those in Australia. The third section examines how those differences appeared to have consequences for the way in which institutional logics filtered down to individual HR practitioners through the field-level and organisation-level. Finally, this chapter compares how individual HR practitioners in each country made sense of employment

laws, focusing on the influence of logics on HR practitioner work-identity, interpretation of employment laws, and the way in which the HR participants could exercise individual agency.

## **8.1 The current HRM literature: theory vs. findings**

### **8.1.1 The state and isomorphism vs. institutional complexity**

The findings suggest that all the participants in this study had to contend with multiple institutional logics when making sense of employment laws. While the constellations of logics indicated by the UK and Australian participants differed (see Figures 4 (p.178) and 5 (p.220)), all participants faced institutional complexity and had to balance the goals and values of different institutional logics in the approach taken. These findings question the current theoretical discussion in the HRM literature surrounding the interaction between HR practitioners and the law.

Where the topic of HR practitioner involvement with employment laws is considered in the mainstream HRM literature, the suggestion is that as a result of coercive isomorphism, organisations respond to and comply with employment laws in the same way (see Boselie et al, 2000; Paauwe and Boselie, 2007; Wood et al, 2012). This assumption is based on neo-institutional theory and the idea that the coercive and regulatory mechanisms of the state impose an ‘iron cage’ over organisations (DiMaggio and Powell, 1983). When it comes to employment laws the only institution perceived to be of relevance is the legal and structural machinery of the state, and there appears to be no room for individual agency in the approach taken. However, as indicated above, this study suggests that HR practitioners also take into account other institutional logics; for example, participants in both countries referred to the clear influence of a corporate logic and the importance of the goals and values of the organisation to the approach taken. Individual HR practitioners had to make sense of and interpret employment laws in combination with what the organisation and senior management demanded. The findings suggest this interpretation was influenced by the way the individual identified and how he / she was able to prioritise the goals and values of the different logics present. Accordingly, these findings also point to the importance of individual agency

and the relevance of the entire institutional context, rather than a one-logic environment and purely structural understanding of the relationship between HR practitioners and the law.

### 8.1.2 Social legitimacy vs. decoupling and settlement agreements

Participants referred to the use of settlement agreements (in the UK) and deeds of release (in Australia) to settle claims that had been made against the organisation. A number of reasons were given for paying-off employees and settling their claims. Some of these reasons appeared connected to a straightforward costs calculation rather than covering up non-compliance. Australian participants explained that while they believed the organisation had complied with its obligations, it was cheaper to pay-off the claimant rather than incur the legal costs of defending the claim. However, other participants (two out of eighteen in Australia, all eleven from the UK) referred to using deeds or settlement agreements to keep claims quiet and prevent reputational damage. UK-based participants also described using settlement agreements to cover-up non-compliance, for example, in contemplation of non-compliance (HR28; HR29; L24). One UK HR practitioner suggested using a settlement agreement before a claim has been made if, “...*maybe there’s something to be concerned about*” (HR25; consultancy); whilst another suggested how such agreements were used to make, “...*the right stuff happen*” (HR27; charity) for the business. It should be noted the extent to which participants indicated that agreements or deeds would be used differed between the UK and Australia. Australian participants suggested deeds were used infrequently, while in the UK they appeared to have become standard practice amongst these participants for certain groups of employees. These differences may be explained by the wider institutional environment and the apparent dominant influence of the goals and values of a corporate logic in the UK, as discussed in chapter 6 and in the following sections.

These findings shed doubt on arguments in the HRM literature that legal, “compliance is the baseline legitimacy goal” (Boxall and Purcell, 2016: 15), for organisations that are keen to preserve their reputation and standing. The findings from this study suggest that organisations are able to retain social legitimacy without the need for legal compliance,



made possible through the use of settlement agreements and deeds of release. This might be seen as a 'spanner in the works' for the supposed connection between the goal of social legitimacy and legal compliance. These findings also echo insights from the legal literature, with Heimer (1999: 19) recognising that, "legitimacy runs into difficulty when organisations are faced with multiple institutions and multiple audiences". The question then arises as to which institution and audience is of most importance. The findings suggest that for the UK based HR participants in this study the answer was a corporate logic, the organisation and senior management. Legitimacy can be preserved if claims are silenced and compliance with the law is not always necessary.

Picking up on an element of Meyer and Rowan's (1977) work that is not discussed in the HRM literature in relation to the law, these findings also suggest that such agreements/deeds are a tool that enables decoupling. Organisations can retain social legitimacy and the outward appearance of compliance with employment law without the need for internal practices to be hampered by actual compliance; for example, the findings suggest that amongst the UK participants there was routine use of settlement agreements to avoid compliance with unfair dismissal laws. For these UK participants, and in matters involving performance management and dismissal, the recognised tension between managerial power and legal compliance (Boxall and Purcell, 2016) appeared to be resolved in favour of management. Settlement agreements were the tool that enabled this outcome. The use of settlement agreements as a result of intended or inadvertent non-compliance with other laws was also referred to, albeit to a lesser extent, such as maternity rights (L1; L24) and discrimination laws (HR25). These findings may reflect fewer cases of potential non-compliance with these laws, or that these types of non-compliance were perceived by participants to be more reputationally damaging (HR4; HR25; L2), not as socially acceptable and not as suitable for discussion in a research interview.

While an article on the CIPD website (Calnan, 2016) suggests that HR practitioners may be pressured into using settlement agreements by senior management, the UK findings indicate that it may be the HR practitioner who recommends using one. An explanation for this may be found in the one-dimensional work-identity indicated by UK HR participants, and the wider institutional environment. References were made to

how using a settlement agreement was ‘commercial’ and in the business’ interests, which meant it was also consistent with the business focused work-identity expressed by the UK HR participants. When compared to the Australian findings, the UK findings also stand out for the paucity of references to HR practitioners as having the power or influence to challenge the approach desired by management. Despite her seniority within the HR function, a HR director at a large international law firm in the UK explained that when she tells partners they need to performance manage the lawyers in their team properly:

*“...they’re like, ‘no, no, too expensive, waste of time, waste of money, I’m not doing it’. And that pushes you to settlement quicker, because you think, well, I can’t performance manage somebody when they’ve done nothing for us for the last month!” (HR29).*

The findings suggest that rather than the HR participants being pressured into using settlement agreements by management, the use of these agreements may be a side effect of the institutional environment they are located within. The apparent strength of the corporate logic in the UK (discussed in more detail below) may arguably be connected to the seemingly widespread use of settlement agreements amongst the UK participants. In contrast, the Australian findings suggest that many of the Australian HR participants could displace the primacy of the corporate logic and help influence a compliance approach (also discussed further below). This finding may then be linked to the comparatively fewer references to the use of deeds of release by Australian participants.

In relation to the UK in particular, the findings also suggest assumptions in the mainstream HRM literature regarding the non-optional nature of employment laws (Cohen, 2015; Orliczky, 2007; Parkes and Davis, 2013) are misplaced. The UK findings indicate that organisations with the resources to pay-off employees appear to have more choice and flexibility about whether to comply with employment laws. There may also be organisations in Australia that would take a similar approach, but the Australian institutional environment seemed to support and enable this group of Australian HR participants to advocate for compliance in a way that was not evident in the UK findings.

## **8.2 Constellations of logics**

As indicated above, the findings point to the influence of multiple institutional logics on the HR participants, depicted in Figures 4 (UK; p.178) and 5 (Australia; p.220). The way in which participants drew upon these logics supports Weber and Glynn's (2006) argument that institutions (and their logics) provide the building blocks of sensemaking. Accordingly, it is important to explore the logics indicated by the participants in each country as these help explain the findings discussed in the rest of the chapter. This section first compares how participants from the two countries referred to how the state regulated the employment relationship. It then examines how participants drew upon corporate and market logics, and how the content of these logics and the approach they influenced appeared to differ between the two countries. This section then discusses how Australian participants also referred to professional and community logics, both of which seemed to support and enable them to take a more compliance-focused approach to employment laws. These findings lend weight to Heimer's (1999) argument that the law works best when it operates in tandem with, not against, other institutions.

An overview of the UK and Australian constellations of logics that participants in this study indicated as influencing the approach taken by HR practitioners toward employment laws is set out in Table 4 below. Table 4 also highlights some of the differences in the content of the logics between the two countries, which are discussed in more detail in the rest of this section. However, attention should be drawn to the apparent strength of the state logic in terms of enabling a compliance approach (arguably strong in Australia, comparatively weak in the UK). In addition, in the Australian context, a compliance approach to employment laws seemed to be supported by other institutional logics (market, community and professional), whilst these influences were arguably weaker amongst the UK participants.

**Table 4:** Comparison of constellations of logics in the UK and Australia

Logic	UK	Australia
State	State determines content of employment laws, role of state actors and mechanisms of enforcement.  Perception of extent enabled a compliance approach: weak.	State determines content of employment laws, role of state actors and mechanisms of enforcement.  Perception of extent enabled a compliance approach: strong.
Corporate	Organisation and senior management exerted a clear influence over approach taken.	Organisation and senior management exerted a clear influence over approach taken.
Market	Financial penalties set out in legislation may support a compliance approach. Amongst this group of participants, this effect appeared weak.	Financial penalties set out in legislation and potential financial consequences arising from reputational damage supported a compliance approach.
Professional	Not connected to a compliance approach amongst these senior HR participants.	Sense of being a HR professional connected to compliance with employment laws.
Community	Not connected to a compliance approach.	Community interest in employment rights may support a compliance approach.

### 8.2.1 State logic

The findings point to the importance of how the workplace was regulated in each country to the approach then taken by the HR participants towards matters governed by employment law. While employment legislation clearly existed in both countries, how the laws were perceived and experienced by participants in the UK and Australia was quite different. The reasons for those differences appeared connected not only to the scope of the employment laws in force, but also the way in which the state determined the following kinds of factors: the financial penalties for non-compliance; who could be held liable for non-compliance; the legislated rights and functions of field-level actors (such as unions and government bodies); and how the claims system operated in each country. The state determined framework for regulation of the employment relationship and how the state balanced the demands of efficiency, equity and voice (Budd, 2004), appeared to have implications for the way participants perceived the importance of

compliance. This finding supports insights from the industrial relations literature, such as Godard’s (2002) argument that the state can shape organisational (and by implication, HR) practices by enacting ‘strong’ or ‘weak’ laws. ‘Strong’ laws are those that may be perceived as leaving little option but to comply, whereas ‘weak’ laws mean, “... resistance may be a viable option” (Godard, 2002: 274). Indeed, the findings of this study point to the importance of the content of the state logic and consequences for non-compliance with employment laws. These seemed to affect how participants could balance the need to comply against the demands and goals of, in particular, the corporate logic. Table 5 provides a comparison of the findings from the two countries in terms of the different ways in which the state logic was seen to influence the way participants made sense of employment laws in practice.

**Table 5:** Comparison of UK and Australian state logic components

State logic components	UK	Australia
Financial penalties	Participants referred to: <ul style="list-style-type: none"> <li>• compliance effect of large penalties for breach of collective redundancy provisions (L2);</li> <li>• perceived compliance effect for bulk of workforce in large organisations (HR4; HR28; HR29); and</li> <li>• lack of compliance effect for certain employees and laws. Employer may risk it or pay off the employee (L1; HR4; L24; HR26; HR27; HR28; HR29).</li> </ul>	Participants referred to compliance effect of large financial penalties (overlapped with potential financial impacts negative publicity could have on reputation) (HR9; HR10; HR15; HR16; HR16; HR19; HR20; HR23).
Potential liability	<u>Not</u> referred to by participants.  However, for alleged breach of most employment laws a claim can only be made against the organisation.	References were made to the potential personal liability of: <ul style="list-style-type: none"> <li>• senior management (HR10; L11; HR19);</li> <li>• HR practitioners (HR6; HR7; L12; HR19); and</li> <li>• legal advisers (L11; L12).</li> </ul> Personal liability used to support arguments for compliance approach.

State logic components	UK	Australia
Union rights	Participants referred to right of unions to represent union members (L1; L24). Participants perceived union representation led to consistency in process and outcomes (HR4; HR28).	Participants referred to: <ul style="list-style-type: none"> <li>• right of unions to represent union members (HR7);</li> <li>• union oversight influencing interpretation of employment laws (L17);</li> <li>• union negotiation of collective agreements (HR6; HR10);</li> <li>• union right to independently make a claim to the FWC (HR10); and</li> <li>• desire to avoid disruptive industrial action (HR6).</li> </ul>
State-funded body	No reference made to any state-funded bodies as influencing a compliance approach.	Reference to the FWO in terms of: <ul style="list-style-type: none"> <li>• provision of information to employees (HR6); and</li> <li>• strength/enforcement powers (L12).</li> </ul>
Claims system	Participants referred to consideration of the ‘risk’ an employee may bring a claim, which helped cue the action taken. Acceptable levels of risk connected to cutting legal corners (HR4; HR26; HR27; L24).	Participants referred to the perceived: <ul style="list-style-type: none"> <li>• high risk of claims being made and expectation will have to justify action taken (HR7; L12; L14; HR15; HR16; HR19; L22; HR23); and</li> <li>• hostility of the claims environment for employers (HR6; L14).</li> </ul>

### 8.2.2 Corporate logic

Participants from both countries also referred to the strong influence of a corporate logic over the approach that could be taken. In both countries participants referred to how HR practitioners advised managers and senior management on how employment law applied to their direct reports, and how employment law affected the workforce and organisation as a whole. In both countries the HR participants had to influence upward, and while they reported making recommendations about the approach that should be taken, they were rarely responsible for making a final determination over the approach that would be taken. This position within the organisation appeared central to the way in which the HR participants made sense of employment laws. The HR participants had to effectively ‘sell’ the argument for compliance to those who were perceived to be more focused on the core business objectives.

In both countries participants emphasised having to satisfy the demands of managers, and in both countries participants perceived managers across the organisational hierarchy to have a strong desire for flexibility in the management of the workforce. These findings support references in the HRM literature to the tension that exists between the goals of legal compliance and managerial power (Boxall and Purcell, 2016). They also appear to represent a clear case of institutional complexity, where the values and goals of different logics (state and corporate) pull in different directions and seem to be incompatible. However, where the countries differed related to how HR participants could balance the goals and demands of the organisation with the requirements of employment law, and these differences appeared connected to the wider inter-institutional environment and the relationship between logics. What management 'needed' and what made sense to the business also depended upon the relative strength of the state logic, which the findings indicate was arguably stronger in Australia than in the UK, and influences from the market and community logics.

