

EMPLOYMENT LAW INITIATIVES, WORK, CARE
AND DIVERSITY

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ABSTRACT

Conflict between work and care is one of the most significant issues for workers in contemporary Australia. Employees report that a poor fit exists between the obligations and expectations of their paid working lives and their responsibilities to care for others, such as children and elderly parents. Since the early 1970s a raft of legal initiatives designed to assist workers to better manage collision between work and care has been developed in Australian employment law. New forms of leave have been recognized, such as maternity, paternity and parental leave, and working time rules now build in a consideration of care responsibilities. Concepts of discrimination, reasonable accommodation and adverse action have been developed in relation to care responsibilities, as has a right to request flexible work arrangements.

The gender dimension of work and care conflict has been explored, both in the empirical scholarship documenting it, and in the scholarship examining the legal initiatives that seek to respond to it. However other forms of diversity, and intersections with gender, such as sexual orientation, race, ethnicity and disability, have received virtually no attention. This thesis fills this gap in the literature by addressing the research question:

Have Australian legal initiatives designed to address collision between work and care adequately recognized diversity in work and care practices?

This thesis argues that it is important to examine how well the Australian work and care legal initiatives account for diversity. Indeed, close attention to diversity is not only warranted, it is necessary. This is so for a number of reasons, including the agendas of social inclusion, equality and non-discrimination, which are now well recognized as objectives of Australian employment law.

The argument of the thesis unfolds in a number of stages. First, it is shown that the legal initiatives developed since the early 1970s do recognize and support some aspects of diverse work and care arrangements, benchmarked against the breadwinner/homemaker model of work and care institutionalized in the early part of the 20th Century. Principally, the legal mechanisms recognize mothers as waged workers, male workers as carers, and same sex couples as relationships of care. This provides a level of recognition of diversity. The close examination of legal rules provided in the thesis reveals as a second stage a number of deficiencies in the recognition of diverse work and care practices. These inadequacies relate to three main matters: law's continuing separation of work from care; a range of substantive limitations in the schemes themselves, such as eligibility rules; and thirdly, complexity, uncertainty and incoherency in the definitions used to recognize care relationships. These matters have a particularly detrimental impact on diverse work and care arrangements.

The thesis thus concludes that to date the legal initiatives of employment law provide less than adequate recognition of diversity in work and care practices. This undermines social inclusion, equality and non-discrimination. The broad contours of a proposal to address these inadequacies are mapped out in the conclusion of the thesis, and offered as the basis for future development.

DECLARATION

I, Anna-Louise Margaret Chapman certify that this work contains no material which has been accepted for the award of any other degree or diploma in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text.

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CHAPTER 1:

INTRODUCTION AND OVERVIEW

1.1 Introduction

Conflict between work and care is one of the most significant issues for workers in contemporary Australia. Employees report that a poor fit exists between the obligations and expectations of their paid working lives and their responsibilities to care for others, such as children and elderly parents.¹ Workers speak of feeling too rushed or pressured for time, and the stress and problems caused by collisions between shifts, and for example, school hours, or the need to accompany an elderly relative to a medical appointment. The consequences of collision between work and care can be seen in a number of matters for women, including fatigue and strained relationships, the movement of women workers out of full-time positions into part-time and casual work after they become a parent, the underutilization of women's skills and experience, and for many women poverty in older age. Men too experience work and care conflict, and vocalize these concerns with increasing frequency, especially in the context of developing masculinities that value male caring. Men are likely to speak of overwork, and a growing sense of alienation from their partners and children.

¹ See eg, Barbara Pocock, Natalie Skinner and Philippa Williams, *Time Bomb: Work, Rest and Play in Australia Today* (NewSouth Publishing, 2012); Jill Dorrian, Natalie Skinner and Sandra Pisaniello, 'Work Quality, Not Just Quantity: Work-Related Predictors of Psychological Distress, Work-Family Interaction and Alcohol Consumption' (Centre for Work + Life, University of South Australia, 2011); Barbara Pocock, Natalie Skinner and Sandra Pisaniello, 'The Australian Work and Life Index 2010: How Much Should We Work? Working Hours, Holidays and Working Life: The Participation Challenge' (Centre for Work + Life, University of South Australia, 2010); Barbara Pocock, Natalie Skinner and Reina Ichii, 'The Australian Work and Life Index 2009: Work, Life and Workplace Flexibility' (Centre for Work + Life, University of South Australia, 2009); Barbara Pocock, *The Work/Life Collision: What Work is Doing to Australians and What to Do about It* (Federation Press, 2003).

Since the 1970s a raft of changes has been made to employment law to assist workers to better manage their care responsibilities with their waged working lives. New forms of leave have been recognized, such as parental leave and carer's leave, and there have been some attempts to constrain long working hours too. 'Right to request' schemes have also been developed to assist employees to seek changes in their working arrangements. In addition, in some parts of Australia the legal concept of discrimination has been rethought to require that an employer accommodate an employee's care responsibilities to a reasonable level. In 2010 a government funded payment system was established for the primary care-givers of babies and adopted children, and this is expected to be extended from January 2013 to encompass a 'dad and partner pay' scheme.² This level of activity attests to the fact that work and care remains a central concern for successive Commonwealth, State and Territory governments.³

The gender dimension of work and care conflict has been explored, both in the empirical scholarship documenting it, and in the scholarship examining the legal initiatives that seek to respond to it. But what of other forms of diversity, and intersecting particularities of gender, such as sexual orientation, race, ethnicity and disability? Are these subjectivities relevant to how people experience work and care conflict? Does legal regulation adequately take account of such diversity? Diverse work and care practices and arrangements, such as those in queer communities, Indigenous kinship networks, culturally and linguistically diverse communities, and disability communities, have received virtually no attention in the Australian

² *Paid Parental Leave Act 2010* (Cth); Paid Parental Leave and Other Legislation Amendment (Dad and Partner Pay and Other Measures) Bill 2012 (Cth); Department of Families, Housing, Community Services and Indigenous Affairs, 'Paid Parental Leave: Dad and Partner Pay – A Policy Statement from the Australian Government September 2011' (Policy Statement, Commonwealth of Australia, September 2011).

³ The significance of, and interest in, work and care issues is also reflected in a 2012 non-government Bill (the Fair Work Amendment (Better Work/Life Balance) Bill 2012 (Cth)) and a 2012 government Bill (the Paid Parental Leave and Other Legislation Amendment (Dad and Partner Pay and Other Measures) Bill 2012 (Cth)). Recent 2011 Productivity Commission inquiries into caring for older Australians, and disability care, also attest to the high level activity around care issues: Productivity Commission, *Caring for Older Australians: Productivity Commission Inquiry Report No 53* (Commonwealth of Australia, 2011) vol 1; Productivity Commission, *Disability Care and Support: Productivity Commission Inquiry Report No 54* (Commonwealth of Australia, 2011).

empirical scholarship comprising the work and care field, and very little examination in the writings on legal initiatives (outside the publications that comprise this thesis). Is it important to examine how well the Australian work and care legal initiatives account for diversity? This thesis argues that it is. Indeed, close attention to diversity in the field of work and care is not only warranted, it is necessary. This is so for a number of reasons, including the agendas of social inclusion and equality, which are now well recognized as objectives of Australian employment law.⁴

1.2 Literature Review

1.2.1 Empirical Scholarship on Work and Care

Scholars have produced a large body of literature seeking to understand the contemporary phenomenon of work and care conflict in Australia. The bulk of this scholarship maps various empirical dimensions of the tension. Much of the early empirical material was brought together by Barbara Pocock in her metastudy published in 2003 entitled *The Work/Life Collision*.⁵ In this foundational text Pocock articulated a useful framework for conceptualizing the Australian problem, or the ‘collision’ as she identified it, between labour market participation and care responsibilities.⁶ She mapped the problem as a ‘moving vehicle’ of changing behaviour colliding with a ‘solid wall’ of unchanging values and institutions, both in the home and within families, in workplaces and in the law.⁷ Pocock identified the shifting behavior, or ‘moving vehicle’, as including women, and particularly mothers, moving into part-time and casual employment, longer working hours for full-timers, work intensification, more time spent commuting to and from work, rising consumption levels, and a thinning of community in residential neighbourhoods. In Pocock’s analysis these developments were running into a ‘solid wall’ of unchanged values, namely, workplace cultures and leave entitlements built

⁴ The field of employment law examined in the thesis is more closely delineated below under subheading 1.4 research method.

⁵ Pocock, above n 1.

⁶ Ibid 2.

⁷ Ibid 2.

around an archetypal worker who has no care responsibilities,⁸ the gendered (and largely unchanged) distribution of household and care work, and the cultural constructions of motherhood and fatherhood. Pocock characterised the legal regulation of work as broadly part of the unchanged wall of resistance.⁹

This model of collision conceptualized by Pocock remains a useful framework in which to situate much of the surge in Australian empirical scholarship on work and care conflict published since 2003. The field has become vast, largely tracking one or another dimension of the conflict identified in *The Work/Life Collision*.

Maternity leave has been seen as a pre-eminent and foundational work and care standard, with considerable research effort focused on mapping the empirical dimensions of leave arrangements following birth. Marian Baird has conducted or been a co-author of much of this work, with a focus on the availability, duration and utilization of maternity leave by mothers, and more recently the availability and use of paternity leave by fathers.¹⁰

Working time is a topic that has also attracted much empirical research. The Australian literature on working hours is not framed solely around work and care conflict, although that is an important axis underlying much of it. Long working hours of full-time employees (and especially men) have been documented, as has an

⁸ Pocock calls him a 'care-less' worker: Ibid 1, 3. At 1-2, she identifies him as having a wife at home.

⁹ Apart from legal entitlements to leave (see chapter 9), legal regulation is not examined as such in *The Work/Life Collision*.

¹⁰ See eg, Marian Baird, 'The State, Work and Family in Australia' (2011) 22 *The International Journal of Human Resource Management* 3742; Marian Baird, 'Paid Parental Leave Policy and Employer Response' in Marian Baird, Keith Hancock and Joe Isaac (eds), *Work and Employment Relations – An Era of Change* (Federation Press, 2011) 63; Marian Baird, Betty Frino and Sue Williamson, 'Paid Maternity and Paternity Leave and the Emergence of "Equality Bargaining" in Australia: An Analysis of Enterprise Agreements 2003-2007' (2009) 35 *Australian Bulletin of Labour* 671; Gillian Whitehouse, Amanda Hosking and Marian Baird, 'Returning Too Soon? Australian Mothers' Satisfaction with Maternity Leave Duration' (2008) 46 *Asia Pacific Journal of Human Resources* 288; Marian Baird and Seth Litwin, 'Re-Thinking Work and Family Policy: The Making and Taking of Parental Leave in Australia' (2005) 17 *International Review of Psychiatry* 385; Marian Baird, 'Orientations to Paid Maternity Leave: Understanding the Australian Debate' (2004) 46 *Journal of Industrial Relations* 259; Marian Baird, 'Paid Maternity Leave: The Good, the Bad, the Ugly' (2003) 29 *Australian Bulletin of Labour* 97; Marian Baird, Deborah Brennan and Leanne Cutcher, 'A Pregnant Pause: Paid Maternity Leave in Australia' (2002) 13 *Labour and Industry* 1.

increase in unsociable working hours. Preferences around working hours have been examined, along with the impact of long working hours on individuals and relationships in terms of physical and mental health and well-being, family conflict, and sustainable communities.¹¹ The concept of time more broadly has been used to explore a lack of fit between different forms of time, namely the ‘clock time’ (of the workplace) and the ‘natural time’ or ‘body time’ (of care responsibilities).¹²

From 2007 the Centre for Work + Life at the University of South Australia, under the leadership of Barbara Pocock, has conducted an annual survey – known as the Australian Work and Life Index (‘AWALI’) – which indexes work-life outcomes amongst working Australians. This index provides a wealth of information, including qualitative and quantitative data in relation to working hours, in addition to information on the types of flexible work arrangements that employees request, their reasons for those requests, and their success in being granted the arrangement sought.¹³

On one level the empirical charting that has been carried out into work and care conflict, and specifically relating to the matters of leave following birth, working hours, and requests for flexibility, is impressive. A broad picture has been produced

¹¹ See eg, Pocock, Skinner and Williams, above n 1, chapter 2; Dorrian, Skinner and Pisaniello, above n 1; Lyn Craig, Killian Mullan and Megan Blaxland, ‘Parenthood, Policy and Work-Family Time in Australia 1992-2006’ (2010) 24 *Work, Employment & Society* 27; Natalie Skinner and Barbara Pocock, ‘Work-Life Conflict: Is Work Time or Work Overload More Important?’ (2008) 46 *Asia Pacific Journal of Human Resources* 303; Mark Wooden et al, ‘Working Time Mismatch and Subjective Well-Being’ (Working Paper No 29/07, Melbourne Institute of Applied Economic and Social Research, 2007); Iain Campbell, ‘Long Working Hours in Australia: Working-Time Regulation and Employer Pressure’ (2007) 17 *The Economic and Labour Relations Review* 37; Marian Baird and Sara Charlesworth, ‘After the Baby: A Qualitative Study of Working Time Arrangements Following Maternity Leave’ (2005) 17 *Labour & Industry* 97; Michael Bittman, ‘Sunday Working and Family Time’ (2005) 16 *Labour & Industry* 59.