### 8.2.3 Market logic

Participants from both countries referred to the influence of a market logic in the approach taken towards employment laws. Again, the influence of a market logic appeared connected to the operation of other logics in the inter-institutional system. As indicated above, UK and Australian participants referred to the state-determined financial penalties for breach of employment laws. Depending on the nature of these penalties they may also be characterised as a financial incentive that can help influence a compliance-focused approach. This incentive effect was evident in the Australian and UK findings, although the perceptions of the participants from the two countries differed when it came to the extent of this influence (see Table 5 above; p.229). The market logic and focus on financial outcomes also appeared to overlap with the goals of the organisation and interact with the corporate and community logics. However, the way in which these logics interacted also appeared to differ between the two countries. Australian participants referred to the financial impact of damage to the organisation's reputation as a result of non-compliance with employment laws or breach of local expectations regarding, for example, the use of employment agreements from the Work Choices era. These potentially serious financial consequences could be used to support

arguments for a compliance or over-compliance approach. In contrast, UK participants indicated that for certain groups of employees the costs of non-compliance with, for example, unfair dismissal laws could almost be characterised as a cost of business. The perceived gains in terms of management time outweighed the potential financial penalties, which could be dealt with through settlement agreements. Consequently, the Australian market logic appeared to strengthen arguments for a compliance approach in a way that was not indicated by the UK participants.

#### 8.2.4 Professional logic

Comparison of the findings from the two countries reveals clear differences in terms of how a professional logic influenced the HR participants. For the Australian participants, being a 'professional' HR practitioner involved personal expertise in terms of knowing what employment laws required and using that knowledge to keep the organisation compliant. Participants referred to the importance of their professional and personal reputation in terms of the compliance approach they took toward employment laws, even if it diverged from the approach desired and eventually taken by the organisation. In contrast, there were very few references by participants in the UK to being a 'professional'. The UK findings suggest that being a senior and 'professional' HR practitioner involved a closer allegiance to the organisation and willingness to prioritise its goals and demands over compliance. Any sense of being a professional HR practitioner, amongst this group of UK participants, appeared subservient to delivering what the organisation and management demanded.

These findings also point to the importance of the relationship between institutional logics. The professional logic in Australia appeared to provide these HR participants with an extra dimension to their work-identity, and the motivation to pursue a compliance approach over demands of and in the face of objections from management. The way in which the state regulated the employment relationship in Australia is also arguably connected to the way Australian HR participants saw their role, in terms of being the legal and compliance expert, challenger and educator. The potential consequences of non-compliance with employment law, including the potential personal liability of HR practitioners and senior management, meant these roles were perceived



to be necessary and required by the organisation, and may have contributed to the apparent strength of this professional logic.

#### 8.2.5 Community logic

The findings from the two countries point to a clear difference in the way a community logic influenced the approach taken by participants in this study, and also highlight the importance of how the logics present in the constellation interact. Australian participants referred to clear community expectations in terms of the expected treatment of employees. Australian participants also perceived there to be a strong public interest in employment rights and collective (trade union) representation of employees. The strength and influence of these community values appeared amplified by media interest in matters involving employment law, with participants referring to the detrimental effect of negative media coverage on organisations and senior management. Accordingly, the community logic in Australia appeared to combine with the state, market, professional and corporate logics to support and enable a compliance focused approach that also made sense to the organisation.

It is by comparison with the Australian findings that the UK findings highlight the lack of accounts or references by participants to the influence of community expectations in supporting a compliance-focused approach. Rather than indicating the absence of a community logic the UK findings may simply reflect the nature of the community logic as experienced by the participants in this study. It may be that the apparent weakness of this logic helped strengthen the corporate logic in the UK and constrained the ability of HR participants to pursue a compliance approach.

### **8.3 The meso-level: the organisation and field-level actors**

The discussion above highlights how all the HR participants in this study faced institutional complexity and had to balance the potentially incompatible demands of state and corporate logics. The way in which the participants resolved the tension between the requirements of legislation and business demands appeared connected to the inter-institutional environment, discussed above, and also the meso-level of the

organisation and the field. The findings of this study point to the clear influence of the organisation over the approach that this group of HR participants could take, and support Martin et al's (2017) argument that the organisation is an important mediator of institutional logics and strong influence in how individuals resolve institutional complexity. However, while Martin et al (2017) emphasised the importance of organisational configuration in this respect, this study highlights the apparent importance of the law-related advice provided by the HR participants to the organisation, which is discussed first. This section presents a discussion of findings that indicate compliance focused HR advice may be more pertinent to organisations exposed to compliance pressures by field-level actors, and also organisations with certain characteristics. This discussion highlights the apparent 'receptivity' (Greenwood et al, 2011) of the organisation - in other words, management and the senior management team - to arguments for adoption of a compliance approach. Accordingly, this study expands our understanding of how the organisation (and field-level actors) mediated institutional logics, and influenced the way in which individual HR practitioners handled institutional complexity.

### 8.3.1 The importance of employment law advice to the organisation

All of the HR participants in this study had been or were employed by private sector organisations, and each organisation was perceived to be important to the approach they could take. In both countries, HR participants were involved in advising managers and senior management on the content of employment laws and recommended course of action. The devolvement of responsibility for managing employees to line managers appeared to leave most HR participants in a primarily support and advisory role. In relation to senior management within the organisation, HR participants were responsible for advising on, for example, the impact of new legislation or changes to the law on the business and employees as a whole. The HR participants lacked the power to dictate the final approach that was taken and their position within the organisational structure and hierarchy appeared similar in both countries. However, the findings point to clear differences in the way the HR participants in the two countries were able to influence a compliance approach, suggesting it was not simply their internal status that led to these differences.

Nevertheless, arguments that the power and status of an individual are important to how institutional complexity is resolved because they are able to enforce the demands of the logic they ‘carry’ (Greenwood et al, 2011; Heimer, 1999) are relevant here. While the HR participants in the UK and Australia occupied similar positions in the organisational hierarchy, the particular constellation of logics and potential consequences to the organisation and individuals within it for non-compliance were quite different. It was these differences that appeared to provide Australian HR participants with an edge in terms of power and influence over those in the UK. Australian participants indicated that organisations needed advice about how to handle matters governed by employment laws in order to avoid: legislated penalties for non-compliance (state logic); negative media coverage and damage to the reputation of the organisation in the local community (community logic); and risk that individual senior managers may be personally sued or named by the media (state and community logics). These consequences appeared to provide the Australian HR participants with a degree of influence that the UK HR participants seemed to lack. It was not the position of the Australian HR participants within the organisational hierarchy that arguably gave them power, but the potential importance of their advice to the organisation. That importance appeared connected to the constellation of logics in Australia and the presence of field-level actors that carried and reinforced the need for a compliance approach.

### 8.3.2 The influence of field-level actors

The findings point to the importance of field-level actors in carrying the values and goals of logics other than the corporate logic to the organisation. It was differences in the presence and perceived strength of field-level actors between the UK and Australia that helped emphasise the role they played. Figures 4 (UK; p.178) and 5 (Australia; p. 220) illustrate the field-level actors referred to by participants in each country, including unions, government bodies (ACAS in the UK; the FWO in Australia), the media (in Australia) and public interest groups (in Australia). The findings highlight the importance of the particular, “constellation of actors” (Jackson, 2010: 69) in each country to the pressures and influences felt by individual HR practitioners and within the organisation. Comparing Figures 4 and 5, this layer of field-level actors may be

described as a protective or ‘buffer zone’, with those in Australia amplifying the demands of employment legislation to the extent that they posed a clear and organisationally ‘sensible’ alternative to pursuit of the values and goals of a corporate logic.

While the findings point to the presence of both unions and government bodies in each country, their powers and influence appeared weak in the UK when compared to those in Australia. As the rights and role of unions and government bodies are legislated and determined by government, the extent of their influence may be traced back to how the state balanced the demands of efficiency, equity and voice (Budd, 2004), discussed above. These findings support the argument of Weber and Glynn (2006) that the presence and role of such actors is connected to the wider and historical institutional environment. Participants with experience of working with unions perceived that they influenced a more compliant approach. These participants referred to the way union presence highlighted the need to follow processes and procedures, treat employees consistently and in accordance with the law, and meant that employees were more likely to be aware of their rights. However, the primary difference between the two countries related to the extent of union presence and state-legislated union rights. None of the UK HR participants had any direct involvement with unions at the time of the interviews. In contrast, Australian participants referred to the wide influence of unions, the extent of union rights, the risks posed by industrial disputes and the values of a community logic that seemed protective of collective representation. These factors meant that for Australian participants it could make business sense to avoid acting in a way that would either aggravate unions already present in the workplace or provide a platform for union involvement.

Australian participants also referred to the oversight of the FWO as operating in a similar way and amplifying the need to comply. Pressure from the FWO could be direct and focused upon a specific organisation, but also indirect in terms of the general risk that non-compliance would be discovered. The only government body referred to by participants in the UK was ACAS and interaction with this body was not emphasised by participants. Additionally, given that a HR manager (UK; HR26) called ACAS for advice about how to get around legal requirements and complained that they could not

*“come up with any good ideas”*, it did not appear that ACAS was a big influencer of compliance amongst UK participants. No references were made to HMRC despite some UK participants referring to potential avoidance of paying the minimum wage (L1; HR4); for example, a lawyer participant talked about working with a large retail client to find a way to avoid recent increases in the minimum wage (L1).

Australian participants also referred to media interest in employment rights and the potential for negative media coverage to result in a public backlash against the organisation involved. Examples of this backlash involved individuals independently deciding to boycott the organisation, to more consolidated protests involving groups placarding and demonstrating outside of stores. In terms of the effect this had on HR practitioners and organisations a lawyer participant likened the impact of the media to that of having a union, *“...looking over your shoulder”* (Australia; L12). To these participants the Australian media appeared to both reflect community interest in employment rights and also amplify that interest. Consequently, this meant avoiding media and public scrutiny was more likely to be in the best interest of the organisation. The Australian participants indicated that, on the whole, the concern to present as socially legitimate helped support arguments for a compliance approach. These findings support arguments that the media and public interest groups are potentially powerful actors that can shape individual sensemaking and organisational behaviour (Weick et al, 2005), and amplify the need to comply, if not over comply, with legislation (Edelman et al, 2010). They also support Weber and Glynn’s (2006: 1651) insight that institutions need *“proximate enforcers with sufficient power”* in order for their influence to be felt. The absence of references by UK participants to these compliance-focused influences and enforcers arguably contributed to the way in which they then interpreted and made sense of employment laws, which appeared more strongly influenced by the demands and values of the organisation.

Finally, it is worth noting the lack of reference by participants to the influence of the respective national HR practitioner associations. However, where they were referred to it was in quite different terms. A UK participant (HR29; law firm) perceived the CIPD to have a compliance focus, but she did not consider this relevant to senior HR practitioners. In contrast, the only Australian participant (HR6; automotive retail) to

refer to AHRI explained how she had been asked to write an article about her experience of challenging senior management when instructed to ignore employment laws. This suggests AHRI may promote awareness of the tension senior HR practitioners can face when managing legal and organisational demands.

### 8.3.3 Organisational attributes

The findings also point to various characteristics of the organisation as increasing the, “thickness of ties” (Greenwood et al, 2011: 342) between it, actors at the field-level and different institutional logics. However, as discussed above, the findings suggest that the starting position faced by participants in both countries was the dominance of a corporate logic. The dominance of this logic could be displaced or weakened by the nature and presence of other logics, but also by the way those logics appeared more pertinent to organisations, or parts of organisations, with particular attributes. This pertinence seemed connected to the way in which the risks or consequences for non-compliance were enhanced as a result of those attributes, making compliance a more desirable option.

Those attributes included whether the organisation was unionised, as discussed above. The influence of union presence on the approach taken in different parts of an organisation was illustrated by a participant from a large manufacturing organisation in the UK (HR28). He indicated that the senior employees he dealt with were not unionised, but there were groups of employees within the organisation that were. His perception was that for these employees the processes were followed and handled well, while he described the approach that may be taken with senior staff as, “...*not legal!*” (HR28; manufacturing).

Participants from both countries also suggested that industry-sector may play a role in increasing exposure of organisations and senior management to the business-sense of compliance. References were made to organisations in industries that were already heavily regulated, which was seen to make it easier for senior management to be convinced of the need to comply with employment legislation. It may also be that the industries referred to, such as the pharmaceutical, mining and banking sectors, required

skilled labour and that the labour costs represented only a small proportion of overall running costs. Consequently, it may be that compliance and its associated costs ‘made sense’ to senior management in these organisations in a way that would be less possible in, for example, industries with proportionately higher labour costs and tighter profit margins.

Australian participants also referred to the heightened risks of non-compliance and breach of community expectations for organisations that marketed themselves on the basis of how they value and treat their people. These organisations risked greater exposure to a community logic supported by field-level actors, and the associated negative consequences if they were perceived to have breached those values in the way employment laws were handled.

Finally, the findings of this study contribute to our understanding of the relevance of organisational size to the approach taken toward employment laws. While there were commonalities in the findings from each country, there were also clear commonalities amongst the senior HR participants in the UK who were employed by large organisations (HR4: property services, over 6,000 employees; HR28: manufacturing, over 30,000 employees; HR29: legal services, over 3,000 employees). The three participants from these organisations referred to situations when the necessary performance management or dismissal procedures were deliberately not followed. Two of these participants also indicated that HR career progression was connected to a closer identification and association with the goals of the organisation over a focus on compliance (HR4; HR28). These findings urge caution against implicit assumptions in the HRM literature that compliance is more important for larger organisations because they are less able to, “fly under the radar” (Boxall and Purcell, 2016: 268). The findings are also at odds with those of Anderson et al (2013), who found HR practitioners from large organisations (in New Zealand) met if not exceeded legal requirements. Their paper reported the participants’ opinion that it was small organisations that were more likely to be irritated by and non-compliant with employment legislation. Contrary to Anderson et al’s (2013) conclusions, the findings of this study support the argument of Australian academics, Howe et al (2014), that larger organisations may have more resources that enable them to subvert the intention of employment laws and conceal

non-compliance. In the UK context this was evident in the heavy use of settlement agreements, and ability to ‘advice-shop’ and find lawyers that would interpret the law in ways that suited the business.