¹² Pocock, Skinner and Williams, above n 1. Those terms first appear on p 5, p 6. On caring time, see in particular chapter 3.

¹³ See eg, Pocock, Skinner and Pisaniello, above n 1; Pocock, Skinner and Ichii, above n 1. For journal articles emanating from the index, see Natalie Skinner and Barbara Pocock, ‘Flexibility and Work-Life Interference in Australia’ (2011) 53 *Journal of Industrial Relations* 65; Natalie Skinner and Barbara Pocock, ‘Work, Life, Flexibility and Workplace Culture in Australia: Results of the 2008 Australian Work and Life Index (AWALI) Survey’ (2010) 36 *Australian Bulletin of Labour* 133; Barbara Pocock, Natalie Skinner and Philippa Williams, ‘Measuring Work-Life Interaction: The Australian Work and Life Index (AWALI) 2007’ (2008) 18 *Labour & Industry* 19.

of the contemporary problem, and this provides a base of empirical information for this thesis' study of legal initiatives in these areas. A close examination though of this empirical scholarship reveals the limitations of much of it.

The Work/Life Collision is explicit in its focus on heterosexual households with dependents, and its decision not to examine diverse family and care arrangements.¹⁴ In its final chapter it sets out a number of principles to guide reform, and although the language of diversity is used, this appears to refer only to gender neutrality in the sense of both men and women having access to entitlements (except where physical differences are relevant such as childbirth).¹⁵ The text's program of reform is notable for its silence about valuing other forms of diversity such as sexual orientation and race.

Empirical scholarship published since *The Work/Life Collision* has not taken up the challenge of diversity. For example, much of Marian Baird's empirical scholarship into leave following birth has focused on exploring the availability and characteristics of maternity leave in Australia. In her early scholarship she explains paid 'maternity leave' as being payment made to a mother to compensate her for her loss of income following giving birth.¹⁶ In her more recent work Baird has examined the empirical dimensions of 'paternity leave' and has done so in ways that make it clear that she interprets this as leave for fathers, and that together, 'maternity leave' for the birth mother and 'paternity leave' for the father provide the complete picture of leave available in relation to birth.¹⁷ Baird's published writings do not comment on issues of diversity such as exist in same sex relationships and Indigenous kinship networks, or note the exclusion of such diverse care arrangements in the legal rules.¹⁸

¹⁴ Pocock, above n 1, 12. Discussed in 'Challenging the Constitution of the (White and Straight) Family in Work and Family Scholarship' (thesis chapter 2).

¹⁵ Pocock, above n 1, 245. Discussed in 'Challenging the Constitution of the (White and Straight) Family in Work and Family Scholarship' (thesis chapter 2).

¹⁶ Baird, 'Paid Maternity Leave: The Good, the Bad, the Ugly', above n 10, 99.

¹⁷ See in particular, Baird, 'The State, Work and Family in Australia', above n 10; Baird, Frino and Williamson, above n 10; Baird and Litwin, above n 10.

¹⁸ See in particular, Baird, 'The State, Work and Family in Australia', above n 10. Unpaid parental leave was extended at the federal level to same sex relationships with the enactment of the *Fair Work Act 2009* (Cth) ('*FW Act*'), yet it is noticeable that this paper, which discusses many aspects of the *FW*

Only a 2009 co-authored background paper containing a recommended model for Australia hints at an awareness of these ‘other’ groups by stating a broad principle that eligibility for any scheme must be ‘non-discriminatory towards same-sex couples’.¹⁹ This limited and undeveloped acknowledgement of one form of diversity highlights the lack of a broader engagement with diverse work and care arrangements in this body of scholarship.

A further example of a lack of engagement with diversity is provided by AWALI, compiled annually by the Centre for Work + Life. This index, which has become a main source of empirical data on the Australian work and care situation, takes some forms of diversity into account, namely, gender, age, educational attainment, geographic location, and ‘marital status’, but other subjectivities such as sexual orientation, race, ethnicity and disability are not recorded or explored in the study.²⁰ Moreover, the concept of ‘marital status’ is articulated in the index as comprising two mutually exclusive (and exhaustive) categories: ‘married / de facto’ and ‘divorced, separated, never married or widowed’.²¹ Each of these identifiers references marriage, a legal status that is (still) only relevant and applicable to different sex two adult couples. In using marriage as the benchmark test in ‘marital

Act scheme of unpaid parental leave, does not note this important extension. See also, Baird and Litwin, above n 10; Baird ‘Orientations to Paid Maternity Leave: Understanding the Australian Debate’, above n 10.

¹⁹ Marian Baird, Jenni Whelan and Alison Page, ‘Paid Maternity, Paternity and Parental Leave for Australia: An Evaluation of the Context, Evidence and Policy Options’ (Women and Work Research Group, University of Sydney, 2009) 78. An earlier statement of the recommended plan notes the need for equality between men and women, but is silent regarding other forms of equality: 77.

²⁰ Barbara Pocock, Philippa Williams and Natalie Skinner, ‘The Australian Work and Life Index (AWALI): Concepts, Methodology and Rationale’ (Discussion Paper No 1/07, Centre for Work + Life, University of South Australia, 2007) Table 4 (at 19). See also for its absence of discussion of diversity beyond gender, Pocock, Skinner and Williams, above n 13.

²¹ See eg, Pocock, Skinner and Pisaniello, above n 1, Table 2 (at 19); Pocock, Skinner and Ichii, above n 1, Table 2 (at 17); Natalie Skinner and Barbara Pocock, ‘Work, Life & Workplace Culture: The Australian Work and Life Index 2008’ (Centre for Work + Life, University of South Australia, 2008) Table 2 (at 21); Barbara Pocock, Natalie Skinner and Philippa Williams, ‘Work, Life and Time: The Australian Work and Life Index 2007’ (Centre for Work + Life, University of South Australia, 2007) Table 2 (at 11). The Australian Bureau of Statistics (‘ABS’) uses a similar category of ‘marital status’ in collecting data on relationships. Notably though, and in contrast to AWALI, the ABS identifies a separate category of same sex couple in its data collection on relationships. See eg, ABS, ‘Census Dictionary 2011’ (Report Cat No 2901.0, ABS, 2011); ABS, ‘Labour Force, Australia: Labour Force Status and Other Characteristics of Families, Jun 2011’ (Report Cat No 6224.0.55.001, ABS, 2011). Even prior to 2011 the ABS census recognized same sex couples: ABS, ‘Census Dictionary 2006 (Revised)’ (Report Cat No 2901.0, ABS, 2006).

status', the AWALI category of 'marital status' sits awkwardly for people in same sex relationships, and other people in broader intimate relationships. Ultimately it is unclear how people in such relationships categorise themselves under the AWALI 'marital status' definition.

Given these gaps in the work/care literature, this thesis supplements its empirical foundations by drawing on scholarship situated broadly in family studies, gay and lesbian studies, and Indigenous studies to provide its understanding of diverse work and care practices and arrangements in Australia.²²

1.2.2 Legal Scholarship on Work and Care

There is a large body of scholarship examining Australian legal initiatives designed to assist workers with care responsibilities. This literature has a number of objectives, including the provision of commentary and critique of particular case decisions such as the long-running litigation in *Schou v Victoria*,²³ or wide-sweeping

²² See 'Challenging the Constitution of the (White and Straight) Family in Work and Family Scholarship' (thesis chapter 2). More recent empirical scholarship on Australia confirms the themes identified in this thesis publication. On diversity in terms of sexual orientation, see eg, Jennifer Power et al, 'Diversity, Tradition and Family: Australian Same-Sex Attracted Parents and Their Families' (2010) 6 *Gay and Lesbian Issues and Psychology Review* 66; Amaryll Perlesz et al, 'Organising Work and Home in Same-Sex Parented Families: Findings From the Work Love Play Study' (2010) 31 *Australian and New Zealand Journal of Family Therapy* 374; Amaryll Perlesz et al, 'Family in Transition: Parents, Children and Grandparents in Lesbian Families Give Meaning to "Doing Families"' (2006) 28 *Journal of Family Therapy* 175. On diversity in Indigenous communities, see eg, Steering Committee for the Review of Government Service Provision, 'Overcoming Indigenous Disadvantage: Key Indicators 2011 Report' (Productivity Commission, 2011); ABS, 'Population Characteristics, Aboriginal and Torres Strait Islander Australians, 2006' (Report, Cat No 4713.0, ABS, reissued 2010); Albert Zhou et al, 'Kinship Care for Children in New South Wales' (2010) 5 *Communities, Children and Families Australia* 60; John Altman, 'Beyond Closing the Gap: Valuing Diversity in Indigenous Australia' (Working Paper No 54, Centre for Aboriginal Economic Policy Research, Australian National University, 2009); Frances Morphy, 'Lost in Translation? Remote Indigenous Households and Definitions of the "Family"' (2006) 73 *Family Matters* 12.

²³ *Schou v Victoria* (2000) EOC 93-100, 93-101; *Victoria v Schou* (2001) 3 VR 655; *Schou v Victoria* (2002) EOC 93-217; *Victoria v Schou* (2004) 8 VR 120. For writings discussing this case see eg, Margaret Thornton, 'Sex Discrimination, Court and Corporate Power' (2008) 36 *Federal Law Review* 31; Carolyn Sutherland, 'Applying *Victoria v Schou*: The Approach of VCAT and the Federal Magistrates Court' (2007) 29 *Australian Bar Review* 45; Belinda Smith and Joellen Riley, 'Family-Friendly Work Practices and the Law' (2004) 26 *Sydney Law Review* 395; Fiona Knowles, 'Misdirection for Indirect Discrimination' (2004) 17 *Australian Journal of Labour Law* 185; Marilyn Pittard, 'The Dispersing and Transformed Workplace: Labour Law and the Effect of Electronic Work' (2003) 16 *Australian Journal of Labour Law* 1; K Lee Adams, 'A Step Backwards in Job

statutory change, such as that brought about through the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) ('*Work Choices*').²⁴ An overlapping body of scholarship has as its objective an analysis of the regulatory models in which different work and care initiatives are embedded, including anti-discrimination law,²⁵ common law contract,²⁶ and the previous industrial award test case mechanism.²⁷ Apart from the publications that comprise this thesis, and one other article,²⁸ none of the legal scholarship on work and care initiatives, including the bodies of work described above, has an objective of examining diversity, or indeed explicitly uses a diversity perspective, apart from diversity in the form of law's gendering of work and care. Differences of sexual orientation, race, ethnicity and disability are not investigated in the legal scholarship, reflecting a similar gap to that found in the empirical literature on work and care.

Protection for Carers' (2002) 15 *Australian Journal of Labour Law* 93; Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26 *Melbourne University Law Review* 325; Therese MacDermott and Rosemary Owens, 'Equality and Flexibility for Workers with Family Responsibilities: A Troubled Union?' (2000) 13 *Australian Journal of Labour Law* 278.

²⁴ The *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) amended the *Workplace Relations Act 1996* (Cth) ('*WR Act*'). For writings on *Work Choices* and work and care, see eg, Sue Williamson and Marian Baird, 'Family Provisions and WorkChoices: Testing Times' (2007) 20 *Australian Journal of Labour Law* 53; Beth Gaze, 'Work Choices, or No Choices: The Impact of the New Industrial Relations Law on Work and Family' in Julian Teicher, Robert Lambert and Anne O'Rourke (eds), *WorkChoices: The New Industrial Relations Agenda* (Pearson Education Australia, 2006) 106; Barbara Pocock and Helen Masterman-Smith, 'Workchoices and Women Workers' (2006) 56 *Journal of Australian Political Economy* 126.

²⁵ See eg, Dominique Allen, 'Strategic Enforcement of Anti-Discrimination Law: A New Role for Australia's Equality Commissions' (2010) 36 *Monash University Law Review* 103; Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31 *Sydney Law Review* 579; Belinda Smith, 'It's About Time – For a New Approach to Equality' (2008) 36 *Federal Law Review* 117; Belinda Smith, 'Not the Baby and the Bathwater – Regulatory Reform for Equality Laws to Address Work-Family Conflict' (2006) 28 *Sydney Law Review* 689.

²⁶ See eg, Joellen Riley, 'Contracting for Work/Family Balance' (2005) 23 *Law in Context* 182; Smith and Riley, above n 23, especially at 24-32.

²⁷ See eg, Rosemary Owens, 'Reproducing Law's Worker: Regulatory Tensions in the Pursuit of "Population, Participation and Productivity"' in Christopher Arup et al (eds) *Labour Law and Labour Market Regulation: Essays on the Construction and Regulation of Labour Markets and Work Relationships* (Federation Press, 2006) 410; Jill Murray, 'The AIRC's Test Case on Work and Family Provisions: The End of Dynamic Regulatory Change at the Federal Level?' (2005) 18 *Australian Journal of Labour Law* 325.

²⁸ Marc Trabsky, 'Deconstructing the Heteronormative Worker or Queering a Jurisprudence of Labour: A Case Study of Family and Personal/Carer's Leave in Australian Labour Law' (2005) 23 *Law in Context* 202. This article explores how sexual orientation is constituted through award entitlements of family and carer's leave. In addition, sexual orientation is addressed in the practical and accessible guide to the *Paid Parental Leave Act 2010* (Cth) of Erin McCarthy, Elise Jenkins and Andrew Stewart, *Parental Leave: A User-Friendly Guide* (Thomson Reuters, 2012) especially [4.60].

An example will suffice to illustrate this gap in the legal scholarship. The example provides both a commentary and critique of a specific case decision, as well as being an analysis of the arbitral test case as a form of regulation. In a 2005 paper examining a key award test case on work and care provisions – the *Parental Leave Test Case 2005*²⁹ – Jill Murray makes the argument that a great strength of the former award test case function exercised by the Australian Industrial Relations Commission (‘AIRC’) was its wide consultation process and deep examination of the relevant issues.³⁰ Murray laments the passing of this test case function (through *Work Choices*) as the loss of a source of ‘innovative’ and ‘dynamic’ standard setting.³¹ She writes of ‘the sophisticated, exhaustive process the Commission superintends in such test cases’,³² and recites that ‘[a]s one participant said of the *Parental Leave Test Case 2005*, “every argument that could possibly be made was thoroughly canvassed”.’³³

While understanding that the primary object of Murray’s paper was to comment on the changed character of the regulatory system introduced by *Work Choices*, a critique of Murray’s analysis is revelatory of the way in which issues of diversity and discrimination have been glossed over in the Australian legal scholarship on work and care. Examination of the submissions in the 2005 test case reveals that arguments regarding the recognition of diverse work and care practices were not ‘thoroughly canvassed’ in the decision. Indeed, they were ignored in one respect and shunted to the side in another. The main written submission made by the Australian Council of Trade Unions (‘ACTU’) (comprising 363 pages in length) contained not a single reference or commitment to extending legal entitlements to non-heterosexual relationships.³⁴ The claims of the ACTU in relation to parental leave were based on explicitly discriminatory tests that clearly excluded same sex relationships and other

²⁹ *Parental Leave Test Case 2005* (2005) 143 IR 245.

³⁰ Murray, above n 27.

³¹ Ibid 340 (‘innovative’); the word ‘dynamic’ appears in the title.

³² Ibid 340.

³³ Ibid 341.

³⁴ Australian Council of Trade Unions (‘ACTU’), ‘Submission in *Family Provisions Test Case*, IRC Matter No 4201 of 2005’ (ACTU, November 2004). This submission is discussed in ‘Challenging the Constitution of the (White and Straight) Family in Work and Family Scholarship’ (thesis chapter 2).

forms of diverse work and care arrangements. That discrimination was not mentioned, let alone discussed, in the 92 page Full Bench decision. This it must be noted was a decision handed down in 2005, not in an earlier time when diversity was a relatively new concept. In addition to providing a reconsideration of the standard award parental leave clause, bereavement leave and emergency leave were also reconsidered in the test case. In relation to these latter forms of leave, the AIRC deliberately placed to one side questions of diversity. This occurred through an agreement being reached in conciliation between the parties (and endorsed by the AIRC) that the parties would jointly review the definition used in the model clauses within six months to ascertain if there 'are any discriminatory aspects'.³⁵

In what appears to be a reference to the issues of bereavement and emergency leave only, Murray notes that the status of same sex couples was left to be addressed by the parties.³⁶ In this sense diversity has not been rendered wholly invisible in Murray's paper, or indeed in the test case process and decision itself, but Murray does not remark, beyond that single sentence, on the test case's lack of engagement with diversity. Moreover, it seems clear that a diversity lens did not inform her analysis and assessment that the Commission test case process was both 'sophisticated' and 'exhaustive'. Ignoring the overtly discriminatory rules regarding parental leave, and side-stepping the question of same sex relationships in bereavement and emergency leave, does not speak to an 'exhaustive' process. Nor does it indicate a 'sophisticated' approach to a complex and challenging policy issue. In addition, the outcomes were not in any sense 'innovative' in relation to diverse work and care practices. The decision merely continued without any alteration the status quo exclusion of same sex relationships in relation to parental leave. Leaving the parties to address the issue of discrimination in emergency and bereavement leave, without Commission supervision, was hardly 'innovative'. Moreover, in terms of other forms

³⁵ *Parental Leave Test Case 2005* (2005) 143 IR 245 at 343 (Appendix 2) cl 1.1. This clause leaves it entirely to the parties (the ACTU, Australian Industry Group, Australian Chamber of Commerce and Industry, National Farmers' Federation) to determine if there are any issues of discrimination in relation to same sex relationships, without input or supervision by the AIRC. This approach contrasts to the issue of hours flexibility which was also left unresolved by the hearing, but notably was referred to the AIRC conciliation process.

³⁶ Murray, above n 27, 342.

of diversity, such as care within Indigenous kinship networks, complete silence marks the test case and Murray's commentary upon it. In short, this test case decision was disappointing from a diversity perspective, and this went unremarked by Murray.³⁷

As observed above, like most of the legal literature on work and care initiatives, it was not an objective of Murray's paper to consider diversity. Nonetheless, examining Murray's analysis from a diversity perspective does illuminate the general point – for which Murray's work is used as an illustration – that a lack of engagement with questions of diversity characterizes the legal literature.

In contrast to Murray's paper, and most of the literature on work and care legal initiatives, a body of legal scholarship has developed with a clear objective of considering gender diversity in the legal regulation of work and care in Australia. Rosemary Owens has authored a substantial body of work examining various aspects of labour market legal regulation, and in particular non-standard or precarious work, for its gendering of legal norms around work, and social reproduction.³⁸ Her scholarship has traversed both industrial law, and the social security system, to focus on how gender, flexibility and equality have been modeled across the public/private divide, including between work and care. Owens' critique is situated in the history of the breadwinner male worker of Australian industrial relations.³⁹ In addition to Owens' work, Beth Gaze also has written on the gendered construction of work and

³⁷ The 2005 test case is discussed in relation to diversity in the form of sexual orientation in 'Industrial Law, Working Hours, and Work, Care, and Family' (thesis chapter 3) 468.

³⁸ See eg, Rosemary Owens, 'Engendering Flexibility in a World of Precarious Work' in Judy Fudge and Rosemary Owens (eds), *Precarious Work, Women, and the New Economy: The Challenges to Legal Norms* (Hart Publishing, 2006) 329; Rosemary J Owens, 'Taking Leave: Work and Family in Australian Law and Policy' in Joanne Conaghan and Kerry Rittich (eds), *Labour Law, Work and Family: Critical and Comparative Perspectives* (Oxford University Press, 2005) 237; Rosemary Owens, 'The Traditional Labour Law Framework: A Critical Evaluation' in Richard Mitchell (ed), *Redefining Labour Law: New Perspectives on the Future of Teaching and Research* (Centre for Employment and Labour Relations Law, University of Melbourne, 1995) 3; Rosemary Owens, 'Women, "Atypical" Work Relationships and the Law' (1993) 19 *Melbourne University Law Review* 399.

³⁹ See eg, Owens, above n 27.

care, revealing a breadwinner tradition, in her examination of part-time work in the Australian university context.⁴⁰

The work of Owens and Gaze explores the assumptions and models embedded in the legal and policy frameworks themselves regarding work, care and gender. This scholarship shows how work and care are in fact interconnected and are not separate spheres of life, and how gender is constructed in the process of separation between work and care. In short, their scholarship critiques the liberal public/private divide through a lens of gender. Gender is the critical tool used in this work, and it is used through a male/female binary divide. Intersecting particularities of gender, including sexual orientation, race, ethnicity and disability are not specifically examined by either Owens or Gaze.

In her 2002 text, *Women Going Backwards: Law and Change in a Family Unfriendly Society*,⁴¹ Sandra Berns explicitly acknowledges particularities beyond gender. In its examination of women's inequalities in Australia, the text engages with issues of diversity, conceiving family as 'no longer monolithic, but kaleidoscopic, almost infinitely variable'.⁴² Gay and lesbian families and identities, Indigenous families, and sole parents are referred to specifically.⁴³ In this book Berns traces the breadwinner model of work and care institutionalized in Australia in the early part of the 20th Century through the *Harvester* judgment of 1907, and shows how that model has largely 'metamorphosed' into the 'unencumbered' worker of Australia today – a normative being who has neither financial responsibility to provide for a family nor actual responsibility for family and domestic work.⁴⁴ For Berns, law's ideal worker

⁴⁰ Beth Gaze, 'Working Part Time: Reflections on "Practicing" the Work-Family Juggling Act' (2001) 21 *Queensland University of Technology Law & Justice Journal* 199. Gaze draws on the work of Joan Williams: Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do about It* (Oxford University Press, 2000).

⁴¹ Sandra Berns, *Women Going Backwards: Law and Change in a Family Unfriendly Society* (Ashgate Publishing, 2002).

⁴² *Ibid* 190.

⁴³ See in particular, chapter 8 of *Women Going Backwards*.

⁴⁴ Berns uses the word 'metamorphosed' on p 167 of her text: Berns, above n 41. The concept of 'unencumbered' is used throughout the text, and first appears in the preface (at vi) in relation to her concept of the 'unencumbered citizen'. *Harvester* refers to *Ex parte H. V. McKay* (1907) 2 CAR 1 ('*Harvester*').

continues to behave in the labour market as if he (or she) has a homemaker wife. Her scholarship shows how culture, gender, government policy and legal frameworks interrelate to constitute a subject worker who is not encumbered in the labour market by care responsibilities.⁴⁵ While Berns examines several different areas of law, including industrial law and policy, and anti-discrimination law, she does not go into a detailed analysis of law. In its engagement with diversity beyond gender alone, the book is exceptional in the Australian literature.