While the findings of this study point to commonalities in the experiences and perceptions of participants from each country, they also highlight differences in terms of organisational attributes that could potentially alter the intensity of compliance pressures. These findings suggest that there is likely to be heterogeneity in the way individual HR practitioners (and organisations) respond to employment laws, rather than the homogeneity assumed in the HRM literature (see Paauwe, 2004; Paauwe and Boselie, 2007; Wood et al, 2012).

#### 8.3.4 Perceived receptivity of managers and senior management to compliance

The discussion in the sections above regarding the role played by field-level actors and the organisations in which HR practitioners are employed highlights how institutional logics are transmitted and ‘filtered’ (Greenwood et al, 2011) through the meso-level. These different entities and actors could amplify or weaken the influence of different logics, contributing to how the HR participants experienced and were also able to resolve institutional complexity. In terms of that resolution, the greater the potential consequences of non-compliance (in terms of legislated penalties and community backlash), the stronger the argument that a compliance approach was also in the best interests of the business. The accounts provided by Australian participants suggest that the nature and extent of those consequences meant managers and senior management teams could be receptive to arguments for compliance. The constellation of logics in Australia and presence of various field-level actors appeared to enable the Australian HR participants to synthesise and align the goals of state and corporate logics. Australian participants provided examples of when they had been able to convince management and senior management that compliance with employment laws ‘made sense’ to them personally and to the organisation in a way that did not seem possible for participants in the UK.



The discussion above highlights how the importance of law-related HR advice to the organisation could arguably affect the approach that HR participants could take toward employment laws. Accordingly, the findings from both countries suggest that the HR participants were, “organisationally embedded” (Moorhead et al, 2019: 147), in that the organisation exerted a degree of influence over the approach they took. However, the findings differ in respect of the extent of that influence, with Australian HR participants indicating a greater sense of independence from the organisation than those in the UK. This independence appears connected to the wider institutional environment and how the Australian participants identified and saw themselves, discussed in the next section.

#### **8.4 The micro-level: HR practitioner approach and sensemaking**

The constellation of logics and multi-level institutional environment identified in each country may be connected to the findings regarding HR participant work-identity, discussed first. Consistent with the sensemaking and institutional logics literature (Weber and Glynn, 2006; Weick, 1995; Weick et al, 2005; Thornton et al, 2012), individual work-identity can also be connected to the way in which participants interpreted and made sense of situations that involved the application of employment laws, examined in the second section below. However, rather than dominant logics and identities imposing a straight-jacket on sensemaking and practice, the findings also point to the potential for individual agency in terms of skill and creativity in the approach taken, discussed last.

##### **8.4.1 HR participant work-identity**

This section focuses on the work-identity and role orientation indicated by the HR participants, first exploring differences in the findings between the UK and Australia. It then connects these findings to the influence of the organisation and perceived expectations of senior management, whose interests appeared shaped by the wider institutional environment. It also highlights the link between work-identity and the vocabulary of practice and language drawn upon by the participants, both of which are implicated in the way they then made sense of and interpreted employment laws.

#### 8.4.1.1 Influence of the organisation on work-identity

The work-identity of the UK based HR participants appeared one-dimensional, focused on enabling and facilitating the efficient achievement of organisational objectives. These participants aligned themselves with the business and management, emphasised by some specifically distancing themselves from identification with the employees (HR4; property services). This work-identity seemed to be reinforced through processes of socialisation and career progression (HR4; HR5; HR29; L1), and apparent acceptance that the business' needs were paramount (HR4; L24; HR26; HR28; HR29). Reference was also made by a lawyer participant to the potentially career-ending implications for HR practitioners that were, "...*too focused on the law*" (L24).

In contrast, the work-identity of the HR participants in Australia appeared multi-dimensional. Australian participants also identified with the business, but this did not appear to be all encompassing as participants also identified with the employees and a strong sense of being a 'professional'. These alternative identities (alternative to a work-identity purely shaped by a corporate logic) appeared to motivate and enable this group of participants to challenge directions from senior management and to pursue a compliance approach.

The differences in findings regarding work-identity can be connected to the influence of the organisation and perceptions regarding senior management expectations of HR practitioners, discussed in the sections above. In both the UK and Australia, HR participants advised senior management on employment laws, but the reported willingness of management to accept compliance-focused advice differed between the two countries. In the UK context the potential consequences for non-compliance did not always appear sufficient to motivate or enable the HR participants to successfully advocate adoption of a compliance approach. Accordingly, in situations where legal requirements conflicted with organisational and managerially defined objectives, UK participants indicated the need to prioritise the demands of the organisation (such as L24; HR26; HR28). However, in the Australian context the potentially serious consequences for non-compliance meant that HR practitioners could effectively argue compliance was in the best interests of the organisation and management.

Linking the needs of the organisation and perceived expectations of senior management to HR practitioner work-identity, the findings suggest that, “...who we are lies importantly in the hands of others” (Weick et al, 2005: 416). In relation to this study the findings clearly suggest those others included senior management. The findings also support insights from studies into work-identity: of how organisations may regulate the work-identity of employees through opportunities for promotion and socialisation (Alvesson and Willmott, 2002); and how different aspects of identity are strengthened and weakened through feedback from important others (Meyer and Hammerschmid, 2006). If those important others only come from the ranks of management then it is perhaps unsurprising that the UK HR participants indicated a one-dimensional work-identity. In contrast, the Australian participants also indicated identification with the employees and as professional HR practitioners, providing them with alternative referent groups and benchmarks for practice. Accordingly, this group of Australian participants appeared able to maintain a multi-dimensional, ‘hybrid identity’ (Lok, 2010; Meyer and Hammerschmid, 2006), which simultaneously drew upon different institutional logics in the Australian constellation.

#### 8.4.1.2 Different vocabularies of practice

The findings also point to the connection between institutional logics, HR participant work-identity, and the language used by participants. Different institutional logics are associated with specific vocabularies of motive and practice (Thornton et al, 2012), and the language used by individuals helps indicate the logics they identify with and that influenced them (Meyer and Hammerschmid, 2006). Again, there were clear differences in the type of vocabulary used by participants from each country; for example, Australian participants used the language of obligation when talking about legal requirements. In turn, this appeared to influence the roles they saw themselves as playing, including legal/compliance expert, challenger and educator. Amongst the UK participants there was little use of obligatory language, with one participant even referring to laws as, “*guidelines*”, that have to be, “...*follow[ed].. as best we can.. without being slaves to it*” (HR29; law firm). The implication of this being that if those laws do not align with what the business wants, then they do not have to be followed.

A further striking difference in the type of language used involved heavy use of the term ‘commercial’ by the UK participants. All the UK participants either used the term directly or indicated through the accounts provided that they effectively prioritised ‘being commercial’ in the approach taken to employment laws. Legal compliance was pitted against, for example, “...*the commercial decision that we want to make*” (HR25; consultancy). Another HR participant explained that, “...*we might have to tip the balance so the business wins, and that’s just the way it works*” (HR5; law firm). Being ‘commercial’ appeared to be a signifier of work-identity and allegiance, and also a description and justification of action taken that prioritised the goals of the organisation rather than those required by legislation. Such action included the use of settlement agreements, discussed above. These findings echo those of Moorhead et al (2019), whose study of in-house lawyers in the UK also found that ‘being commercial’ could involve greater embeddedness within the organisation and a lack of independence. However, while in-house lawyers have professional ethical obligations that may lead to tension in terms of the different ‘hats’ they have to wear (Moorhead et al, 2019), HR practitioners do not have such obligations. The findings suggest that some UK participants did not perceive any such tension, with a head of HR at a consultancy explaining she did not see a, “...*conflict situation*” (HR25) between the law and the commercial approach desired. For her, it is a question: “...*of taking a range of factors into account and... trying to get to your end solution as quickly as you can*” (HR25; consultancy).

Finally, it is worth highlighting language used by some of the Australian participants when describing themselves and their role. Reference was made to, “...*protect[ing] the employees.. to be a voice for them*” (HR23; consultancy), and a HR manager at a commercial law firm even described herself as, “*employee champion*” (HR13). Use of the term ‘employee champion’ clearly references an aspect of Ulrich’s (1997) business partner model that UK-based studies indicate fell out of use and favour more than a decade ago (Caldwell, 2003; Francis and Keegan, 2006). While the findings of this study suggest that in the UK the concept of ‘HR practitioner as employee champion’ is an oxymoron, this does not appear to be the case in Australia. An explanation for this may lie in the way in which the Australian institutional environment appeared to enable

adoption of a multi-dimensional work-identity and heightened the importance of a compliance approach for Australian organisations. Alvesson and Willmott (2002: 622) argue that individuals do not passively accept and adopt corporate vocabularies of practice, but alternative vocabularies are necessary in order to avoid, “serial identification with corporate values”. The availability of viable alternative logics in the Australian context and their corresponding values, goals and vocabularies seemed to provide Australian participants with the scope to adopt and maintain a more diverse work-identity. These findings also support references in Australian literature that connect legal compliance with the professional reputation of Australian HR practitioners (Sheedy, 2016), and HR practitioner legal expertise with internal organisational influence (Sheehan and De Cieri, 2012). Identity and language are also considered to play an important role in sensemaking and help shape processes of interpretation (Weick, 1995; Weick et al, 2005), discussed next.

#### 8.4.2 Interpretation, action and sensemaking

As discussed above, participants from both countries indicated that they advised the organisation and management on employment laws and how they should apply in different situations. Participants from both countries also emphasised that the process of understanding what the law required was not always straightforward. Employment laws were seen to present ‘grey’ and ambiguous areas that needed to be interpreted before they could be applied (UK: HR26, HR28, HR29; Australia: HR6). The findings indicate this ambiguity provided the participants with a degree of space to interpret these laws in a way that corresponded with the interests of dominant referent groups. The discussion first focuses on the connection between the institutional environment, work-identity and interpretation. It then discusses an issue peculiar to the UK participants, the paradox of ‘compliance’ that does not involve compliance. Finally, it examines how the UK participants appeared to make sense of their involvement in non-compliance, by presenting it as ‘fairer’ for the employee.

#### 8.4.2.1 The institutional environment, work-identity and interpretation

As noted, the findings suggest a link between the way in which participants interpreted ambiguity in employment law, the work-identity indicated in the interviews and the wider institutional environment.

Consistent with findings regarding the apparent strength of the corporate logic and the one-dimensional work-identity of UK participants, the findings suggest they may interpret the law in a way that enabled and facilitated the achievement of organisational objectives. By way of example, a head of HR at a law firm described how she may have to, “...*bend [the law] in a way that suits the business... sometimes we might have to tip the balance so the business wins*” (HR5). UK participants also complained about legal advice that was, “*too risk averse*” (HR29; law firm), and consequently, “*unrealistic*” (HR28; manufacturing). Where the goals and demands of management and the business diverged from the law, UK participants indicated a willingness to interpret laws in a way that made sense for and prioritised the interests of the organisation. These findings support Pache and Santos’ (2013) argument that singular identification with a particular institutional logic will likely shape an individual’s approach and efforts to see that logic prevail. The UK findings also echo those from studies reported in the legal literature, including Jenoff’s (2012) and Moorhead et al’s (2019) emphasis on how organisational embeddedness and identity pressures can lead to interpretation of law in a way that meets organisational objectives and desired outcomes.

The UK findings question Thornton et al’s (2012) argument that an individual may pursue the goals associated with a particular logic without necessarily identifying with it. Thornton et al (2012) provide the example of regulation, arguing that an individual may not identify with a logic but will still conform with it in order to avoid sanction and punishment. In relation to employment laws this argument necessarily depends on the wider institutional environment and existence of effective sanction and punishment for non-compliance. The UK findings suggest these penalties were not necessarily sufficient to overcome the goals and demands of the business, and in many cases could be avoided through use of settlement agreements. Accordingly, the findings of this study highlight the important combination of the institutional environment and HR

practitioner work-identity, how these shaped the interpretation of employment laws and how they did not always lead to compliance.

The Australian findings also highlight the connection between the multi-level and inter-institutional environment, multi-dimensional work-identity and the way in which participants interpreted and approached employment laws. However, consistent with differences in these findings when compared to those from the UK, the approach of Australian participants to interpretation also appeared quite different. In particular, none of the Australian HR participants indicated that they would interpret the law in a way that suited the organisation at the expense of compliance. The professional dimension to work-identity and commitment to compliance and the organisation's employees appeared to motivate most of the Australian participants to interpret employment laws in a compliance-focused manner.

Highlighting the importance of meso-level influences on the organisation to the approach taken to interpretation, some Australian participants referred to the threat of union involvement and negative media coverage as influencing an interpretation that favoured the employee (L12; L17). Australian HR participants also referred to obtaining legal advice on how to interpret certain laws and situations, but the focus appeared to be on taking the 'right' or 'correct' legal approach (HR6; HR10; HR20) rather than interpreting the law in the business' interests. Lawyer participants also highlighted their personal liability for advice given, with one indicating this had perhaps changed her approach and meant she was much more careful when giving, "...*commercial advice*" (L12). Accordingly, the Australian institutional environment appeared to support and enable a law / compliance-focused interpretation in a way that the UK environment did not.

As discussed elsewhere in this chapter, the Australian institutional environment also appeared to enable these participants to interpret compliance with employment legislation in a way that also made sense to the business. Australian participants also indicated facing objections from management to taking a compliance approach and had to try and reconcile potentially incompatible demands. However, rather than a focus on the business case and 'what's in it for me' type approach, the focus of Australian

participants appeared to be more on the avoidance of the negative consequences that may result from non-compliance. This is a fine distinction, but arguably links to arguments in the legal literature regarding the importance of having respect for the law rather than seeing it as something to be moulded to business needs and demands (Parker et al, 2009). Indeed, some Australian participants indicated that employment law would be followed even if it did not suit the business; for example, a people and culture manager complained about laws regarding retirement age, but indicated they would be followed and not interpreted in a way that suited the business (HR10; retail / manufacturing). These findings also support Pache and Santos' (2013) arguments regarding how identification with different logics can lead to commitment to seeing both prevail.