Other work that is exceptional in examining diversity beyond gender is a paper authored by Marc Trabsky. Using Michel Foucault's writings on sexuality, law and power, Trabsky examines industrial award test cases on family leave and personal/carer's leave in the mid 1990s to show how law produces a heteronormative worker of labour law.⁴⁶

1.3 Aims, Significance and the Research Question

This thesis fills the gaps left by the work of Owens, Gaze, Berns and Trabsky. The focus of the scholarship of Owens, Gaze and Berns is on gender, although Berns' *Women Going Backwards* looks beyond gender to engage with intersections of gender in the form of sexual orientation, race and sole parenting. In contrast, sexuality is the critical tool used in the Trabsky paper on family leave and personal/carer's leave. This thesis more squarely addresses the question of diversity. Although the thesis uses sexual orientation as a main illustration of diversity, this is not intended to suggest that sexual orientation is the only, or the main, aspect of diversity that is relevant to work and care legal mechanisms. In addition to examining diversity in the form of sexual orientation, gender diversity is examined in

⁴⁵ Writing in the United States context, Williams uses a concept of the 'ideal worker' of the labour market who does not have care responsibilities, and who is mutually interdependent with the 'domestic caretaker': Williams, above n 40.

⁴⁶ Trabsky, above n 28.

the thesis,⁴⁷ as is diversity in the form of race.⁴⁸ The issues that arise from intersecting subjectivities of diversity in particular those relating to gender and ethnicity, and gender and sexual orientation, are also studied.⁴⁹

In addition to addressing diversity more broadly, there is a second way in which the thesis adds to the legal scholarship on work and care. It provides a close and sustained reading of a wide range of employment law statutory rules and case decisions regarding work and care. This contrasts with Berns' meta-narrative across many fields of law, policy and social values, the more thematic work of Owens, and the disparate work of Gaze and Trabsky. In addition, new legal mechanisms are examined in the thesis publications, as they have been implemented. In this way the thesis maps as it critiques detailed changes in the legal framework in relation to diversity over time, and across the entire field of employment law comprising industrial law and anti-discrimination law,⁵⁰ including the many important legal mechanisms and rules that have arisen since the scholarship of Owens, Gaze, Berns and Trabsky was published.

The research question addressed in the thesis is:

Have Australian legal initiatives designed to address collision between work and care adequately recognized diversity in work and care practices?

Paying attention to diversity is important for a number of reasons. Valuing diversity is central in the goal of social inclusion, which has become a main concept of social

⁴⁷ 'Uncovering the Normative Family of Parental Leave: Harvester, Law and the Household' (thesis chapter 3); 'Employment Entitlements to Carer's Leave: Domesticating Diverse Subjectivities' (thesis chapter 3); 'Australian Anti-Discrimination Law, Work, Care and Family' (thesis chapter 4).

⁴⁸ On race, see 'Challenging the Constitution of the (White and Straight) Family in Work and Family Scholarship' (thesis chapter 2); 'Australian Anti-Discrimination Law, Work, Care and Family' (thesis chapter 4) 31-35; 'The New National Scheme of Parental Leave Payment' (thesis chapter 5).

⁴⁹ 'Australian Anti-Discrimination Law, Work, Care and Family' (thesis chapter 4).

⁵⁰ The field of employment law examined in the thesis is more closely delineated below under subheading 1.4 research method.

and labour market policy in Australia.⁵¹ Indeed, the object of the *Fair Work Act 2009* (Cth) (*FW Act*) refers to providing a system of workplace relations that promotes ‘social inclusion for all Australians’.⁵² Where legal rules articulate entitlements in ways that exclude forms of work and care arrangements found in diverse communities such as queer communities and Indigenous communities, this undermines the goal of social inclusion. It reduces or negates the employment entitlements of the excluded, and in this way undermines the opportunity for people to engage fully in, and enjoy the benefits of, both employment and meaningful relationships including family and community. This reinforces economic and social disadvantage in excluded communities. Social inclusion is an attempt to account for the pluralist character of society, as reflected through diversity. The goal is social inclusion for all; and not just the majority. This is why attention to diversity in legal rules is important.

Related to social inclusion is the policy goal of equality and non-discrimination, and diversity is central also to these concerns. Equality has been, and remains, a particular policy goal of anti-discrimination legislation, with equality and the elimination of discrimination articulated as objectives across Commonwealth, State and Territory anti-discrimination law.⁵³ The *FW Act* also articulates its objective of ‘social inclusion for all Australians’ by ‘protecting against’ ‘discrimination’, as well as ‘assisting employees to balance their work and family responsibilities’.⁵⁴ A failure to recognize and bestow legal rights in relation to diverse work and care

⁵¹ See eg, the special issue on social inclusion in (2010) 45 *Australian Journal of Social Issues*, including Emily Long, ‘The Australian Social Inclusion Agenda: A New Approach to Social Policy?’ (2010) 45 *Australian Journal of Social Issues* 161. See also Alan Hayes and Matthew Gray, ‘Social Inclusion: A Policy Platform for Those Who Live Particularly Challenging Lives’ (2008) 78 *Family Matters* 4; Boyd Hunter, ‘Indigenous Social Exclusion: Insights and Challenges for the Concept of Social Inclusion’ (2009) 82 *Family Matters* 52. Social inclusion is an explicit policy goal of the current federal Labor Government and diversity is recognized explicitly in the federal government’s framework of action on social inclusion which includes a reference to providing support for ‘strong, diverse communities free from discrimination’: Australian Government, ‘A Stronger, Fairer Australia’ (Commonwealth of Australia, 2009).

⁵² *FW Act* s 3. Interestingly, the 1996 version of the *WR Act* recited as an objective ‘respecting and valuing the diversity of the work force by helping to prevent and eliminate discrimination’ (s 3(j)). The explicit reference to diversity was removed with the enactment of the *FW Act*.

⁵³ See eg, *Sex Discrimination Act 1984* (Cth) (*SDA*) s 3; *Equal Opportunity Act 1984* (SA) (*EOA* (SA)) preamble; *Equal Opportunity Act 2010* (Vic) (*EOA* (Vic)) s 3.

⁵⁴ *FW Act* s 3(d), (e).

arrangements undermines the goals of equality and the elimination of discrimination.⁵⁵

In the words of the former Chief Justice of the Family Court of Australia, Alastair Nicholson:

One of the fundamental misconceptions which plagues me is the failure to understand that heterosexual family life in no way gains stature, security or respect by the denigration or refusal to acknowledge same-sex families. The sum social good is in fact reduced, because when a community refuses to recognize and protect genuine commitment made by its members, the state acts against everybody's interests.⁵⁶

The values and policy goals of social inclusion, equality and non-discrimination provide strong reasons why legal rules on work and care ought to adequately recognize and value diversity. For this reason paying close attention to whether legal rules do satisfactorily align with diversity in work and care practices is not only warranted, it is necessary.

1.4 Research Method

1.4.1 Industrial Law and Anti-Discrimination Law

Many areas of Australian law shape the interplay between waged work and care responsibilities. As reflected in Berns' meta-study, *Women Going Backwards*, candidates include employment law, the social security and welfare system, tax law and family law, to name a few. The interest of this thesis lies in the legal regulation of waged work and the employment relationship, rather than how work and care are shaped and constituted more broadly across Australian law. For this reason the focus

⁵⁵ On the meanings of formal equality and substantive equality, see Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work* (Oxford University Press, 2nd ed, 2011) 396-402; Rosemary Hunter (ed), *Rethinking Equality Projects in Law: Feminist Challenges* (Hart Publishing, 2008); Reg Graycar and Jenny Morgan, 'Thinking About Equality' (2004) 10 *University of New South Wales Law Journal* 5.

⁵⁶ P Boers, 'Same Sex Parenting', Paper presented at the Law Conference (College of Law, Sydney, 2004) 3, cited in Ruth McNair, 'Outcomes for Children Born of ART (Assisted Reproductive Technology) in a Diverse Range of Families' (Occasional Paper, Victorian Law Reform Commission, 2004) 6.

of the thesis lies in employment law in the form of industrial law⁵⁷ and anti-discrimination law,⁵⁸ as it is these two areas that provide the main sources of legal regulation of the employment relationship in terms of legal entitlements and obligations regarding the intersections of work and care.⁵⁹ Mechanisms of industrial law are examined in chapter 3, and anti-discrimination law initiatives regarding work and care are investigated in chapter 4 of the thesis. Industrial law and anti-discrimination law together have the most significant impact on issues of work and care, and for this reason both are examined in the thesis.

It should be noted that although the thesis utilizes industrial law and anti-discrimination law as two separate categories, this is somewhat of an oversimplification, adopted in the thesis for the sake of convenience and the manageability of material. Certainly for most of the 20th Century the tradition of industrial law and the more recent addition of the field of anti-discrimination were seen in Australia to occupy separate realms to each other; each with a focus on different concerns.⁶⁰ That separation began to break down from the early 1990s as anti-discrimination measures were enacted into the industrial system.⁶¹ New mechanisms enacted with the *FW Act* – specifically relating to discrimination as a form of prohibited adverse action, and a right to request a change in working arrangements in order to accommodate care responsibilities – present new challenges

⁵⁷ I use the terminology of ‘industrial law’ in this Introduction and Overview, and in the Conclusion, to refer to law regulating the individual work relationship and the collective dimensions of labour regulation, principally through the statutory framework of the current *FW Act*, its federal predecessors and State and Territory industrial legislation such as the *Fair Work Act 1994* (SA) and the *Industrial Relations Act 1996* (NSW).

⁵⁸ In this Introduction and Overview, and in the Conclusion, I use ‘anti-discrimination law’ in the conventional sense to refer to federal, State and Territory statutory schemes designed to address discrimination and bring about equal opportunity, including the *SDA*, the *EOA* (SA) and the *EOA* (Vic).

⁵⁹ Other areas of law that regulate the employment relationship, such as work health and safety law and common law contract and tort, are not examined in the thesis as they do not provide initiatives designed to assist workers to better manage the intersections between work and care.

⁶⁰ See eg, Owens, Riley and Murray, above n 55, 441-4; Rosemary Hunter, ‘Representing Gender in Legal Analysis: A Case/Book Study in Labour Law’ (1991) 18 *Melbourne University Law Review* 305; Margaret Thornton, ‘Discrimination Law/Industrial Law: Are They Compatible?’ (1987) *The Australian Quarterly* 162.

⁶¹ See ‘Work/Family, Australian Labour Law, and the Normative Worker’ (thesis chapter 2); Owens, Riley and Murray, above n 55, 441-452; Belinda Smith, ‘What Kind of Equality Can We Expect from the Fair Work Act?’ (2011) 35 *Melbourne University Law Review* 545.

to the coherence of the boundaries between industrial law and anti-discrimination law.⁶²

The thesis does not examine directly the social security system. In this the thesis is positioned as part of the traditions of industrial law and anti-discrimination law, and not social security law and policy. Again, these disciplinary borders are far from sealed. For most of the 20th Century in Australia the industrial sphere (as with anti-discrimination) was seen to be separate to the realm of social security, in scholarship and in disciplinary boundaries. The separation was, however, never strict and the two spheres interacted to produce particular outcomes.⁶³ For example, industrial law and the social security and welfare system interacted around the *Harvester* model. The vision for Australia under that model was as a ‘wage earners’ welfare state’ where the financial needs of families would be provided for through the *Harvester* framework, with social security playing a residual role to the workings of the labour market.⁶⁴ In the early 1970s the *Harvester* wage concept was abandoned in a series of equal pay test cases, and in a key decision the federal Commission emphasised that it saw itself as ‘an industrial arbitration tribunal, not a social welfare agency’,⁶⁵ thereby confirming the separation of industrial law from the social security system with its welfare orientation. Although that separation has rung true generally speaking throughout the latter parts of the 20th Century and into the 21st Century, the new scheme of parental leave payment established under the *Paid Parental Leave*

⁶² See ‘Reasonable Accommodation, Adverse Action and the Case of Deborah Schou’ (thesis chapter 5); ‘Requests for Flexible Work under the Fair Work Act’ (thesis chapter 5).