The findings from both countries support insights from various literatures (legal, sensemaking and institutional) that an individual's identity is crucial to how ambiguity is resolved (Jenoff, 2012; Lok, 2010; Maitlis and Christianson, 2014; Moorhead et al, 2019; Pache and Santos, 2013; Weber and Glynn, 2006; Weick, 1995). The work-identity of the HR participants arguably helped provide the, "rules of the game" (Alvesson and Willmott, 2002: 631), and a frame or lens through which he / she understood how to make sense of and approach employment laws.

#### 8.4.2.2 UK: the paradox of compliance without compliance

The influence of a corporate logic and the organisation over the UK participants was also evident in a paradox, with some indicating they wanted to avoid the requirements of employment laws without having to make a choice to not comply (L2; HR5; HR26; HR28; HR29). To illustrate, a HR manager (HR26; accountants) complained that ACAS was unable to come up with any good ideas about how to get around the law without breaking it. UK lawyer participants were also helpful in indicating how they would interpret employment laws for clients, with one emphasising that when it comes to compliance it is a question of, "*...have I actually actively not complied with a legal requirement? It depends how you frame what a legal requirement is*" (L2). These findings suggest that the way in which UK HR participants could navigate the paradox created by their different roles and obligations, as referred to by Ulrich (1997) and



Kryscynski and Ulrich (2015a and 2015b), was through prioritisation of the demands and goals of the organisation.

Interpreting and framing the law in the ways indicated above appear to fall within Parker et al's (2009) description of taking a game-playing and non-compliant approach to law. Parker et al (2009: 211) argue that gaming the law, "changes or muddies the very meaning of compliance", with the law then seen as, "something to be moulded to suit one's purposes rather than as something to be respected". The moulding of the law to suit the interests of the organisation may require a certain creativity, with two UK participants describing it as "*a bit of an art*" (HR29), and "*a bit of a dark art*" (HR28). These references echo an article published on the CIPD website that approvingly praises the "artful", "skilful" and "clandestine" approach of UK HR practitioners to the interpretation and implementation of gender pay reporting obligations (Rees and Mortimore, 2017; no pagination). The authors call for greater recognition for HR practitioners that protect the organisation in this way, implicitly suggesting that the goals of the organisation should be placed in a priority position. The UK findings suggest that prioritisation of the business' interests had arguably become the norm, with a head of HR commenting that ensuring the business "...wins... [is] *just the way it works*" (HR5; law firm).

#### 8.4.2.3 UK: 'fairness'

The dominance of the goals and values of the organisation may also explain the arguably creative use of the concept of 'fairness' by UK participants to justify non-compliance with laws concerning performance management and dismissal. Some of the UK participants defended not following the necessary procedures to help an employee improve their performance or before termination of employment on the basis that this was 'fairer' for the employee (HR4; HR5; L24; R25; HR29); it is worth adding that none of the Australian participants used 'fairness' in this way. As UK unfair dismissal laws centre on the concept of having a 'fair' reason for dismissal and the requirement that an employer follow a 'fair' procedure before dismissal, the presentation and defence of an absence of legal fairness as 'fair' is also paradoxical. However, it may reflect how these participants made sense of their involvement in handling competing

demands and institutional complexity. Some UK participants referred to the difficulty, if not impossibility, of forcing some managers to follow the necessary procedures (L1; L2; L3; HR26; HR28; HR29). Participants also referred to situations when employees had been dismissed without fair reason, which meant there was little option but to pay-off the employee and use a settlement agreement. Accordingly, rationalising and justifying the outcome desired by management as fairer for the employee appears to be a way of making sense of the action taken. The relevant employment laws may not have been followed, but if the action can be justified as ‘fair’ then it is legitimised, arguably being more socially acceptable and providing a ‘salve’ for the conscience of the individuals concerned.

#### 8.4.3 Individual agency

The discussion above points to the ‘embeddedness’ of all the HR participants in a country-specific institutional context, with the particular constellation of logics and multi-level institutional environment influencing the way they made sense of employment laws. However, rather than this embeddedness imposing and resulting in a uniform approach the findings also point to variation in the way individual participants performed their role. While Martin et al (2017) argue the organisation is key in shaping individual ability and creativity when it comes to handling institutional complexity, the findings of this study also point to the skill, creativity and inclination of the individual HR practitioner concerned. This shifts the focus of where and how institutional complexity is finally resolved to the micro-level of the individual, rather than at a higher level. The findings suggest the importance of individual agency in two main ways: the skill and ability of the HR practitioner to effectively ‘sell’ the need for compliance; and the potential for HR practitioners to diverge from the prescriptions of a dominant logic, what Weber and Glynn (2006: 1640) refer to as the “enactment of deviance”.

Connected to the role of the HR participants in both countries as adviser to the business on matters involving employment law, the findings point to the importance of the individual HR practitioner’s ability to influence management. An example from the UK includes the HR director who explained that she has to communicate with the Board, “...*in tables and graphs and numbers and money because that’s how the Board think.*”

*You can't say to them we're going to do it because it's just the right thing to do*" (HR4; property services). This quote emphasises how this HR director felt the need to effectively translate the requirements of legislation into language and terms that the Board would understand and act upon. This participant also added that she has to "*get creative*" when demonstrating the financial benefits associated with, for example, following laws regarding diversity. Other UK HR participants also indicated there were certain things they could not say to management; for example, head of HR at a law firm explained, "*...it cannot just be, 'the process says', 'the law says'... because that is the biggest turn off in the world, because nobody will do that*" (HR5). These findings not only indicate the apparent dominance of a corporate logic over legal requirements, but also what Maitlis and Lawrence (2007) refer to as the 'discursive ability' of the individual. These participants reported being able to influence decisions through their ability to draw on the 'right' language and vocabulary, which in the UK context appeared to be primarily business focused and financial.

While the accounts provided by UK participants suggested that the language of business and finance had to be used, there is also an example of a UK HR director (HR4; property services) who creatively used this language in order to influence compliance. While this participant provided varied accounts of whose interests would be prioritised in different situations, she also referred to deliberately falsifying the risk and potential consequences for non-compliance with minimum wage laws in order to ensure that, "*... doing nothing is not an option*" (HR4). This example helps indicate the extent to which a corporate logic appeared to have a stranglehold over the approach this HR participant perceived could be taken to employment laws. Accordingly, her attempt to ensure compliance with minimum wage laws appeared as an act of deviance, she felt she had to fabricate the risks to the organisation in order to influence the Board's decision. While the constellation of logics and multi-level institutional environment were clearly relevant, this UK participant (HR4) still exerted a degree of autonomy in how she approached the situation. This observation highlights how institutions are inhabited and made sense of by individuals (Binder, 2007; Hallett, 2010), and how institutional complexity may be resolved at the micro-level and in creative ways. It also suggests how, in the UK context, legislation and the legal machinery of the state were not

perceived to be the dominant institutional influence and appeared to lack the coercive effect with which they have been credited.

As noted, the Australian institutional environment seemed to encourage and enable the Australian HR participants to adopt a compliance focused approach. Australian participants also referred to the importance of their professional identity and how this was connected to taking a compliance approach, such that their work-identity was not entirely bound up with the organisation; seen in examples of participants who chose to leave their employment rather than be associated with non-compliance (HR6; HR15). These findings may be connected to the apparent diversity in the constellation of logics available, and support arguments that multiple logics may provide individuals with a degree of discretion and agency in how they act (Waldorff et al, 2013). The Australian institutional environment may be seen as providing these HR participants with space, enabling them to avoid what may otherwise be the seemingly strong influence of a corporate logic.

## **8.5 Summary and concluding remarks**

This chapter commenced with discussion of the findings in terms of how they contribute to the theoretical understanding of the way HR practitioners interact with employment laws. The discussion focused on how HR participants in both countries had to grapple with multiple logics when interpreting and enacting employment law in practice. This is in contrast to the one-logic institutional environment assumed to exist in the HRM literature in reference to compliance with employment law. The findings suggest that the participants from both countries faced institutional complexity when handling employment laws, and had to endeavour to resolve the potential incompatibility between legal requirements and the demands, goals and values of the organisation. The way in which participants from each country navigated and resolved this complexity differed. The differences in participant accounts from the UK and Australia can be connected to: the particular constellation of logics they drew upon; the nature and content of those logics, for example, the state logic in Australia was seen to effectively encourage compliance in ways that the UK state logic did not; the way the logics present in the constellation interacted; and how the logics were transmitted through the

multiple levels of the institutional environment, in particular, the way they could influence perceived senior management receptivity to arguments for compliance. The differences between the constellations of logics available were evident in the work-identity indicated by HR participants, and whose interests were prioritised when it came to the interpretation of employment laws and the application of those laws in specific situations. The way in which the goals and values of a corporate logic appeared to dominate in the UK was seen in the extensive use of settlement agreements, the paradox of complying without complying, and making sense of non-compliance as 'fairer' for the individual concerned.

## **CHAPTER 9**

### **Conclusion**

This study set out to examine how HR practitioners make sense of and apply employment laws, as the way this issue is discussed in the HRM literature did not tally with the researcher's experience of advising HR practitioners on employment law. While HR practitioners appear to have a clear interest in employment law (Markoulli et al, 2017), there is a dearth of research into how HR practitioners actually work with and approach these laws. This study sought to begin filling this gap, and proposed the institutional logics and sensemaking perspectives as helpful to explore how individual HR practitioners understand, perceive and experience their role when working with employment laws. A comparative approach was undertaken, as comparison of HR practitioner accounts from two countries could assist with the, "bottom-up" (Reay and Jones, 2016: 449) identification of the institutional logics present, the way in which they influenced HR practitioner sensemaking and how they were applied. This concluding chapter will start by providing answers to the research questions posed in chapter 3. The second section addresses implications for HR policy and practice, and the third considers the main contributions of the study. The chapter then sets out the limitations of the study, before ending with a summary of areas for future research.

#### **9.1 Addressing the research questions**

The primary research question involved examination of how institutional logics influenced the way HR practitioners make sense of and apply employment laws in the UK and Australia. Additional research questions were concerned with: the identification of these logics; how the identified logics impacted HR practitioner work-identity and the sensemaking process; and how concerns about social legitimacy influenced the approach taken. By focusing on the accounts provided by participants in semi-structured interviews, this study has provided an analysis of the institutions perceived by them as relevant to how HR practitioners make sense of and apply employment laws. Interpretive analysis of the interview data pointed to the influence of a number of logics,

and the constellations of logics identified are illustrated in Figure 4 (p.178), in relation to the UK, and Figure 5 (p.220), in relation to Australia. The findings demonstrate how the application of employment laws into practice may not be straightforward for HR practitioners in either country. Participants from both the UK and Australia referred to the influence of multiple logics, and potential incompatibility between the goals, values and desired outcomes of the state and corporate logics. How participants resolved this complexity differed in each country, with the differences connected to the country specific multi-level and inter-institutional context.

While the employment laws were clearly of relevance, how the employment relationship was regulated appeared to be important to the approach then taken. Thus, while the state logic was influential in both countries the 'strength' of regulation differed in terms of how it was perceived by the participants. The arguable strength of the state logic in Australia was seen in, for example, the severity of state-determined consequences for non-compliance (which also affected the market logic). Who could be held responsible for non-compliance also differed. In Australia HR practitioners, senior management and legal advisers could all be held liable, whereas in the UK this degree of individual responsibility and liability was absent. Moreover, the powers and remit of state-regulated field-level actors differed; these actors included regulatory authorities, such as the FWO in Australia, and ACAS and HMRC in the UK. They also included unions, as the rights of unions to represent the workforce and effectively challenge the approach taken by organisations are also contained in legislation. Again, the influence of unions differed between the two countries, with Australian participants emphasising that interpretation and implementation of employment laws were more heavily swayed by the potential for union oversight. These findings point to the importance of how the state balances the interests of efficiency, equity and voice, discussed by Budd (2004), to how participants made sense of and balanced legislative requirements against the other influences and demands they were exposed to.

In relation to other influences, the findings point to the importance of a corporate logic and how the HR participants were involved in helping the organisation to achieve its goals. Participants from both countries referred to HR practitioners in terms of advising managers and senior management on matters involving employment laws, and they had

to provide what these groups ‘needed’. However, what managers and senior management needed appeared to differ between the two countries, in part because of the state-determined consequences for non-compliance. While management in both countries was perceived as desiring flexibility in how it managed the workforce, Australian participants pointed to how they could effectively argue that the goals associated with a corporate logic should instead be re-directed toward compliance. The accounts provided by Australian participants also referred to the importance of public expectations regarding how the workforce should be treated, whether contained in legislation or not. The risk of the organisation or individual members of the senior management team being exposed by the media (another field-level actor) also helped bolster arguments for compliance within the organisation, and the perceived ‘receptivity’ of senior management to such arguments. In contrast, the wider institutional environment in the UK did not appear to support or enable HR practitioners to challenge senior management objectives and demands in the same way.

The constellations of logics in each country, and the way they filtered down through the multiple levels of the institutional environment arguably had implications for the work-identity indicated by HR participants and the action they reportedly took when interpreting and applying employment laws in practice. In the UK context, the analysis suggests the clear influence of a corporate logic in terms of a one-dimensional, business focused identity. However, Australian HR participants appeared to have a multi-dimensional, hybrid, identity. This included identification with the business, but also identification as a professional, which appeared to be supported by the apparent business need for legal expertise and advice. Being a ‘HR professional’ was connected by Australian participants to having not only legal expertise, but also a focus on ensuring employment laws were complied with. As a result, some of the Australian HR participants referred to how they would rather leave their employment than be associated with non-compliance by their employer. A statement made by a senior HR BP helps illustrate the extent of this influence:

*“I wasn’t prepared to put my professional reputation on the line and put my name against rolling out that particular [non-compliant] activity .. it was the*



*first time in my career where .. commercial activities could have impacted my professional reputation” (HR6; automotive retail; Australia).*

In this way, the action taken by Australian HR participants occasionally diverged from that desired by management / senior management. In contrast, the UK participants seemed to be more fully embedded within and less independent from the organisation. The extent of this embeddedness may account for the seemingly heavy use of settlement agreements in the UK. These agreements were not only used after claims had been made, but in circumstances where managers or senior management would refuse to follow the legally required procedures. The use of settlement agreements was itself described as ‘commercial’, arguably reinforcing the commercial and business focused work-identity of the UK HR participants. In addition, settlement agreements had the commercial advantage of keeping the matter quiet, preserving the social legitimacy of the organisation without the need for actual compliance. In these circumstances, legal compliance was not necessary for the preservation of social legitimacy because a settlement agreement and non-disclosure provision would prevent external scrutiny.