⁶³ See eg, Terry Carney, Gaby Ramia and Anna Chapman, ‘Comparativism, the Labour-Social Policy Nexus and Intra-national Analysis: A Case Study’ (2007) 35 *Policy and Politics* 233; Terry Carney, Gaby Ramia and Anna Chapman, ‘Which Law is Laggard? Regulation and the Gaps Between Labour Law and Social Security Law’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Federation Press, 2006) 383; Gaby Ramia, Anna Chapman and Marco Michelotti, ‘How Well do Industrial Relations and Social Policy Interact? Labour Law and Social Security Law in the Social Protection of Sole Parents’ (2005) 21 *The International Journal of Comparative Labour Law and Industrial Relations* 249.

⁶⁴ The concept of the ‘wage earners’ welfare state’ is from Francis Castles: Francis Castles, ‘The Institutional Design of the Australian Welfare State’ (1997) 50 *International Social Security Review* 25. See further ‘Work/Family, Australian Labour Law, and the Normative Worker’ (thesis chapter 2) 82-85. The *Harvester* model is discussed further in this Introduction and Overview under 1.7.2(i).

⁶⁵ *National Wage Case 1974* (1974) 157 CAR 293 at 299. See ‘Work/Family, Australian Labour Law, and the Normative Worker’ (thesis chapter 2) 84-85.

Act 2010 (Cth) presents a further challenge to disciplinary coherence. It troubles the category of industrial law, providing evidence that the terrain of industrial law (as for social security and welfare law) is always under the process of construction (and contestation).

The thesis responds to these challenges through chapter 5, entitled ‘Work and Care Across Law’s Disciplinary Boundaries’. This chapter contains three papers. The first examines the 2009 *FW Act* provisions relating to discrimination as a form of prohibited adverse action, and a right to request a change in working arrangements in order to accommodate care responsibilities, legal entitlements positioned as part of industrial law that draw on the anti-discrimination tradition.⁶⁶ The second paper explores in greater depth the question of enforceability of the federal right to request regime. The third paper in chapter 5 examines the 2010 parental leave payment scheme, an entitlement that worries the boundaries of industrial law and the social security system.⁶⁷ Although this scheme shares many features of a social security measure, it is nonetheless closely connected with industrial law and has characteristics of an employment entitlement. Both the parental leave payment scheme and the new provisions in the *FW Act* are of importance to the thesis focus on assessing the legal regulation of waged work and employment entitlements that address conflict between work and care, and for that reason are examined. They are positioned in chapter 5, as they do not sit easily under either industrial law or anti-discrimination law.

1.4.2 Minimum Standards

The legal initiatives of industrial law and anti-discrimination law investigated in the thesis are the minimum standards that have developed since the early 1970s for the purpose of addressing conflicts and tension between work and care. The entitlements that are examined are those that relate to leave, namely parental leave and carer’s

⁶⁶ ‘Reasonable Accommodation, Adverse Action and the Case of Deborah Schou’ (thesis chapter 5); ‘Requests for Flexible Work under the Fair Work Act’ (thesis chapter 5).

⁶⁷ ‘The New National Scheme of Parental Leave Payment’ (thesis chapter 5).

leave,⁶⁸ the parental leave payment scheme,⁶⁹ working time standards,⁷⁰ and the rules regarding non-discrimination, adverse action and requests for flexible work arrangements.⁷¹ The examination of the thesis lies in these sets of legal entitlements, as it is these matters that are the initiatives in Australian industrial law and anti-discrimination law affected for the purpose of assisting workers with care responsibilities.

The rules examined are those that relate to the minimum standards in relation to each of these entitlements. A focus on the basic standards articulated in legislation and test cases is justified for a number of reasons. Importantly, minimum standards house the normative assumptions of the legal frameworks of industrial law and anti-discrimination law. Assumptions about work, care and diversity are embedded within, and articulated through, the minimum standards, and for this reason it is these standards that provide the best site from which to excavate the issues of diversity. If the floor of standards does not adequately take account of diversity, in that diverse work and care arrangements are excluded from the entitlements to leave, or protection from discrimination or adverse action for example, then this undermines the effectiveness of the minimum entitlement itself, and the goals of social inclusion, equality and non-discrimination.

A number of these minimum standards, and principally those relating to leave, payment whilst on parental leave, and working hours, exist in an industrial framework that anticipates and encourages employers and employees to bargain and reach enterprise agreements which are more beneficial to employees than is provided in the minima.⁷² Empirical research though indicates that enterprise bargaining has not generally speaking taken up the challenge of work and care conflict over the

⁶⁸ 'Uncovering the Normative Family of Parental Leave: Harvester, Law and the Household' (thesis chapter 3); 'Employment Entitlements to Carer's Leave: Domesticating Diverse Subjectivities' (thesis chapter 3).

⁶⁹ 'The New National Scheme of Parental Leave Payment' (thesis chapter 5).

⁷⁰ 'Industrial Law, Working Hours, and Work, Care, and Family' (thesis chapter 3).

⁷¹ 'Australian Anti-Discrimination Law, Work, Care and Family' (thesis chapter 4); 'Reasonable Accommodation, Adverse Action and the Case of Deborah Schou' (thesis chapter 5); 'Requests for Flexible Work under the Fair Work Act' (thesis chapter 5).

⁷² Andrew Stewart, *Stewart's Guide to Employment Law* (Federation Press, 3rd ed, 2011) chapter 8.

years.⁷³ Two matters may provide the exception to that. First, there is empirical evidence that employees are successfully bargaining for better arrangements regarding requesting flexibility than the federal minimum right to request.⁷⁴ In addition, gains have been made through enterprise bargaining in relation to paid maternity leave, though these are not widespread or even.⁷⁵ Apart from these two topics, the empirical evidence suggests that broader work and care mechanisms have not emerged through agreement-making under the previous *Workplace Relations Act 1996* (Cth) ('*WR Act*'), or the current *FW Act*.

It is unclear how the new Individual Flexibility Arrangements ('IFAs') under the *FW Act* are being used, if at all, as these are not public documents in the sense of being registered and available freely on the internet.⁷⁶ Anecdotally, it appears that IFAs are not being widely utilized.⁷⁷ Other legal – and private – mechanisms such as common law contract also appear not to be greatly utilized to assist employees to better manage work and care tension.⁷⁸ The evidence that bargaining and contract do not appear to have taken up the challenge of work and care, and diversity, underscores further the importance of the minimum standards regarding work and care. For many employees the minimum standards are the applicable standards governing their engagement.

⁷³ Owens, Riley and Murray, above n 55, 452-9; Barbara Pocock et al, 'The Impact of "Work Choices" on Women in Low Paid Employment in Australia: A Qualitative Analysis' (2008) 50 *Journal of Industrial Relations* 475; Williamson and Baird, above n 24; John Burgess, Lindy Henderson and Glenda Strachan, 'Work and Family Balance Through Equal Employment Opportunity Programmes and Agreement Making in Australia' (2007) 29 *Employee Relations* 415; Dennis Mortimer and Brian O'Neill, 'Is Enterprise Bargaining Meeting the Needs of Employers and Employees?: The Case of Family-Friendly Working Conditions in the Australian Retail Industry' (2007) 7 *Employment Relations Record* 63; Richard Mitchell et al, 'Protecting the Worker's Interest in Enterprise Bargaining: The "No Disadvantage" Test in the Australian Federal Industrial Jurisdiction: Final Report' (Report Prepared for the Workplace Innovation Unit, Industrial Relations Victoria, 2004) 48-9; John Burgess, Glenda Strachan and Anne Sullivan, 'The Interaction between Agreement Making and EEO Programs in Australian Retailing' (2005) 13 *International Journal of Employment Studies* 1. See also Brigid van Wanrooy, 'Women at Work in Australia: Bargaining a Better Position?' (2009) 35 *Australian Bulletin of Labour* 611.

⁷⁴ See Skinner and Pocock, 'Flexibility and Work-Life Interference in Australia', above n 13.

⁷⁵ Baird, Frino and Williamson, above n 10.

⁷⁶ The *FW Act* requires that all modern awards contain a flexibility term permitting the making of IFAs: *FW Act* s 144.

⁷⁷ Stewart, above n 72, [7.18]; Australian Industry Group, 'Removing the Barriers to Productivity and Flexibility: Submission to the Fair Work Act Review' (AIG, 2012) 15.

⁷⁸ See eg, Smith and Riley, above n 23; Riley, above n 26.

The thesis provides an Australia-wide study examining the minimum legal entitlements in the Commonwealth, State and Territory jurisdictions, as relevant. Notably, the Fair Work system now applies to all private sector employees throughout Australia, and replaces State and Territory industrial relations systems for those employees, except in Western Australia where the State system has been retained for those who do not work for trading, financial or foreign corporations.⁷⁹ In contrast, Commonwealth anti-discrimination law does not replace State and Territory anti-discrimination law in relation to the private sector, and indeed contains provisions that seek to save State and Territory anti-discrimination law that is capable of operating concurrently with the Commonwealth Act.⁸⁰

1.4.3 Legal Method

The thesis research question is addressed through a well-established legal method, drawing on industrial statutes and anti-discrimination legislation, Parliamentary materials, decisions of courts and tribunals, reports of government inquiries, and secondary literature in the form of articles and other scholarly papers. The thesis is a study of the legal rules and their legal operation. It is not a socio-legal study of how the standards are translated into actual workplace practices. Such an investigation of law in action would not address the objective of the thesis – to develop an understanding of the adequacy of the legal framework in reflecting diversity. The thesis also does not examine questions of enforcement of the minimum standards, as that too would take the examination away from the focus of the thesis on the substantive rules themselves.

1.4.4 Exclusion of Volunteer Work

The interest of this thesis lies in the legal regulation of the labour market comprised of remunerated work and the employment relationship. For this reason the concept of work that is used in reference to work and care mechanisms is one of market work,

⁷⁹ Owens, Riley and Murray, above n 55, 138-142; Andrew Lynch, 'The Fair Work Act and the Referrals Power – Keeping the States in the Game' (2011) 24 *Australian Journal of Labour Law* 1.

⁸⁰ See eg, *SDA* s 10.

where services are provided in return for a wage or other form of remuneration. Unpaid work, or volunteer work, is not within the ambit of the thesis' understanding of work, reflecting the broader exclusion of volunteer work from the legal regulation of the employment relation.⁸¹ Notably, volunteer work may involve the provision of care in the community in the form of, for example, meals on wheels, soup vans, starlight volunteers, and youth mentoring services such as Big Brothers Big Sisters. This type of volunteer work does not directly engage issues of diversity in the sense of diverse work and care arrangements, and for this reason is not viewed in the thesis as a form of 'care' relevant to work and care legal mechanisms. The appropriate conceptualization and regulation of unpaid work, and especially where it involves the provision of care services in the community, raises a set of distinct and complex questions. Those questions do not directly go to diverse work and care arrangements. For reasons of time and space they are not explored in the thesis.

1.5 Related Critical Perspectives

The thesis draws on a number of critical perspectives and understandings of law, and more broadly social and cultural practices. Three warrant a brief explanation at this point.

A foundation of the thesis lies in the liberal understanding of the public/private divide. In the second half of the 20th Century a body of scholarship emerged exploring the linguistic basis of law in the Western liberal tradition as lying in binary oppositions of meaning, such as public/private. Theorists have shown how law has traditionally seen itself as reluctant to intervene in the private sphere of life. Liberalism has represented itself as concerned solely with the public realms of life, such as work (the labour market), and not the private spheres of care and intimate relations, which in liberal legal philosophy are left untouched by legal regulation.

⁸¹ Jill Murray, 'The Legal Regulation of Volunteer Work' in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Federation Press, 2006) 696. See also Lourdes Beneria, 'The Enduring Debate Over Unpaid Labour' (1999) 138 *International Labour Review* 287; Nicole Busby, *A Right to Care? Unpaid Work in European Employment Law* (Oxford Monographs on Labour Law, Oxford University Press, 2011).

Scholarship has convincingly shown that law does indeed shape liberalism's so-called private domain of life, in complex and sometimes contradictory ways.⁸²

Moreover, legal scholarship has moved to explore how law is one of a number of regulatory mechanisms (including history, religion, biology and economics) that shape subjectivity, in the sense of the ways in which each person understands themselves, their relations with other people, and the world.⁸³ Work and care are not natural, pre-defined or pre-formed products of the world that the system of law merely acts upon, or alternatively leaves untouched as being in the private sphere. Rather, through a process of reiteration law reinforces and produces its own meanings of work, and care relationships, which are bestowed in the naturalization process with normative social value. In the course of producing its ideal care relationship, law simultaneously constitutes as non-ideal, as dysfunctional and deviant, care relationships and forms of care that do not align with law's normative ideal.

A final foundational strand of the thesis lies in an understanding of heteronormativity. Heteronormativity is used to uncover the normativity of heterosexuality in the law it examines. Michael Warner, who coined the term in his 1993 edited collection *Fear of a Queer Planet*, writes:

So much privilege lies in heterosexual culture's exclusive ability to interpret itself as society. Het culture thinks of itself as the elemental form of human association, as the very model of inter-gender relations, as the indivisible basis of all community, and as the means of reproduction without which society wouldn't exist ... Western political thought has taken the heterosexual couple to represent the principle of social union itself.⁸⁴

⁸² See eg, Frances Olsen, 'The Myth of State Intervention in the Family' (1985) 18 *University of Michigan Journal of Law Reform* 835; Margaret Thornton, 'The Public/Private Dichotomy: Gendered and Discriminatory' (1991) 18 *Journal of Law and Society* 448; Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995); Susan B Boyd (ed), *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (University of Toronto Press, 1997).

⁸³ The origins of this approach lie in the work of Michel Foucault, *The History of Sexuality: Vol 1: An Introduction* (Pantheon Books, 1978).

⁸⁴ Michael Warner, 'Introduction' in Michael Warner (ed), *Fear of a Queer Planet: Queer Politics and Social Theory* (University of Minnesota Press, 1993) xxi. The concept of heteronormativity owes its lineage to Foucault's view of law as being a productive form of power, producing the heterosexual/homosexual binary divide. See also Annemarie Jagose, *Queer Theory* (Melbourne

The word heteronormativity ‘designates a regime that organizes sex, gender and sexuality in order to match heterosexual norms’.⁸⁵ Heteronormativity is a naturalizing power that produces heterosexuality as not only the dominant expression of sexuality and sexual orientation, but as the taken-for-granted, as well as the universal, expression of it.

1.6 Work and Care, or Work and Life?

A comment on the framework of work and care is needed. From the 1980s the Australian debate and much of the Australian research was framed around the concepts of work and ‘family’, and the need to find balance between work and ‘family’. ‘Family’ was the preferred term to juxtapose with work, rather than ‘care’ or ‘life’. The central concern was expressed as being to assist workers with ‘family responsibilities’, often through the development of ‘family-friendly’ initiatives.

The first three publications of this thesis (contained in chapter 2) use a framework of work and ‘family’. In contrast to other scholarship at the time though, that approach is used with the explicit intention of disrupting the heteronormativity of law’s ‘family’.⁸⁶ The framing of questions around work and ‘family’ has not been continued in the thesis papers post 2006. Rather, work and ‘care’ is used, as the terminology of ‘care’ more directly and accurately identifies the source of collision with work commitments and the labour market. It is not ‘family’ per se that is the source of conflict. Rather, it is care responsibilities, and these may arise in a broad

University Press, 1996). Queer is used as an umbrella term to refer to the diversity of sexual expression that is not heterosexual. On queer, see further Aleardo Zanghellini, ‘Queer, Antinormativity, Counter-Normativity and Abjection’ (2009) 18 *Griffith Law Review* 1.

⁸⁵ Maria do Mar Castro Varela, Nikita Dhawan and Antke Engel, ‘Introduction’ in Maria do Mar Castro Varela, Nikita Dhawan and Antke Engel (eds), *Hegemony and Heteronormativity: Revisiting ‘The Political’ in Queer Politics* (Ashgate Publishing, 2011) 1 at 11. See also, Judith Butler, *Bodies That Matter: On the Discursive Limits of ‘Sex’* (Routledge, 1993); Samuel Chambers and Terrell Carver, *Judith Butler and Political Theory: Troubling Politics* (Routledge, 2008); Chrys Ingraham, ‘Thinking Straight, Acting Bent: Heteronormativity and Homosexuality’ in Kathy Davis, Mary Evans and Judith Lorber (eds), *Handbook of Gender and Women Studies* (Sage, 2006) 307 at 308.

⁸⁶ See ‘Challenging the Constitution of the (White and Straight) Family in Work and Family Scholarship’ (thesis chapter 2) especially 68; ‘Regulating Family through Employee Entitlements’ (thesis chapter 2) 455 (fn 5).

range of contexts, whether identified as ‘family’ or not. Indeed, and as the thesis explores, ‘family’ has been used as an ideological gatekeeper of some legal entitlements in the work and care field.

Further, in its use of ‘care’, the thesis is primarily concerned with care for others, rather than self-care per se, although it is acknowledged that self-care and care for others may be merged or at least closely related in practice. The most obvious example is provided by maternity leave following birth, which is designed to address both the birth mother’s recovery from the birth and also for her bonding with and care of the new baby. Maternity leave is included in the thesis’ examination.

Due to the primary interest of the thesis in care for others, the terminology used in latter papers is work and ‘care’, rather than the more expansive work and ‘life’. The thesis is not concerned with the broader questions of intersections and conflicts between labour market engagement and aspects of life that do not relate to care responsibilities for others, such as self-fulfillment through sport, hobbies, education and training. Whilst those work and ‘life’ dynamics are important, they raise different questions from those relevant to the dynamic of work and caring for others. The interest of the thesis lies in work and care for others, because it is that dynamic that presents the more pressing issue in terms of social inclusion, equality and non-discrimination, rather than the broader work and ‘life’ debate. Indeed diversity in work and care arrangements may be lost in a work and ‘life’ frame where having children or other care responsibilities may be seen as merely the choice of an individual, thereby obscuring systemic features going to social inclusion, equality and non-discrimination.

For these reasons the thesis keeps its focus to work and care, even though it is acknowledged that there are some advantages in adopting a broader work and ‘life’ frame of reference. The appeal lies in the potential of a work and ‘life’ model to destigmatise carers and potentially reduce resentment towards workers with care

responsibilities, a category that is often seen as synonymous with women workers.⁸⁷ In addition, work and ‘life’ offers potential to move beyond the goals of social inclusion and equality and towards the pursuit of a policy goal of decent work.⁸⁸ For these reasons a number of scholars have moved to a work and ‘life’ framework of analysis.⁸⁹ This thesis however does not do so, as it maintains its scholarly focus on diversity, social inclusion, equality and non-discrimination.

1.7 Overview of the Thesis

The thesis consists of this introduction and overview, together with a conclusion, and four other chapters. Each chapter itself contains one or more published papers, in addition to a brief introduction to the chapter. The thesis also contains an appendix comprising one related paper. A table of cases, table of statutes and bibliography complete the thesis.

The linking theme of the thesis is the critical evaluation of whether Australian legal attempts in industrial law and anti-discrimination law to address conflict between work and care have adequately recognized diversity. The thesis unfolds in the following four stages.

1.7.1 Expansion in Work and Care Legal Mechanisms

The first point of the thesis is to show that from the early 1970s there has been a large expansion in legal initiatives in industrial law and anti-discrimination law

⁸⁷ There do not appear to be high levels of resentment towards workers with care responsibilities in Australian workplaces. This may be because many employer programs of work flexibility are articulated as extending beyond care situations, in a broader work and life framework: Skinner and Pocock, ‘Flexibility and Work-Life Interference in Australia’, above n 13.

⁸⁸ International Labour Organisation, *Decent Work* (ILO, 1999); Owens, Riley and Murray, above n 55, 69-70.

⁸⁹ See eg, *The Australian Work and Life Index*, Centre for Work + Life, University of South Australia, above n 13; E Anne Bardoel, Helen De Cieri and Clarice Santos, ‘A Review of Work-Life Research in Australia and New Zealand’ (2008) 46 *Asia Pacific Journal of Human Resources* 316; John Burgess and Jennifer Waterhouse, ‘Balancing Work, Family and Life: Introduction to the Special Issue’ (2010) 36 *Australian Bulletin of Labour* 130.

designed to assist workers to better manage their work commitments and care responsibilities. This part of the thesis also serves to identify the legal mechanisms evaluated in the thesis.

Industrial law has instituted new forms of leave, and new rules regarding working time, discrimination, adverse treatment and requests for flexible work arrangements. Unpaid maternity leave became a federal award entitlement in the private sector in 1979, was extended in relation to adoption in 1985, and became available to spouses as paternity leave in 1990.⁹⁰ Extensions were made to these entitlements in the *Parental Leave Test Case 2005*, and the basic standards continue in similar terms today – although now extended to same sex couple relationships – as parental leave under the *FW Act*.⁹¹ The minimum standards regarding this leave make no provision for payment whilst on leave, although in January 2011 a new national scheme of payment for primary carers commenced,⁹² and in March 2012 a Bill was introduced into Parliament to extend this scheme by introducing a new payment, known as ‘dad and partner pay’, anticipated to take effect from 1 January 2013.⁹³ In addition to parental leave, in a series of federal award test cases in the mid 1990s leave in order to care for a member of the employee’s ‘immediate family’ or member of the employee’s ‘household’ was recognized.⁹⁴ This form of leave has also been continued in similar terms today as personal/carer’s leave, compassionate leave and carer’s leave.⁹⁵

⁹⁰ ‘Uncovering the Normative Family of Parental Leave: Harvester, Law and the Household’ (thesis chapter 3) 32. These federal standards became generalised through both federal awards and legislation, and State awards and legislation: ‘Employment Entitlements to Carer’s Leave: Domesticating Diverse Subjectivities’ (thesis chapter 3) 456 (fn 15).

⁹¹ ‘Employment Entitlements to Carer’s Leave: Domesticating Diverse Subjectivities’ (thesis chapter 3) 459-60.

⁹² ‘The New National Scheme of Parental Leave Payment’ (thesis chapter 5) 60.

⁹³ Paid Parental Leave and Other Legislation Amendment (Dad and Partner Pay and Other Measures) Bill 2012 (Cth).

⁹⁴ ‘Employment Entitlements to Carer’s Leave: Domesticating Diverse Subjectivities’ (thesis chapter 3) 457-8. These federal standards became generalised across State industrial systems: Employment Entitlements to Carer’s Leave: Domesticating Diverse Subjectivities’ (thesis chapter 3) 457.

⁹⁵ ‘Employment Entitlements to Carer’s Leave: Domesticating Diverse Subjectivities’ (thesis chapter 3) 460.