## **9.2 Implications for HR policy and practice**

By making a contribution to knowledge in terms of our understanding of the pressures and influences HR practitioners are subject to when it comes to handling employment laws, the findings of this study may have a number of implications for policy and practice. Glaser et al (2016: 31) point out that, “hidden and unarticulated” theories often shape organisational practice, and naming and identifying these theories is important to enable critical reflection on and about their use. The same may be said for institutional logics, and as the HRM literature tends to assume that only state-made law is of relevance to how HR practitioners make sense of and apply that law. This discussion should arguably be opened up to recognise the ‘strength’, or otherwise, of the state logic and the influence of a corporate logic. By recognising the challenges that HR practitioners may face if they attempt to pursue a compliance approach, the nature of their role in relation to employment laws can be better assessed (and questioned).

At the practitioner level, the CIPD has shifted its position and recommendations over the duration of this study in terms of the expected behaviours of HR practitioners, seen in its updated profession map (CIPD, no date-c). These behaviours now include a greater emphasis on the ethical aspects of HR practice. However, these still co-exist with an emphasis on having ‘commercial drive’ (CIPD, no-date-c), and CIPD publications continue to underscore the need for HR practitioners to, for example, “... demonstrate commercial awareness” (Jeffery, 2019: 24). The findings of this study point to how ‘being commercial’ appeared to dominate the work-identity of the UK HR participants, how this could lead to prioritisation of what the business wanted over legal requirements, and how the use of settlement agreements was seen as the ‘commercial’ thing to do. If HR practitioners are expected to attend to all of the behaviours in the CIPD profession map, there should perhaps be greater discussion about the challenges and difficulties they can face in practice.

At the policy level, the findings of this study may feed into debates regarding the use of NDAs to silence (ex)employees. The WEC (2019: 39) report on the use of NDAs in discrimination and harassment cases in the UK refers to how an, “enforcement gap leaves it open to employers to flout the law”. It later refers to the failure of the UK government to ensure, “there is sufficient incentive to encourage employers to take appropriate action to tackle and prevent discrimination” (WEC, 2019: 42). The findings of this study highlight differences in the experiences and perceptions of the participants from the two countries in terms of the incentives that may encourage employers to comply with employment laws. The perception of the Australian participants was that these incentives could and did help encourage a compliance approach. Moreover, incentives did not just relate to the potential financial consequences of non-compliance, but also the potential personal liability and the likelihood of being held to account and the need to justify action taken. While it was not the focus of this study, the accounts provided by Australian lawyers suggest that because of their own personal liability they may be more cautious in terms of the legal advice they provide. These findings may be contrasted to the UK where the incentives for compliance were limited and HR practitioners are not held personally liable. The following statement made by a UK lawyer in reference to the use of settlement agreements exemplifies this well:

*“...it is not unlawful to sack somebody who is pregnant, one just needs to have a fair reason or if you don't have a fair reason for doing it you need to be able to pay” (L24; UK).*

While the current political and media interest in non-disclosure agreements relates to discrimination (see WEC, 2019), UK participants in this study referred to the use of settlement agreements in situations where there had been non-compliance with performance management procedures and the requirements for a fair dismissal. The seemingly routine use of settlement agreements in these situations suggests their use may perhaps be endemic when it comes to matters involving (ex)employees, and not just restricted to discrimination, which arguably deserves further attention by UK policy makers.

The WEC (2019: 43) report recommends that employers be required to name a senior manager at board level to: “...oversee anti-discrimination and harassment policies and procedures.. [and] the [appropriate] use of NDAs”. However, there is no definition of what ‘appropriate’ would mean. The UK findings in this study point to the creative interpretation of employment laws in ways that suit the business, which fall within Parker’s (2009) categorisation of a game-playing and non-compliant approach to law. If the recommendations made in the WEC (2019) report were to become law, there must be a risk that a business-focused and ‘flexible’ approach to interpretation may be taken to the meaning of ‘appropriate’. What is ‘appropriate’ to a senior manager closely involved in running the organisation is arguably unlikely to reflect what the individual employee concerned would deem appropriate. Consideration should perhaps be given to holding legal advisers and senior managers at board level personally liable for non-compliance with any laws related to the workplace, as is the case in Australia. This may be more likely to gain their attention.

### **9.3 Major contributions to the literature**

In examining the research questions this study makes several contributions. First, this thesis makes both a theoretical and empirical contribution to the HRM literature by challenging the current premise in the literature that assumes HR practitioners have

limited scope in interpreting and enacting employment laws. The findings of this study highlight how laws do not impose an ‘iron cage’ over HR practice, and nor does social legitimacy need to involve actual compliance. This thesis argues that the sensemaking and institutional logics perspectives provide a more helpful and useful theoretical basis for understanding the way HR practitioners are involved in the application of employment laws. The findings presented in this thesis begin to address a gap in knowledge, as the way in which HR practitioners make sense of and apply employment laws has received scant research attention. As such, this study contributes to our understanding of the way employment laws are handled by HR practitioners and highlights some of the challenges and difficulties they face.

Second, this thesis makes a theoretical contribution. By building on the insights of Weber and Glynn (2006) this study contributes to the institutional logics and sensemaking literatures. It adapts Weber and Glynn’s (2006: 1645) model of “institutionalised typifications in sensemaking”, developing a conceptual framework that may be used in future studies for examination of micro-level, individual sensemaking. Rather than pre-determining the logics that applied to the participants, by adopting a ‘bottom-up’ approach this study was able to identify the institutional logics that influenced the sensemaking processes of HR practitioners. In focusing on the micro-level and examining individual’s perceptions and experiences of handling employment laws, this study also provides a fine-grained analysis of the importance of the entire inter-institutional and multi-level environment. It connects the multiple levels of the institutional environment and highlights how these contribute to the pressures faced by and influences on individuals.

Third, this thesis highlights the importance of the logics in the constellation, how those logics interact and filter down to and through organisations. Moreover, it highlights how individual HR practitioners are embedded within those organisations and the wider institutional context, and contributes to our understanding of how these individuals handled institutional complexity. The findings suggest that, in the context of this study, complexity may be resolved at the level of the individual. The experiences and perceptions of the participants suggest that, initially, management and senior management in both countries wanted to retain flexibility and autonomy in the handling

of the workforce and may be reluctant to follow procedures or comply with legal requirements. However, the Australian HR participants appeared to be more willing (supported by a professional logic) and generally able (supported by state and community logics, but also down to the individual concerned) to mount an argument that compliance would satisfy the goals of state, corporate and community logics.

#### **9.4 Limitations**

Despite a key strength of this thesis being in the methodological approach adopted, this is also a limitation. This approach was deliberate, as there had been few studies into and little was known about the way in which HR practitioners made sense of and applied employment laws. It privileged breadth and involved the recruitment of participants from different industry sectors and organisations of different sizes, over in-depth insight. Furthermore, it is hoped that the findings of this study will be taken and built upon in future research, which could benefit from, for example, a case study approach. A case study could provide insights into, for example, senior management attitudes toward compliance and expectations of the HR function, and how these interact with the characteristics of the organisation and HR practitioner experiences.

The small sample size and interpretive approach to analysis of the data means that the findings are not generalisable to all HR practitioners in the UK or in Australia. However, this was not the intention of the study, which instead sought to examine the range of influences indicated by participants on how they made sense of and applied employment laws. The contextual influences differed, not just between countries but also between organisations in terms of the organisational characteristics that may influence the approach taken. In addition, there were differences relating to the ability of the HR practitioner concerned to champion a compliance approach. Accordingly, the research design adopted in this study helped provide a deeper understanding of the influence of institutional logics on the way in which HR practitioners made sense of and applied employment laws.

## **9.5 Future directions and conclusions**

The findings from this study point to a number of different areas that could be researched in the future.

This study provided a snap-shot regarding the approach taken by the participants to employment laws at a particular point in time. It would be interesting to explore the extent to which, for example, the use of accessorial / personal liability provisions in Australia changed the way HR practitioners made sense of and applied employment laws. A historical approach would provide further insights into, for example, the impact of any future changes to the way the employment relationship is regulated by the state.

The findings from both countries point to the importance of senior management receptivity to arguments for compliance, however, members from senior management teams were not interviewed as part of this study. The findings chapters also highlight how there may be differences in senior management attitude depending on the industry sector and nature of the organisation. Future research could helpfully focus on exploring senior management perceptions of employment law, the importance of compliance and the purpose of the HR function, how these are influenced and whether they vary from sector to sector.

The UK findings point to potential differences in the approach taken to employment laws by HR practitioners at different levels of seniority. References by UK participants to the importance of close identification with the business for HR career progression could be an area to focus on in future research. Examination of HR practitioners in transition, from junior to senior positions, may provide insights into how they are socialised into these roles, and how and whether their work-identity, the way they make sense of laws and the perceived importance of compliance changes over career trajectories. An exploratory study by Gustafsson et al (2018) into how lawyers may be 'captured' by clients provides helpful insight here and offers a useful basis for future research.

Given the lack of reference by any of the participants to the respective HR practitioner associations, future research could focus on unpicking the perceptions of HR practitioners of the CIPD and AHRI, in terms of how they are perceived to promote the approach to compliance with employment laws and whether this is perceived as relevant to their area of practice.

The findings also point to other areas of research interest, including whether exposure to legal mechanisms outside of the organisation, such as attendance at a tribunal and being cross-examined on steps and action taken, changes and/or influences the approach taken in similar matters in the future. Does the act of being held accountable alter the way that individual then makes sense of similar matters in the future? And conversely, what effect does not being held accountable have? Does the extensive use of settlement agreements in the UK, as indicated by the findings of this study, constrain the ability of HR practitioners (and other office holders) from conceiving of or taking a different approach? Such research could build on the work of Glaser et al (2016), who argue that experience with and exposure to different situational cues, associated with different institutional logics, may trigger different behavioural responses. Alvesson and Willmott (2002) argue situations that disrupt and challenge an individual's self-identity can lead to tension and remedial 'identity work'. Being cross-examined on action taken may contribute to an individual questioning the basis from which they acted, and their understanding and occupational belief regarding what action is sensible and reasonable. Accountability may be important to HR practitioner work-identity, senior management receptivity to compliance focused advice, and provide a challenge to the apparent dominance of a corporate-based logic in the UK.

Future research could explicitly focus on and adopt the institutional work perspective (see Lawrence et al, 2009) and examine how HR practitioners shape the way employees understand employment laws and perceptions of action taken. In arguing that it was 'fairer' to not follow various procedural and legal requirements, and how care would be taken in the framing and presentation of legal rights and entitlements to employees and employee forums, some of the UK HR participants appeared to be engaging in sensegiving (for example, HR5; law firm). The process of sensegiving is defined as, "... attempting to influence the sensemaking and meaning construction of others toward a

preferred redefinition of organisational reality” (Gioia and Chittipeddi, 1991: 442). That HR practitioners may engage in sensegiving is also highlighted in a CIPD report (Sparrow et al, 2013) on fairness, which argues that HR practitioners have an important role to play in ensuring employees feel ‘fairly’ treated. The report states: “if fairness is about mutually making sense of a situation, managers need to assist employees and shape their interpretation of fair practices” (Sparrow et al, 2013: 21). While the report frames this insight in a positive way, the findings of this study suggest there may be HR practitioners that shape employee interpretation of workplace laws and organisational action in a more insidious way, which deserves further examination.

A further area to explore relates to the operation of the community logic. As discussed in chapter 3, a community may be a specific geographical area (Marquis et al, 2011), and Ingram et al (2010: 85) identified a, “geography of legitimacy” in the US. The Australian participants in this study were all located in the South and South East corner of Australia, in Melbourne, Sydney and Adelaide. Future research should explore whether there are any differences in perceptions regarding the approach that should be taken toward employment laws in the different states and territories in Australia. A project between Fairfax Media and the Australian National University reports that there are seven different political tribes in Australia (Hanna et al, 2017). Queensland is reported to have a higher proportion of those who are less politically engaged, and Victorians are twice as likely than Queenslanders to have a strong social conscience and support government intervention to make society more equitable (Hanna et al, 2017). A survey of those in different electorates also suggests Victoria has five of the ten most left-leaning political seats, while Queensland has seven of the top ten most right-leaning seats (Hanrahan et al, 2019). Australia could present a useful case in terms of examining how potential geographical differences lead to differences in community logic, and how and whether these influence internal HRM practices.

To summarise, this study has helped shed light on a ‘black-box’ area of HRM practice, which has received very little research attention. Contrary to the way the HRM literature presents the interaction between HR practitioners and the law, this study has highlighted how compliance should not be assumed. The approach taken by HR practitioners to workplace laws appears influenced not only by the law, but complex web of influence



provided by the entire institutional context. This study has also helped develop the theoretical understanding of how HR practitioners interact with employment laws. It highlights how concerns about social legitimacy can be managed through use of settlement agreements and do not necessarily lead to compliance. By building on the work of Weber and Glynn (2006), this study also involved development of conceptual framework that may be adapted for use in examination of individual sensemaking in other contexts. Given the lack of research on this topic it was also intended to provide a foundation for future research, and a number of potential avenues are set out above.