As well as developing new forms of leave to care, care responsibilities have been identified as a relevant factor in the industrial regulation of working time. A 2002 federal award test case decision articulated that ‘personal circumstances’, including ‘family responsibilities’ was to be a relevant consideration in the assessment of any requirement to work overtime, and this has been retained as a current statutory provision.⁹⁶ The *FW Act* enacted important extensions to existing non-discrimination protections in the industrial sphere by providing redress in relation to ‘adverse action’, including discrimination, across all stages of employment, on the ground of ‘family or carer’s responsibilities’, as well as sex, race and sexual orientation.⁹⁷ This 2009 Act also introduced a statutory mechanism enabling parents and carers to request a change in their working arrangements in order to accommodate care responsibilities to pre-school aged children and children with a disability.⁹⁸

Since the early 1970s there has also been considerable reform in relation to anti-discrimination legislation. Much of this has occurred at the State and Territory level, although there have been amendments at the Commonwealth level too. Attributes of unlawful discrimination have been incrementally expanded, including since the 1990s grounds of ‘family responsibilities’, and ‘carer’ responsibilities and status.⁹⁹ These grounds take their place beside long standing attributes such as sex, race and parental status, and more recent grounds related to sexual orientation. As well as the recognition of new grounds, a small number of anti-discrimination statutes prohibit a new form of discrimination in an employer’s refusal to provide reasonable accommodation in relation to an employee’s care responsibilities.¹⁰⁰

⁹⁶ ‘Industrial Law, Working Hours, and Work, Care, and Family’ (thesis chapter 3) 14-15.

⁹⁷ ‘Reasonable Accommodation, Adverse Action and the Case of Deborah Schou’ (thesis chapter 5) 22-34.

⁹⁸ ‘Reasonable Accommodation, Adverse Action and the Case of Deborah Schou’ (thesis chapter 5) 8-12. A similar request mechanism was first developed through a 2005 federal award test case: ‘Requests for Flexible Work under the Fair Work Act’ (thesis chapter 5) 9.

⁹⁹ ‘Australian Anti-Discrimination Law, Work, Care and Family’ (thesis chapter 4) 6-7.

¹⁰⁰ ‘Australian Anti-Discrimination Law, Work, Care and Family’ (thesis chapter 4) 9-10.

These developments together establish the large expansion since the early 1970s in legal initiatives designed to assist workers to better manage their work commitments with their care responsibilities.

1.7.2 A Move Towards Diversity

This raft of legal initiatives that has arisen since the early 1970s provides a level of recognition of diversity in work and care arrangements. This is visible as a displacement of several key markers of the *Harvester* model of work and care institutionalized in the Australian industrial system in the early part of the 20th Century.

(i) The Harvester Model

The *Harvester* model of work and care is associated with a 1907 decision of the Arbitration Court known as the *Harvester* judgment.¹⁰¹ The specific issue before the court in this case concerned the relationship between tariffs and wage rates. Commonwealth excise legislation provided tariff protection to manufacturers on condition that the wage rates they paid to unskilled labourers were ‘fair and reasonable’.¹⁰² Justice Higgins, President of the Arbitration Court, determined that in order to satisfy this test, the wage rate must be sufficient to support the ‘labourer’s home of about five persons’.¹⁰³ A central assumption made by the court, and adopted subsequently in the industrial system, was that the worker was the sole wage earner for himself, his wife and two or three children.

As Berns has highlighted in *Women Going Backwards*, an often unacknowledged implicit corollary assumption underlying *Harvester*’s constitution of the worker as the family breadwinner is that the worker did not have responsibilities to undertake care, as all care needs fell to the worker’s wife, who was for that reason not engaged

¹⁰¹ *Ex parte H V McKay* (1907) 2 CAR 1 (*‘Harvester’*). See ‘Challenging the Constitution of the (White and Straight) Family in Work and Family Scholarship’ (thesis chapter 2) 82-5; ‘Regulating Family through Employee Entitlements’ (thesis chapter 2) 458-9.

¹⁰² *Harvester* at 2.

¹⁰³ *Harvester* at 6.

in the labour market.¹⁰⁴ In this way *Harvester* presented a strongly gendered understanding of work and care, where work was constituted as male waged labour of the public world of the labour market, separated (or insulated) from care which was constituted as female and of the private world of the home and family.¹⁰⁵ In this way work and care were located in two different – and gendered – people, in an interdependent couple relationship. Workers were male breadwinners and carers were female homemakers.

This breadwinner/homemaker model became a core pillar of the Australian industrial system for most of the 20th Century. It was visible at many different points, including the existence (until the 1974 *National Wage Case*)¹⁰⁶ of explicitly gendered minimum wage rates which incorporated assumptions that women who did work in the labour market were unmarried and childless, and rules in the Commonwealth public service (until 1966) that women were deemed to have ‘retired’ upon marriage.¹⁰⁷

(ii) *Worker-Mothers, Male Workers as Carers, and Same Sex Relationships*

The legal initiatives developed in industrial law and anti-discrimination law since the early 1970s (identified above in 1.7.1) support forms of work and care outside the *Harvester* model, and in this way represent a shift away from *Harvester* and towards a formally non-gendered and non-heteronormative model. This shift comprises three dimensions.

First, the legal initiatives support mothers as waged workers in the labour market. This contrasts sharply with the gendered model of the *Harvester* homemaker wife-mother who was not engaged in the labour market. Legal recognition and support for

¹⁰⁴ Berns, above n 41, 4-5, chapter 6, discussed in ‘Challenging the Constitution of the (White and Straight) Family in Work and Family Scholarship’ (thesis chapter 2) 85-6.

¹⁰⁵ Notably the separation of work and care can be dated to earlier times in the processes of industrialisation and the emergence of industrial law in the United Kingdom: ‘Regulating Family through Employee Entitlements’ (thesis chapter 2) 456-7.

¹⁰⁶ *National Wage Case 1974* (1974) 157 CAR 293, discussed in ‘Challenging the Constitution of the (White and Straight) Family in Work and Family Scholarship’ (thesis chapter 2) 84-5.

¹⁰⁷ ‘Challenging the Constitution of the (White and Straight) Family in Work and Family Scholarship’ (thesis chapter 2) 83.

the worker-mother occurs through the provision of minimum standards of parental leave¹⁰⁸ (bolstered by the parental leave payment scheme),¹⁰⁹ personal/carer's leave, compassionate leave and unpaid carer's leave,¹¹⁰ and the various protections relating to adverse action and discrimination.¹¹¹ In addition, the right to request under the *FW Act*, and discrimination in anti-discrimination law in the form of an unreasonable failure to accommodate a worker's care responsibilities, provide further recognition of non-*Harvester* work and care arrangements.¹¹² These various legal initiatives recognize that workers may be mothers.

A second dimension of diversity lies in the gender neutral provision of most of these legal entitlements since 1990.¹¹³ The exception to the formally gender-neutral approach of the legal framework lies in entitlements related to physiological matters such as pregnancy related illness, miscarriage, transfer of a pregnant employee to a safe job, and breastfeeding.¹¹⁴ Access by men to the industrial and anti-discrimination law initiatives provides a recognition that male workers may have care responsibilities, and indeed may have substantial care responsibilities, possibly being on leave for up to 24 months as the primary carer of a baby, infant or adopted child.¹¹⁵ The expected commencement in January 2013 of the 'dad and partner pay' scheme provides further support to men as carers. This gender neutral approach of legal initiatives provides a recognition of more diverse work and care practices than present in the *Harvester* gender model where men were workers with no care responsibilities.

¹⁰⁸ 'Uncovering the Normative Family of Parental Leave: Harvester, Law and the Household' (thesis chapter 3); 'Employment Entitlements to Carer's Leave: Domesticating Diverse Subjectivities' (thesis chapter 3).

¹⁰⁹ 'The New National Scheme of Parental Leave Payment' (thesis chapter 5).

¹¹⁰ 'Employment Entitlements to Carer's Leave: Domesticating Diverse Subjectivities' (thesis chapter 3).

¹¹¹ 'Reasonable Accommodation, Adverse Action and the Case of Deborah Schou' (thesis chapter 5); 'Australian Anti-Discrimination Law, Work, Care and Family' (thesis chapter 4).

¹¹² 'Reasonable Accommodation, Adverse Action and the Case of Deborah Schou' (thesis chapter 5).

¹¹³ 'Uncovering the Normative Family of Parental Leave: Harvester, Law and the Household' (thesis chapter 3); 'Employment Entitlements to Carer's Leave: Domesticating Diverse Subjectivities' (thesis chapter 3).

¹¹⁴ See eg, special maternity leave (*FW Act* s 80) and transfer to a safe job (*FW Act* s 81). See also the anti-discrimination ground of breastfeeding (*EOA* (Vic) s 6(b)).

¹¹⁵ 'Uncovering the Normative Family of Parental Leave: Harvester, Law and the Household' (thesis chapter 3); 'Employment Entitlements to Carer's Leave: Domesticating Diverse Subjectivities' (thesis chapter 3).

Finally, in addition to the legal framework moving towards a formally gender neutral constitution of work and care, industrial and anti-discrimination entitlements have been extended to same sex couple relationships. Generally the States and Territories acted in this regard earlier than the Commonwealth Parliament, which only moved to recognize same sex relationships in some respects in anti-discrimination law in 2008 and in industrial law in 2009.¹¹⁶ This is a shift away from the heterosexual couple of *Harvester*, and towards a non-heteronormative model of work and care.

1.7.3 Inadequate Recognition of Diversity

The third stage of the thesis reveals that although the range of industrial law and anti-discrimination law mechanisms on work and care have addressed some key aspects diversity, in other ways these legal developments have been deficient in recognizing diverse work and care arrangements. The thesis reveals three main, and intersecting, categories of shortcomings. These relate to law's continued separation of work and care, substantive limitations in the legal rules themselves relating to, for example, eligibility, and thirdly the concepts used to recognize care relations. These are examined in turn.

(i) The Separation of Work and Care

Most of the legal initiatives of industrial law and anti-discrimination law designed to assist workers in managing work and care collision reflect a separation of work and care. They do this in a number of different ways. Laws prohibiting direct discrimination,¹¹⁷ and the federal adverse action provisions,¹¹⁸ seek to ensure that decision-makers do not treat a person less favourably or adversely because of their care responsibilities. These legal rules aim to expunge any negative view of care responsibilities from the decisions of employers, in relation to, for example,

¹¹⁶ 'Employment Entitlements to Carer's Leave: Domesticating Diverse Subjectivities' (thesis chapter 3) 460-1. Note that dismissal on the ground of 'sexual preference' has been prohibited in the federal industrial statute since 1993: *Industrial Relations Reform Act 1993* (Cth). Federal anti-discrimination legislation still does not contain an enforceable ground relating to sexual orientation: Anna Chapman, 'Intersectionality: Lesbians and Same-Sex Attracted Women' in Patricia Eastal (ed), *Women and the Law in Australia* (LexisNexis, 2010) 269, 280-1.

¹¹⁷ 'Australian Anti-Discrimination Law, Work, Care and Family' (thesis chapter 4).

¹¹⁸ 'Reasonable Accommodation, Adverse Action and the Case of Deborah Schou' (thesis chapter 5).

recruitment, promotion, training opportunities, and dismissal. In attempting to render care responsibilities extraneous to the decision-making of managers, these rules maintain a strong separation between work and care.

Other legal initiatives of industrial law and anti-discrimination law bring certain closely defined aspects of care responsibilities into specific topics of employment rights and obligations. This is seen in leave regimes and working time rules, where new forms of leave have been developed for care responsibilities, and care responsibilities have been injected as a relevant consideration into the legal provisions regarding working time.¹¹⁹ Although the act of importing care responsibilities in this way breaks down the separation of work and care in relation to those topics, this very act confirms as it reinforces the irrelevance of care responsibilities elsewhere in employment rights and obligations, such as for example, in minimum wages, redundancy pay, and notice of termination provisions. In identifying care as relevant to some limited employment entitlements, the legal rules confirm the irrelevance of care elsewhere, highlighting and confirming the broader separation of work and care.

In these two main ways these legal initiatives maintain a separation of work from care. The more recent federal right to request mechanism,¹²⁰ and anti-discrimination rules that require reasonable accommodation by employers,¹²¹ act against that trend, as they anticipate that an employer ought actively to take into account a person's care responsibilities, and across all aspects of the entire employment relationship. This offers potential to bring care into work much more completely. Nonetheless, and as discussed below, these mechanisms are besieged by substantive limitations including the lack of a direct enforcement mechanism in the case of the right to request, and a weak enforcement mechanism in the case of the anti-discrimination accommodation requirement, and for this reason their impact on bringing care into work appears to be quite limited.