# **APPENDICES**

## **Appendix A: Participant information sheet**

### **Participant Information Sheet**

#### **Role and approach of HR practitioners to employment/workplace laws in the UK and Australia**

Researcher: Clare Young, PhD student, The York Management School, University of York  
Supervisors: Professor Tony Royle and Dr Jane Suter, University of York

You are invited to take part in this research study for a PhD student project. It is important for you to understand what this research is about and what it will involve, so please take the time to read the following information carefully. If you have any questions or would like more information, please do not hesitate to ask. *Thank you for your time in reading this information sheet.*

#### **What is this project about?**

This PhD research project aims to develop understanding about the role undertaken and approach by HR practitioners to employment/workplace laws, and explore whether there are differences between the UK and Australia. HR practitioners are traditionally associated with responsibility for legal compliance in the workplace, but the nature and practicalities of this role may have changed as a result of different internal and external expectations and pressures placed on them. The project will explore how HR practitioners perceive their role, contributing to our understanding of the HR profession.

This research project asks the following questions:

- How do HR practitioners perceive and experience their role regarding employment laws?
- What factors, both internal and external to the organisation, do HR practitioners perceive as affecting or influencing this role?

- Do HR practitioners experience any tension between the different aspects and responsibilities of their role when it comes to legal matters?

### **What do I have to do?**

This research will ask for your participation in a semi-structured interview of approximately 1 hour, at a public location or at your place of work, whichever is more convenient for you. You will also be asked to sign a consent form if you agree to participate in this research project. If the interview is recorded, you will be sent a copy of the transcript on request. A brief report will be given to all participants at the end of the study, summarising the findings. Participation in the interview is completely voluntary. Should you wish to withdraw your participation, for any reason, please inform the researcher. The interview recording (if applicable) and any notes about the interview would then be destroyed. While you may be asked to recall (in your own mind) certain instances or examples regarding your role in and influences on legal matters, if these involve any instances of non-compliance that could lead to criminal liability you should not raise or discuss any details of the matter.

### **Will my taking part be confidential?**

All information gathered during the project, including that from you, will be kept confidential and anonymised. Any information obtained from you will have a code assigned to it; the researcher will be the only person who knows what the codes are. Your name, the name of your employer and any other information that could be used to identify you will not be included in the research. It is anticipated there will be no or minimal risk to you in taking part in this project. If you have any concerns about information that may be of potential risk, please raise it with the researcher.

### **How will my data be used?**

Information and data obtained from you will be analysed and written up in a PhD thesis; anonymised quotes may be used from the interviews conducted as part of this project. It may also be used in academic and practitioner publications (online or in print), conference presentations and feedback to HR practitioner organisations or government agencies. If you agree, the data may also be stored in the UK Data Archive.

### **What will happen to my data in an archive?**

An archive is a secure place where different types of materials are stored and looked after indefinitely. Because so many things can be learned from the data, preserving them means they can be shared with other researchers. The material stored in the archive can only be used in appropriate ways, and the primary concern of archivists is to protect research participants. Your data would also be anonymised before being placed in the UK Data Archive, which means removing anything that could identify you or anyone you talk about. Your personal contact details would never be made available.

### **Who has reviewed the study?**

The University of York ELMPS Ethics Committee has reviewed and approved the research project. It is also supported by the Economic and Social Research Council (UK).

### **Contact details for further information:**

The researcher's contact details are: Clare Young, PhD student, The York Management School, University of York, York, YO12 5GD, UK; Email - [ch1124@york.ac.uk](mailto:ch1124@york.ac.uk); Telephone: +44 (0)1904 325012 / mobile: 07583 186215.

If you have any concerns about this project, please contact: Professor Tony Royle; Email: [tony.royle@york.ac.uk](mailto:tony.royle@york.ac.uk)

## **Appendix B: Participant consent form**

### **Consent Form for research project: Role of HR practitioners in compliance with workplace laws**

This form is for you to state whether you agree to take part in the study. Please read and answer every question. If there is anything you do not understand, or if you would like more information, please ask the researcher.

***Please tick the appropriate boxes***

#### **Taking part**

I have read and understood the information leaflet about the study. Yes  No

I have been given an opportunity to ask questions about the project. Yes  No

I agree to take part in the project. Yes  No

If yes, I agree to my interview being recorded.  
(You may take part in the study without agreeing to this) Yes  No

I understand that my taking part is voluntary; I may withdraw from the study for any reason. Yes  No

#### **Use of the information I provide for this project only**

I understand my personal details, such as phone number and address will not be revealed to anyone other than the researcher. Yes  No

I understand that my (anonymised) words may be quoted in publications, reports and other research outputs. Yes  No

#### **Use of the information I provide beyond this project**

I agree for the data I provide to be archived at the UK Data Archive. Yes  No

I understand that other genuine researchers will have access to this data only if they agree to preserve the confidentiality of the information as requested in this form. Yes  No

I understand that other genuine researchers may use my words in publications, reports and other research outputs, only if they agree to preserve the confidentiality of the information as requested in this form Yes  No

All data will be held by The University of York in accordance with the Data Protection Act 1998 (UK).

Researcher: Clare Young (PhD student), The York Management School, University of York

Supervisor: Dr Jane Suter, University of York

\_\_\_\_\_  
Your name (in BLOCK letters): \_\_\_\_\_

Your signature: \_\_\_\_\_

Date: \_\_\_\_\_

## Appendix C: Interview guides

<b>Interview Guide - Lawyers - UK</b>		
1	<b>Preliminaries</b>	<ul style="list-style-type: none"> <li>- Particip info sheet</li> <li>- Consent form - signed?</li> <li>- Confidentiality and anonymity</li> <li>- Conversation rather than Q/A</li> <li>- As much as possible - provide eggs and draw on own experiences - here or other orgs, but let me know</li> </ul>
2	<b>Background</b>	<ul style="list-style-type: none"> <li>- Career</li> <li>- Number of years practiced employment law</li> <li>- Kind of clients</li> <li>- Unionised?</li> <li>- Who deal with in organisations?</li> </ul>
3	<b>Legal advice</b>	<ul style="list-style-type: none"> <li>- How see own role in working with HR?</li> <li>- How are you used by HR practitioners / organisations?</li> </ul>
4	<b>HR practitioners / laws</b>	<ul style="list-style-type: none"> <li>- How would describe role played by HR?</li> <li>- Possible for HR to keep the organisation compliant?</li> <li>- Does it vary amongst clients? Based on?</li> <li>- HR as decision maker or adviser?</li> <li>- Level of influence of HR? (individually or team)</li> <li>- How would describe compliance?</li> <li>- How find working with employment laws? Straightforward / not straightforward / clear / unclear?</li> <li>- Need to interpret workplace laws? How?</li> <li>- If law unclear - what kinds of things do you discuss with HR?</li> <li>- What see HR taking into account?</li> <li>- HR role not just laws - seen HR experience tension?</li> <li>- See HR struggle with legal aspects? In what ways?</li> </ul>

### Interview Guide - Lawyers - UK

5	<b>Influences on compliance</b>	<ul style="list-style-type: none"><li>- Clients do less than the minimum / the minimum / more than the minimum? Know the reasons why?</li><li>- Unionised clients?</li><li>- Different industries - see any differences?</li><li>- Reputation / media important?</li><li>- Threat of litigation?</li><li>- Use of settlement agreements?</li></ul>
6	<b>Anything to add?</b>	<ul style="list-style-type: none"><li>- Anyone else could introduce me to that would be willing to participate?</li></ul>

### Interview Guide - Lawyers - Australia

1	<b>Preliminaries</b>	<ul style="list-style-type: none"><li>- Particip info sheet</li><li>- Consent form - signed?</li><li>- Confidentiality and anonymity</li><li>- Conversation rather than Q/A</li><li>- As much as possible - provide eggs and draw on own experiences - here or other orgs, but let me know</li></ul>
2	<b>Background</b>	<ul style="list-style-type: none"><li>- Career</li><li>- Number of years practiced employment law</li><li>- Kind of clients</li><li>- Unionised?</li><li>- Who deal with in organisations?</li></ul>
3	<b>Legal advice</b>	<ul style="list-style-type: none"><li>- How see own role in working with HR?</li><li>- How are you used by HR practitioners / organisations?</li></ul>

## Interview Guide - Lawyers - Australia

4	<b>HR practitioners / laws</b>	<ul style="list-style-type: none"> <li>- How would describe role played by HR?</li> <li>- Possible for HR to keep the organisation compliant?</li> <li>- Does it vary amongst clients? Based on?</li> <li>- HR as decision maker or adviser?</li> <li>- Level of influence of HR? (individually or team)</li> <li>- How would describe compliance?</li> <li>- How find working with employment laws? Straightforward / not straightforward / clear / unclear?</li> <li>- Need to interpret workplace laws? How?</li> <li>- If law unclear - what kinds of things do you discuss with HR?</li> <li>- What see HR taking into account?</li> <li>- HR role not just laws - seen HR experience tension?</li> <li>- See HR struggle with legal aspects? In what ways?</li> </ul>
5	<b>Accessorial liability</b>	<ul style="list-style-type: none"> <li>- Have you seen any changes following introduction of accessorial liability provisions?</li> </ul>
6	<b>Influences on compliance</b>	<ul style="list-style-type: none"> <li>- Clients do less than the minimum / the minimum / more than the minimum? Know the reasons why?</li> <li>- Unionised clients?</li> <li>- Different industries - see any differences?</li> <li>- Reputation / media important?</li> <li>- Threat of litigation?</li> <li>- Use of deeds of release?</li> </ul>
7	<b>Anything to add?</b>	<ul style="list-style-type: none"> <li>- Anyone else could introduce me to that would be willing to participate?</li> </ul>



## Interview Guide - HR - UK

1	<b>Preliminaries</b>	<ul style="list-style-type: none"> <li>- Particip info sheet</li> <li>- Consent form - signed?</li> <li>- Confidentiality and anonymity</li> <li>- Conversation rather than Q/A</li> <li>- Not a test! No right/wrong answers - interested in your experiences.</li> <li>- As much as possible - provide eggs and draw on own experiences - here or other orgs, but let me know</li> </ul>
2	<b>Background / Organisation</b>	<ul style="list-style-type: none"> <li>- Career?</li> <li>- Number of years at current organisation</li> <li>- Who report to?</li> <li>- Number of employees?</li> <li>- Size of HR function?</li> <li>- Unionised?</li> </ul>
3	<b>General role of HR</b>	<ul style="list-style-type: none"> <li>- Can give me overview of how you see the general role and purpose of HR here?</li> <li>- Own views on HR or purpose of HR here?</li> </ul>
4	<b>Legal role and approach</b>	<ul style="list-style-type: none"> <li>- How do you see your role regarding employment law?</li> <li>- How would you describe compliance?</li> <li>- Role to keep the org compliant? Is this possible?</li> <li>- See laws as clear / unclear / straightforward / easy to understand?</li> <li>- How handle law if unclear?</li> <li>- Would say organisation has a particular approach to or view of employment laws?</li> <li>- What take into account when handling employment laws?</li> <li>- Risk of litigation an issue? Costs?</li> <li>- Work with managers?</li> <li>- Involved with any organisations / bodies external to the organisation re legal issues?</li> <li>- Make decisions re laws, or advise?</li> <li>- Ever get push back on advice?</li> <li>- How do legal duties interact with overall HR role?</li> <li>- Ever experience tension between them?</li> <li>- Use external lawyers? Why? What seek from them?</li> </ul>

### Interview Guide - HR - UK

5	<b>Influences on compliance</b>	<ul style="list-style-type: none"><li>- Why comply?</li><li>- Experiences the same in all organisations worked in?</li><li>- Reputation / media important concern?</li><li>- Threat of litigation?</li><li>- Use deeds of release?</li></ul>
6	<b>Anything to add?</b>	<ul style="list-style-type: none"><li>- Anyone else could introduce me to that would be willing to participate?</li></ul>

### Interview Guide - HR - Australia

1	<b>Preliminaries</b>	<ul style="list-style-type: none"><li>- Particip info sheet</li><li>- Consent form - signed?</li><li>- Confidentiality and anonymity</li><li>- Conversation rather than Q/A</li><li>- Not a test! No right/wrong answers - interested in your experiences.</li><li>- As much as possible - provide eggs and draw on own experiences - here or other orgs, but let me know</li></ul>
2	<b>Background / Organisation</b>	<ul style="list-style-type: none"><li>- Career?</li><li>- Number of years at current organisation</li><li>- Who report to?</li><li>- Number of employees?</li><li>- Size of HR function?</li><li>- Unionised?</li></ul>
3	<b>General role of HR</b>	<ul style="list-style-type: none"><li>- Can give me overview of how you see the general role and purpose of HR here?</li><li>- Own views on HR or purpose of HR here?</li></ul>

## Interview Guide - HR - Australia

4	<b>Legal role and approach</b>	<ul style="list-style-type: none"> <li>- How do you see your role regarding employment law?</li> <li>- How would you describe compliance?</li> <li>- Role to keep the org compliant? Is this possible?</li> <li>- See laws as clear / unclear / straightforward / easy to understand?</li> <li>- How handle law if unclear?</li> <li>- Would say organisation has a particular approach to or view of employment laws?</li> <li>- What take into account when handling employment laws?</li> <li>- Risk of litigation an issue? Costs?</li> <li>- Work with managers?</li> <li>- Involved with any organisations / bodies external to the organisation re legal issues?</li> <li>- Make decisions re laws, or advise?</li> <li>- Ever get push back on advice?</li> <li>- How do legal duties interact with overall HR role?</li> <li>- Ever experience tension between them?</li> <li>- Use external lawyers? Why? What seek from them?</li> </ul>
5	<b>Influences on compliance</b>	<ul style="list-style-type: none"> <li>- Why comply?</li> <li>- Experiences the same in all organisations worked in?</li> <li>- Reputation / media important concern?</li> <li>- Threat of litigation?</li> <li>- Heard about accessorial liability provisions?</li> <li>- Use deeds of release?</li> </ul>
6	<b>Anything to add?</b>	<ul style="list-style-type: none"> <li>- Anyone else could introduce me to that would be willing to participate?</li> </ul>

## **Appendix D: Transcript sample**

### **Interview with HR29, law firm**

**30 January 2018**

R: Can you give me an overview of how you see the general role and purpose of HR before we get on to the legal side of things.

HR29: Yes, I'll do it from basically, if you don't mind, focus on the business partner role. Obviously it's quite easy to say the purpose of things like recruitment.

R: Yeah, yeah.

HR29: The role of HR business partner to me is very much about enabling the firm, and managers within the firm, to run an effective business. So, it's not about being the police, it's not about enforcing rules, it's about enabling managers to do the best they can for their people.

R: Yeah.

HR29: So, our role is to make sure that on a very basic level, policies, that the policies are there to support the way we want the business to run. But also then when it gets down to implementing those policies, it's also to implement them to the best of our ability but also to have an understanding of the business and the business need. So not all black and white. I'm not one of those people who believes that a policy has to be followed to the letter of the law in every instance. You know, there is room for making things work for that situation. But my team, their role is- take, for example, the property HR manager. She needs to understand what property is trying to achieve as a group, what their strategy is for growth and for development and the market place, who the key clients are and whose involved in those clients, the challenges of the lawyers in the day-to-day as well as bigger career challenges, and basically work with the management team for that group to ensure that where those things cross over into the people stream, she makes sure that the group operates to meet that strategy in the best way they possibly can. It's very much for me about, you are part of the business, you're not a business support person who sits there just preaching policy, you need to understand what we're trying to achieve as a firm. And if you're not interested in that, you're never going to be successful.

R: Can you give me examples, you talk about the policies and won't necessarily always stick to them, can you think of an example.

HR29: Um, let me think of an example. We have, sickness policy is a good one isn't it. It's very important from a law perspective and, of course we understand that this, you don't flick too much so that people are treated differently. However, what we don't have, and there's a policy that says if you have got a very serious illness,

for example, cancer, we will do something different from what our standard terms are, which are 6 weeks at full pay and 6 weeks at half pay. However, if somebody is in that position we do tend to be more flexible in terms of expanding the level of full pay that they will get. Which I realise there are lots of risks involved in that, but I think sometimes [?] practical.

One that really frustrates me is, we have a compassionate leave policy that says you can get 5 days of leave for a bereavement. And it kinds of gets to the point where you think, how on earth, I understand you have to have a policy and you can't say we'll take it on a case by case basis, but on what planet can you say after 5 days somebody can come back, if it's an extremely close bereavement. Things like that.

R: Yes, fair enough. So the partners make decisions or do you feed in and advise partners in terms of making those kind of calls?

HR29: It depends on the partner! There are some who are very experienced in people management who will have had, have dealt with these situations so will come to you and say 'I would like to do this, are you comfortable with it?'. But in a lot of cases we will say, right this is the policy are you comfortable with implementing it as it says, yes or no? And we'll advise as to what we feel is appropriate.

Now I don't want to focus too much on not meeting our policies because 99% of the time it's absolutely appropriate. This is the policy, they're on board with it, it's fine, you follow through the policy. But in the compassionate leave case, you could- we quite often get HR, junior HR people who come in and they'll have had a call from the partner and the partner'll say, 'Joe Bloggs' dad has just died, compassionate leave policy'. And the HR adviser will say, they can have 5 days off and after that its unpaid leave. Whereas, I think the managers and myself would say ok, talk us through the situation, is he, you know, how close were they? Is he managing the funeral? Is he doing all of this? And actually after 5 days I would advise Joe Bloggs to be going to his doctor and speaking to him to say that he's not fit to come back to work and then move him on to paid sickness leave as opposed to automatic unpaid leave. But it's all a dialogue with the partner about what is appropriate and I would say 90% of the time you're telling the partner 'this is the policy, I'm sorry', but there are obviously times when it's just not appropriate and you have to use common sense.

R: Yeah, and do you see that in terms of the experience of HR people coming through?

HR29: Definitely, definitely. When you have an adviser who has perhaps come from shared services, so they've come from an environment where obviously, I don't know what experience you've got of working with shared services teams, but they can't operate without following the rules. They have to follow the letter of the law, that's how a shared services team works, they have to implement processes and policies. And if we promote someone from that environment into the adviser space, where actually it's more about a dialogue and building

relationships, there is a real step change for them to actually work out where they are allowed to use discretion, because they've never had to do it before. And that, more than anything else, that takes experience to get a sense of what is and isn't appropriate when you're starting to build a relationship with somebody and do something that works for the business but doesn't put HR at risk of doing something they shouldn't be doing. It's that step that takes, probably more than any other part in your career, takes longest to get your head around.

R: Yeah, knowing where you can stretch things and where you can't.

HR29: Exactly! And there are some people who come through and they're never going to do that and they're the type of HR person who will operate incredibly effectively in a very rules driven environment so, for example, a kind of council or a public sector environment. But this type of environment, they're never going to be able to adapt to the grey areas, and we say it quite a lot, myself and the managers I work with, our life is involved around, we operate in the grey areas pretty much most of the time.

R: Sorry, can you say that again?

HR29: We operate within the grey areas most of the time. You know, rarely is anything black and white.

R: Yeah. Ok, so the shared services group what issues do they deal with, and touching on the employment law side as well?

HR29: Em.. they're kind of very.. very base level of employment law when it comes to HR I suppose. So they will deal with starters. So all the immigration checks, for example. Leavers, so everything around references they'll deal with all of that. Um, they deal with all maternity leaves, so they, our maternity policies including shared parental, all of those things. What else do they do?.. Um.. it's kind of, it's the life cycle stuff, so they'll send us an email to say somebody has gone over their sickness triggers, so they'll run the reports to get the triggers and send it to us to say, 'Clare's had more than 10 days, do you want to set up a return to work meeting?' or something like that. They do a lot of the softer stuff as well, so things like long service awards and.. so it's all, anything that's to do with the admin of a employee life cycle, which is great for us so then we don't have to get involved in any of that..

R: Ok, so in your side of the team, what employment law issues would you be dealing with?

HR29: Everything! The whole gamut from.. so R'm trying to think of some of the biggies, um.. anything to do with, obviously, discrimination around things like grievances, disciplinaries, um, we've done quite a lot of TUPE this year. We've done a fair bit of redundancy work this year, including our first ever submission of an HR1 form, which I've never done before, that was fun!

R: Which form?

HR29: An HR1.

R: HR1, is that the consultation requirement?

HR29: Yes, so we've never had a redundancy programme that's involved the need for, sort of 90 day consultation.

R: Yeah.

HR29: So we've had to do that, that was fun this year.

R: How did it go?

HR29: As well as could be expected! We got to the end with no major issues, but it was things like that, the employment law is so vital to the process, but the process is just one piece of a major cultural change. And it's really, I think that's the interesting part of our role to not forget that employment law and HR process is important, but it is just one element of what you're trying to achieve in most cases. So yes, so that was an interesting one. Disability stuff, we're doing quite a lot of that at the moment around understanding the legal side of it, but also doing a much more of an awareness, sort of education of both HR and partners around what we need to do. What have I missed? It can be anything, it just depends on what issue is going to crop up and how you're going to deal with it.

R: How would you describe, you've talked about your role in terms of HR and the business, how do you see HR's role in terms of employment law?

HR29: How would I see our role? I think we are there to.. follow the employment law guidelines that have been set out for organisations in the UK as best we can.. without, I'm glad this is anonymous! Without being slaves to it.

R: Without being?

HR29: Without being slaves to the letter of the law, because sometimes we are given advice by employment lawyers that you just think, that's not practical, that's far too risk averse, it's not going to achieve what we need to achieve.

R: Can you think of, sorry go on.

HR29: Yes, it, it, one of the biggest challenges for our role, my role particularly, but the managers I work with, is to know when to trust your own instincts. Take the law on board, be aware of it, take the advice you need to take, and then have confidence to do what you feel is the right thing to do in that situation.

R: Can you think of an example?

HR29: Erm, so.. we.. at the end of the redundancy- I can think of a couple of examples, I'll give you two specific ones. At the end of the redundancy programme that we've just run, we had always said that we were going to exit people on settlement agreements. And we were incredibly fortunate in that we- every redundancy we made was a voluntary redundancy. We didn't have to make any compulsory redundancies in the end, which was great. So everybody was going through voluntary redundancy, and we had a bit of an issue with the timing of payroll. So we sent out the settlement agreements to everybody who was leaving and our employment lawyers phoned me one day and said, 'I'm not comfortable with this clause in the agreement because, because it suggests that..', um, I can't explain it properly. Basically it was suggesting that they could claim extra pay if you looked at the letter, of the way it had been written, they could claim extra pay that we weren't willing to give. All legal and above board, but. Eventually our external employment lawyer said I need you to change that paragraph in all of the agreements, so while my instinct was no, people aren't reading it that way, you're being incredibly risk averse, this isn't going to cause us any problems, I took his advice and changed 80 settlement agreements, which really hacked people off, um and afterwards, 24 hours later, I thought you're an idiot. Why did you listen to that? Trust your own instinct, it wasn't going to be a problem you should have just said no, we're not going to do it. Again it was that, I'm usually pretty confident about these things, I'm not, I am, I'm not risk averse usually. But in that, because it was the first redundancy programme of that size I probably relied more on the external advice than I normally would have done. So things like that, you just think actually we don't need to belt and braces everything, just treat people with a bit of, give your employees the sense that they've got common sense, because they do, and trust your own instinct.

And the second example I can think of, and this is years ago, bizarrely this is before we had external employment law advice, this is two internal employment lawyers. We had a partner many years ago, the partner is long gone, um.. believed one of their employees was fiddling their expenses. Now it turned out that they were, so I was dealing with this employee and doing this investigation into her expenses, and the partner had emailed me an extremely unprofessional chain of emails saying things about the employee that you would never want to have in writing!

R: Yeah.

HR29: You know what happens, the employee puts in a GDSR, crap! So I had one employment lawyer saying you must disclose everything, you must print out all of those incredibly inflammatory emails and send them. I had another employment lawyer internally saying, no, don't send them. It doesn't change the reality of this situation and all you're going to do is offend somebody unnecessarily. In that position, I was quite new here and had never worked with employment lawyers face-to-face before, making a call then, what way am I going to go, what's my decision. Needless to say I didn't include those emails! [laugh] So things like that, you get two people who are equally qualified giving



you incredibly different advice and trusting yourself to make a decision that you believe is going to get the best outcome.

R: Yeah, so lots of things I want to try and follow up with you. So your use of employment lawyers, do you use people internally from the employment law department, you've talked about external lawyers.

HR29: We don't now, we used to when we were smaller, we used to use internal solicitors, we don't now. We now have an external firm that gives us our advice.

R: Why did you change?

HR29: Um, it was more of a structural thing within the firm, in that the employment lawyers within the employment team weren't able to charge our time basically. So we weren't getting the level of service that we needed. There was a couple, there was one particular partner that I still go to for really sensitive things just to get his take on stuff, so they're a really good bunch, but they just couldn't, because we're internal, we're not paying their fees, we just weren't getting the service that we needed. Now we're a client of another organisation, yeah, it's pretty instant in terms of support and guidance when we need it.

R: What do you use them for?

HR29: We try to use them as little as we possibly can, but we do use them where any issue comes up where there is an employment law angle that we're not familiar with. So, for example, this HR1, I'd never done that before. Um, we had quite a complicated TUPE case that one of my colleagues was dealing with that they advised on. From a disciplinary, performance management perspective they tend only to be used when something very awkward happens, you know the employee says, 'Oh, I didn't tell you all along, but actually I've got arthritis and that's why I can't do the job that you're asking me to do even though I've been doing it for the past years'. It's advice on the things that are none standard, basically.

R: Ok. Do they do updates, when new laws come out, do you use them?

HR29: We're actually quite lucky on that front because we get updates from them and we get all our internal ones as well. So if our employment law team are sending any client updates they'll automatically be copied into us.

R: One thing I didn't ask, are you involved in the CIPD at all?

HR29: Erm, hm.. I am part qualified, I did the first year at Westminster University when I lived in London and, um.. not to put too fine a point on it, I thought the quality of the teaching was absolutely shocking and I never went back for the second year. I always said I would, but I never did, I never finished it. It's not something I hold an awful lot of stock in, I don't think they're a particularly great organisation.. It's interesting what I was saying about the shared services guys

coming up to adviser, they are all CIPD qualified. If they have ambition in shared services and they want to be adviser level they will have done their CIPD. But what they seem to then approach HR with is this incredibly simplistic model of there being a right and wrong answer to everything, and you think that's just not how the world works! You can't.. yes, that's my opinion of the CIPD, it seems to be very, very black and white.

R: Do you use any of their employment law updates or the employment lawyers?

HR29: We do, so I tend to read, they come out I think once a month, our internal ones actually come out every week, so it's one of those things that go in your reading pile. But no, they're actually really good. The joy of working in a law firm, in my team we're given access to the internal, sorry the external training programmes that our employment lawyers run for clients, they'll say we're doing something on the gender pay gap, we've got 3 spots, do any of your team want to come along? So we have access to that, so that's really good.

R: In the HR academic literature and in the CIPD stuff as well, they often describe laws and employment laws as straightforward. Is that something you would agree with?

HR29: Erm.. straightforward?

R: And that it's easy to know what you need to do, basically. Put in contrast to things like ethics that is seen as more blurry and unclear, and laws are pretty straightforward.

HR29: No, no they're not actually. I think the reality is you can say, it's easy enough to say, I can't think of an example, you're able to do this and you're not able to do that. So, I'm trying to think- so say a capability dismissal for somebody who has a disability. So you can dismiss on capability, but you must follow this process. So that's lovely, set that out, that you must go through these three steps, but there is no guidance on what those steps could and should look like. And you're then, what they will then throw in is, but however if this situation arises you might want to think about doing something differently. I'm not explaining myself very well here. There's many employment laws that I think are just not clear cut, but that's the one that comes to mind. I remember sitting with our internal employment law trainers trying to do a worked example on dismissing somebody with a disability, and there was no way to describe what you can and can't do, it was all around, you'll have the meeting and talk about their capability, and then 6 weeks' later when they're not back, but in those 6 weeks, 15 things are going to happen around workplace stress and around not going to occupational health meetings as requested and the doctor saying you have to give them a phased return to work. So.. the skeleton of a lot of employment law is fairly easy to understand, what is not helpful is what happens in the detail is incredibly easy to get wrong and you don't know how a tribunal is going to react that. Again, tribunal decisions seem to lack consistency. One situation, you're all fine, in another situation, absolutely no.

So, we're ok with the structure of all of it and again my team are, they're bright, they're intelligent, they're good at working in the grey areas. But, you never quite know that if somebody was going to come along and look at what you've done from an employment law or tribunal perspective, whether or not they're going to pick 15 holes in it. Because you're kind of going on gut a lot of the time!

R: Can you say that again please?

HR29: You're going on your gut instinct a lot of the time. And again, my example about the GDSR, I understand that the person, the employment lawyer who told me to disclose everything was legally correct. Course they were. But the other employment lawyer who was telling me not to, because ultimately the emails in question were not going to impact the final decision, so.. where's the legal point on that? It isn't a legal point, it's a using your own common sense point. And a lot of employment law comes down to that... it's a conversation I must have at least once a month with my team, which is, so you've got this individual, you're talking about having a protected conversation or moving to settlement agreement discussions. What do you know about the employee? How self aware are they? How much do they understand the bigger picture here, because you need to know all of that before you start this conversation. Because if they firmly believe that we have done them wrong then there's no point starting this conversation, it's going to get you nowhere!

R: Yeah, do you use many settlement agreements? Is that a way to get that security?

HR29: Probably more than we should. We would probably tend to use them more with lawyers than we would with business operations staff. Erm..

R: Why?

HR29: Why? A couple of reasons, lawyers by their very nature, will argue black is white for the sake of it. They don't want to.. if you start with something very basic, a performance management conversation with somebody who is, from a legal perspective is not operating where you would expect them to be, in a sense that they're missing points of law, their advice isn't coherent or consistent, they just don't really get what we're trying to tell people. Which sounds like a very easy conversation to have, but quite often you'll get the push back around, 'well you don't understand what I'm trying to do'. Well no I personally don't, but the partner sitting beside me absolutely does. 'Well no in that situation what the client had asked for was yada, yada'. Whereas if you're talking about something in facilities or IT, a lot of it is black or white, it's either right or it's wrong. We tend to follow through very structured performance management, first written, second written, dismissal with business operations staff or it gets messy. But with lawyers we tend to go to probably go to settlement agreements quicker, and again it protects them as well to a degree because we can then have a conversation around, this is your career, you tell us what you want us to tell your

team, we can agree a reference, all of those things. Because I'm very conscious that the type of legal environment we ourselves and firms like us, operate in, won't be the way every law firm operates. You can go and be a property lawyer in a smaller firm doing much less complex deals and be incredibly successful. So it's trying not to get somebody to the point where they've been sacked for performance and actually their career is then in tatters when you can get to that exit point and give them a future career in a different type of structure.

R: Do you think, and it might not be, some people have said when it comes to managing lawyers it might be hard to, and accountants, hard to get some of the more senior people to spend the time with them to get them up to speed and assess their work and give them that feedback. Is that something you've seen or is it not so much an issue?

HR29: No, it definitely is an issue, it definitely is an issue. It wasn't the same in accountancy because we had, erm, what we called counsellors, so basically a small number of partners and directors and senior managers who had a proportion of their role as people managers. So not every partner was a people manager at [accountancy firm], you did it because you were interested in it and you were good at it. Whereas in law, we've not, the legal industry hasn't quite got to the resource management perspective. Where a lawyer doesn't do the next piece of work that is appropriate to their skill set and their career development, they tend to do a piece of work because the partner that they work for gives them it. So it's much more, I don't know if I'm being clear, but it's much more about the partner you sit beside and the work they feed you in law than it is in accountancy.

R: Please can you say that again?

HR29: In law it's much more about the solicitors and associates being associated with one or two partners and the work that those partners bring in goes to those individuals. So you're tied to one or two partners who feed you your work.

R: Yes.

HR29: In accountancy it's not like that, the work all goes to a central pool and there's a resourcing team who decides who does what. So basically what that does mean, so absolutely, so you've got you know, Joe Bloggs, managed by the partner, Clare. And the partner Clare thinks, I don't have the time to sit and go through it with Joe Bloggs. I know he's going to get it wrong, we've already started performance conversations, I'm going to have to re-do it, so I'm not giving it to him I'm going to give it to someone else. So the conversations we have around, 'right partner, if we're going to do performance management properly, you can't stop giving them work, you have to give them work'. And they're like, 'no, no, too expensive, waste of time, waste of money, I'm not doing it'. And that pushes you to settlement quicker, because you think, well I can't performance manage somebody when they're done nothing for us for the last month!

## Appendix E: Memo and coding sample

HR9 - Australia - Adelaide Lawyer and IR / HR Practitioner 40+ years experience			Area
Pg	Codes	Example / discussion	
1	Experience	<ul style="list-style-type: none"> <li>- IR and HR practitioner</li> <li>- Mixture of public and private sector experience</li> </ul> <p><i>"I've worked as an industrial relations or human resources practitioner in the [name of public sector org] of South Australia in the 1980s, then at the [name of organisation], then I went into the law at [name of large law national firm] and then under my own account I guess for about 14, and then [name of second law firm] for about 14 or 15 years. I went back into a Group or General Manager Human Resources role, again in the electricity industry, for about 3 years and then I went back into private practice"</i></p>	
1	Unionised	<ul style="list-style-type: none"> <li>- Mostly worked in unionised environments</li> <li>- Private sector more heavily unionised in 80s and 90s, but <i>"a lot of"</i> private sector orgs he's worked with are <i>"still unionised"</i></li> </ul>	Field level actors - unions
1	Legal advice	<ul style="list-style-type: none"> <li>- When working as a lawyer in private practice</li> <li><i>"I would generally have been dealing with human resources, senior human resources executives in the client's organisation"</i></li> <li>- The HR practitioners he advised, would then be reporting to <i>"the senior operations executive or the CEO"</i></li> </ul>	
1	HR structure	When in last 2 HR roles, reported to the CEO	
2	HR role Contracts Awards Collective agreements Complexity 'Compliance'	<ul style="list-style-type: none"> <li>- HR role he played:</li> <li><i>"they were bold roles because they covered the whole of the human resource function including in [name of employer] payroll, recruitment, personnel records, as well as employee relations, industrial relations. Compliance with our awards, enterprise agreements and the industrial laws in South Australia and Australia was always a key aspect"</i></li> </ul>	<p><u>Role:</u> compliance</p> <p><u>Language:</u> 'compliance'</p>

2	HR role - education Compliance	<ul style="list-style-type: none"> <li>- He was in a more senior HR position</li> <li>- Role - ensure those who focused on compliance understood what that meant and were compliant.</li> </ul> <p><i>"I would have in those roles, I would have had people who were very specifically ensuring compliance, but my role would be to make sure that they understood what compliance meant, and that they were, in fact, operating in compliance with all the laws and agreements and rewards. My roles were more strategic so it would be hard, but maybe 15% of my time would have been focused on ensuring compliance 15/20%"</i></p>	<p><u>Role:</u> Compliance / Education / Strategic</p> <p><u>Language:</u> compliance</p>
2	Laws: Equal opps; pay rates Language: 'that we comply'	<ul style="list-style-type: none"> <li>- He sees compliance as involving:</li> <li>- Payroll - penalty rates - Equal opp...</li> </ul> <p><i>"all our payroll systems at the bottom level, I guess all the payroll systems are set up so that when we calculate people's pay and record the details they are accurate against the dollars and the cents and the conditions that require penalty rights and so forth are accurately transcribed. That the people both in Head Office and in the regions understand how to accurately calculate pays, that we comply with a myriad now of statutory requirements in relation to equal opportunity, anti-discrimination, anti-harassment, all of those types of laws, and over those periods that became an increasing focus and more and more onerous"</i></p>	<p><u>Language:</u> compliance</p>
2	Complexity Government Politics Legislation Ambiguity	<p><i>"I guess that one of the features of the Australian industrial relations law since about 1990, has been there have been a number of changes in government, governments of different political persuasion, and unfortunately, we've had what I call pendulum swings in terms of the way the industrial relations system works. Which end of the industrial relations spectrum is favoured? And so it's been a constant issue to - against some incredibly complex and often poorly drafted legislation - to actually understand how that's going to work for the organisation and how the organisation is going to comply with it and even survive with it"</i></p>	<p>Macro level</p> <p><u>Language:</u> Complying</p> <p><u>Laws:</u> ambiguous; how work for org'n; how comply</p>
2 - 3	Identity Experience HR role	<p><i>"I guess because I'm fundamentally an industrial relations practitioner... because I've got the background that I have, I've seen that as part of my role"</i></p>	<p><u>Identity:</u> IR - connected to role</p>

3	<p>Org chr Legal advice - Business association Org size Compliance HR practitioners: range of experience</p>	<p>- Org - take advice re what can / can't do - Either way - focus still seems to be compliance - do what Business SA tells you to do, or work out what approach you'll take for yourself.</p> <p><i>“I've had clients who have taken the attitude.. generally they tend to be smaller clients. often family companies, that perhaps don't have as highly qualified HR managers, who take the view that we just blunder on, we get Business SA - which is, in South Australia, the major employer association - to tell us what we can do and what we can't do. As opposed to larger more professional organisations who <b>definitely keep on top of this, and bother to understand the changes to the laws and work out strategically how they're going to have to change the way they run their business in order to make the most of the changes or suffer the least amount of downside of the changes, whilst still complying with the new laws</b>”</i></p>	<p><u>Macro level:</u> changes to laws / need to keep on top of what to do <u>Language:</u> complying / strategic</p>
3 - 4	<p>Org culture Industry - need to comply with other laws US owned Compliance reporting Proper management: involves compliance MNC</p>	<p><i>“when I was with [name of employer] we were owned by a very large American corporation so we had to comply with Sarbanes-Oxley laws of America as whole subsidiary of an American company, and that had a very particular focus on total compliance with all the laws, and it was seen as a major challenge for an Australian organisation to actually get 100% tick off in having complied with Sarbanes-Oxley”.</i></p> <p>- Asked whether these laws influenced the approach taken toward all laws that applied to the business:</p> <p><i>“Oh it did, it did, yes the Sarbanes-Oxley applied to our total legal compliance so that we had to schedule a very substantial document. We had analysed all the statutes and regulations in Australia that applied to our business and that required our compliance, direct compliance from the business, and in respect of each item we had a plan to ensure compliance and we reported in detail on an annual basis”</i></p> <p><i>“the Americans couldn't believe what we'd done because we did it better than any other department, which was good..”</i></p> <p>- did it include all workplace laws?</p> <p><i>“Yeah, absolutely, it included I reckon there must have been over 100 statutes... There was workplace health and safety. There were all sorts when you're running [identifying organisational activity], there are a myriad of statutes that apply to those, so it was a really big and probably worth while part of running the business and managing it properly”</i></p>	<p><u>Situation</u> - points to macro level influence / Aus legal complexity <u>Org:</u> ownership <u>Language:</u> compliance connected to managing the business properly</p>

<p>4</p> <p>Compliance</p> <p>Corporate citizenship</p> <p>HR identity - compliance</p> <p>Money</p> <p>Commercial pressures</p>	<p>“Hopefully, we work for good corporate organisations that want to comply, and want to be good corporate citizens. And I guess that every now and then when I was in private practice I was approached by clients who wanted to me to act for them in respect of something and I got the impression that they were reluctant to comply to the letter, and I would be quite happy if they decided they didn't want me to act for them”.</p> <p>- Know why didn't want to comply?</p> <p>“Arrogance, yeah, usually arrogance. I'm not spending a dollar on that, that's rubbish”, or “ don't really care”, yeah those sorts of attitudes”</p> <p>(Were Australian organisations)</p>	<p>Identity</p> <p>Organisations - different approaches</p>
<p>4 - 5</p> <p>Senior management</p> <p>CEO attitude</p> <p>Dismissal</p> <p>Claim</p> <p>Legal advice - EDUCATION</p>	<p>“I had a CEO of a large organisation who I was just negotiating a settlement of a wrongful dismissal application, and it had sort of gone off the rails because of the CEO's personal arrogance. In the end, the tribunal made an order in relation to the settlement of the matter and he hadn't complied with it. We had to go down to the tribunal to discuss this and he said, 'I'm going to tell him where to go', and I invited him to bring his toothbrush along with him! [laughter] ... He finally saw the light! That was just a person, a single individual with that attitude. And that was an attitude of, 'well, I'm the boss here, who are these people in the tribunal? They can sod off'. It's a matter of educating and saying, 'if you really want them to sod off and you tell them to do so, at the end of the day you might be in the big house for a while, do you want that?'. They've got a bigger stick than you have!”</p> <p>- This org: 800-900 employees</p>	<p><u>Situation:</u> CEO attitude</p> <p><u>Role:</u> education</p> <p>Consequences</p>



## **GLOSSARY AND ABBREVIATIONS**

<b>Glossary of terms</b>	
Award	An Australian document, made by the Fair Work Commission, that sets out the minimum terms and conditions of employment that apply to all employees in particular industries. An employer may be covered by an award without knowing of its existence.
B-Corporation ('B-Corps')	Becoming a B-Corps involves independent assessment of the organisation's impact on workers, customers, community and environment by B-Lab, a non-profit organisation (B-Corporation, undated).
Deed of release	An Australian document that is used to settle any current or future claims arising out of employment.
Managing Principal	The most senior lawyer in a law firm that is a corporation rather than a partnership.
Principal lawyer	A senior lawyer in a law firm that is a corporation; equivalent to a partner in a partnership.
Settlement agreement	A UK document that is used to settle any current or future claims arising out of employment.
Work Choices	Short for the Australian 'Workplace Relations Amendment (Work Choices) Act 2005 (Cth), introduced by the Liberal Coalition government led by John Howard.

<b>Abbreviations</b>	
ACAS	Advisory, Conciliation and Arbitration Service (UK)
AHRI	Australian Human Resources Institute
AWA	Australian Workplace Agreement (Australia)
CIPD	Chartered Institute of Personnel and Development (UK)
ERA	Employment Rights Act (UK)
FWA	Fair Work Act (Australia)
FWIS	Fair Work Information Statement (Australia)
FWO	Fair Work Ombudsman (Australia)
FWC	Fair Work Commission (Australia)
NDA	Non-disclosure agreement

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