¹¹⁹ 'Uncovering the Normative Family of Parental Leave: Harvester, Law and the Household' (thesis chapter 3); 'Employment Entitlements to Carer's Leave: Domesticating Diverse Subjectivities' (thesis chapter 3); 'Industrial Law, Working Hours, and Work, Care, and Family' (thesis chapter 3).

¹²⁰ 'Reasonable Accommodation, Adverse Action and the Case of Deborah Schou' (thesis chapter 5).

¹²¹ 'Australian Anti-Discrimination Law, Work, Care and Family' (thesis chapter 4).

Leaving aside the right to request mechanism and anti-discrimination rules on reasonable accommodation, the remaining legal initiatives continue, in one form or another, a separation of work and care, albeit with a recognition that the two spheres overlap. Empirical evidence supports the view that such a separation may align poorly with the practices of diverse communities, which appear to be more seamless in that regard. For example, it is known that domestic work and the care of children is more evenly shared between the adults in lesbian households, without there being a primary care-giver as such, compared to heterosexual couples.¹²² Indigenous children move between households of extended family and kinship systems, especially in more remote parts of Australia, suggesting much fluidity in adult caring responsibilities.¹²³ This empirical information suggests that the separation between work and care may provide a particularly poor fit in diverse communities.

(ii) Substantive Limitations

A range of substantive limitations written into the legal initiatives themselves undermine their effectiveness in general, including (and often particularly) in recognizing diverse work and care practices. Those limitations relate to a number of matters. Eligibility rules are important in this regard. The entitlements of unpaid parental leave¹²⁴ and the industrial right to request mechanism¹²⁵ contain a precondition of 12 months of continuous service (or regular engagement as a long term casual). Paid personal/carer's leave does not apply to casuals at all.¹²⁶ These preconditions of service length and type of engagement are highly gendered in that

¹²² 'Employment Entitlements to Carer's Leave: Domesticating Diverse Subjectivities' (thesis chapter 3) 454. Recent research confirms the earlier empirical findings referred to in this thesis publication: Power et al, above n 22; Perlesz et al, 'Organising Work and Home in Same-Sex Parented Families: Findings From the Work Love Play Study', above n 22.

¹²³ 'Challenging the Constitution of the (White and Straight) Family in Work and Family Scholarship' (thesis chapter 2) 70-1. Recent research confirms the earlier empirical research used in this publication: ABS, above n 22; Zhou et al, above n 22.

¹²⁴ 'Uncovering the Normative Family of Parental Leave: Harvester, Law and the Household' (thesis chapter 3) 35; 'Employment Entitlements to Carer's Leave: Domesticating Diverse Subjectivities' (thesis chapter 3). Notably the parental leave payment scheme has a much more flexible work test as a key component of eligibility: 'The New National Scheme of Parental Leave Payment' (thesis chapter 5).

¹²⁵ 'Reasonable Accommodation, Adverse Action and the Case of Deborah Schou' (thesis chapter 5).

¹²⁶ 'Employment Entitlements to Carer's Leave: Domesticating Diverse Subjectivities' (thesis chapter 3) 460 (fn 35). Note that unpaid carer's leave and unpaid compassionate leave are available to casuals.

they disproportionately exclude employment arrangements of women.¹²⁷ In this way these eligibility rules undermine the effectiveness of the legal mechanisms to support women workers who have care responsibilities.

A second substantive limitation is the standard of reasonableness that provides the key test in a number of the legal entitlements. Notably, an employer may refuse a request for flexible working arrangements,¹²⁸ or an extension of unpaid parental leave¹²⁹ on ‘reasonable business grounds’. Working time rules permit only ‘reasonable’ additional hours, taking into account care responsibilities, amongst other matters.¹³⁰ The Victorian anti-discrimination statute provides that an employer must not ‘unreasonably refuse to accommodate’ an employee’s care responsibilities.¹³¹ Across these different contexts, the thesis reveals that there is reason to doubt whether the concept of reasonableness itself, in addition to the ways in which it has been articulated in these rules, has capacity to take adequate account of diversity, and to give proper weight to the values of social inclusion, equality and non-discrimination.¹³²

A third main substantive limitation lies in the range of exceptions and exemptions that accompany some of the legal mechanisms designed to assist workers with care responsibilities. Anti-discrimination statutes in particular carry a number of

¹²⁷ In 2007 women accounted for over half (56%) of all casuals, and almost two-thirds of all casuals working part-time hours. Almost half (45%) of all casuals had been in their current job for less than a year. See ABS, ‘Australian Social Trends’ (Report, Cat No 4102.0, ABS, 2009) 18, 19, 22. In 2006 employed mothers with children aged 0–14 years were much more likely to be working part-time hours (including as casuals) than were employed women overall: ABS, ‘Australian Social Trends’ (Report, Cat No 4102.0, ABS, 2008) 4. See also Australian Human Rights Commission, ‘Submission No 137 to the Senate Education, Employment and Workplace Relations Committee Inquiry into the Fair Work Bill 2008’ (AHRC, 2009) [8].

¹²⁸ ‘Reasonable Accommodation, Adverse Action and the Case of Deborah Schou’ (thesis chapter 5).

¹²⁹ ‘Employment Entitlements to Carer’s Leave: Domesticating Diverse Subjectivities’ (thesis chapter 3) 459.

¹³⁰ ‘Industrial Law, Working Hours, and Work, Care, and Family’ (thesis chapter 3) 204-5. Note also that a reasonableness test applies where an employer requests an employee to work on a public holiday: *FW Act* s 114(2). The employee’s ‘personal circumstances, including family responsibilities’ are relevant in this assessment of reasonableness: *FW Act* s 114(4)(b).

¹³¹ ‘Australian Anti-Discrimination Law, Work, Care and Family’ (thesis chapter 4); ‘Care Responsibilities and Discrimination in Victoria: The Equal Opportunity Amendment (Family Responsibilities) Act 2008 (Vic)’ (thesis appendix).

¹³² ‘Reasonable Accommodation, Adverse Action and the Case of Deborah Schou’ (thesis chapter 5); ‘Industrial Law, Working Hours, and Work, Care, and Family’ (thesis chapter 3); ‘Australian Anti-Discrimination Law, Work, Care and Family’ (thesis chapter 4).

exceptions and exemptions that act to cut down the scope of the prohibition on discrimination. Some of these, such as the exemption for conduct that conforms to religious doctrine or beliefs, found broadly across Australian anti-discrimination law, have a differentially exclusionary impact on diverse work and care arrangements, most notably those found in queer communities.¹³³ The adverse action protections of industrial law contain an exemption that exonerates conduct that is ‘not unlawful under’ anti-discrimination law. This appears to apply in the adverse action jurisdiction the range of exemptions contained in anti-discrimination law, including the religious beliefs and conduct exemption.¹³⁴

A final substantive limitation warrants attention. It is that no direct enforcement mechanism attaches to the federal right to request regime, so that the merits of an employer’s refusal to grant a request under the scheme cannot be challenged directly under the legislation.¹³⁵ The same lack of a direct enforcement mechanism attaches to the ability to request an extension of unpaid parental leave beyond the initial 12 months.¹³⁶ This reduces the potential effectiveness of these request mechanisms in relation to diverse work and care arrangements, as for all work and care arrangements.

In these various ways the legal initiatives of industrial law and anti-discrimination designed to assist workers with care responsibilities have been drafted or articulated weakly. This draws attention to the technical factors and dimensions of the rules that limit their potential to adequately recognize diversity in work and care practices.

¹³³ ‘Australian Anti-Discrimination Law, Work, Care and Family’ (thesis chapter 4) fn 34.

¹³⁴ ‘Reasonable Accommodation, Adverse Action and the Case of Deborah Schou’ (thesis chapter 5).

¹³⁵ ‘Reasonable Accommodation, Adverse Action and the Case of Deborah Schou’ (thesis chapter 5); ‘Requests for Flexible Work under the Fair Work Act’ (thesis chapter 5). Note that a non-government Bill – the Fair Work Amendment (Better Work/Life Balance) Bill 2012 (Cth) – proposes to introduce an enforcement mechanism into the right to request scheme, in addition to making other amendments to the scheme. At the time of writing it seems unlikely that this Bill will be enacted.

¹³⁶ ‘Requests for Flexible Work under the Fair Work Act (thesis chapter 5).

(iii) Concepts of Care

The third category of limitation on the effectiveness of the legal initiatives of industrial law and anti-discrimination law in adequately recognizing diversity lies in the definitions and concepts of care used in the different schemes.

The earlier publications of the thesis reveal the explicitly heteronormative construction of care responsibilities in federal industrial law and anti-discrimination law operating at the time of those publications. These dimensions are revealed in the definition of ‘family responsibilities’ in federal anti-discrimination law (at 2006),¹³⁷ in the industrial rules regarding unpaid maternity and paternity leave following birth or adoption of a child (at 2007),¹³⁸ and award test case standards in the mid 1990s regarding carer’s leave.¹³⁹ All jurisdictions in Australia have now amended their industrial and anti-discrimination legislation to recognize same sex couple relationships.¹⁴⁰ Generally the States and Territories acted in this respect earlier than the Commonwealth Parliament, which only moved to recognize same sex couples in anti-discrimination law in 2008 and in industrial law in 2009.¹⁴¹ This is ten years after some State jurisdictions began this process of law reform. For example, New South Wales recognized same sex relationships in its anti-discrimination statute in 1999.¹⁴²

¹³⁷ ‘Regulating Family through Employee Entitlements’ (thesis chapter 2) 462-5.

¹³⁸ ‘Uncovering the Normative Family of Parental Leave: Harvester, Law and the Household’ (thesis chapter 3).

¹³⁹ ‘Challenging the Constitution of the (White and Straight) Family in Work and Family Scholarship’ (thesis chapter 2) 81-4.

¹⁴⁰ On the broader developments in the recognition of same sex relationships in Australian law, see Chapman, above n 116; Anna Chapman, ‘Protection from Discrimination on the Basis of Sexual Orientation or Sex and/or Gender Identity in Australia, Research Paper’ (Research Paper, Australian Human Rights Commission, 2010).

¹⁴¹ ‘Employment Entitlements to Carer’s Leave: Domesticating Diverse Subjectivities’ (thesis chapter 3) 460-1. Note that dismissal on the ground of race and sexual preference was prohibited in the federal industrial statute from 1993: *Industrial Relations Reform Act 1993* (Cth). Whilst discrimination on the ground of race has been unlawful under federal anti-discrimination legislation since 1973, federal anti-discrimination legislation still does not at this time provide that discrimination on the ground of sexual orientation is unlawful. See Chapman, above n 116.

¹⁴² ‘Australian Anti-Discrimination Law, Work, Care and Family’ (thesis chapter 4) fn 165. Note that the New South Wales anti-discrimination statute has provided a ground of homosexuality since its enactment in 1977.

In contrast to this story of law reform around sexual orientation, there has been little attempt to recognize care practices in extended Indigenous care networks. Two exceptions exist. First, the South Australian anti-discrimination statute was amended in 2009 to recognize explicitly the caring responsibilities that Aboriginal and Torres Strait Islander people have under kinship rules.¹⁴³ In addition, the 2011 parental leave payment scheme introduced an ability to claim a parental leave payment in ‘exceptional circumstances’. Indigenous care arrangements were discussed as potentially falling within that category of claim.¹⁴⁴ These two instances highlight the lack of attention to this issue elsewhere in the legal framework. Apart from these two disparate occurrences, there has been no law reform effort within industrial law and anti-discrimination law to understand and take account of Indigenous practices in relation to the care of children and others in extended kinship systems.

A number of the legal initiatives examined in this thesis constitute the two adult couple as the normative care relationship, with articulations of that couple generally referencing marriage-like indicators such as living together, pooled finances and the public recognition of the relationship. Although this couple now includes same sex couples, it remains a conventional two adult couple marked by marriage-like factors. That model may not sit well with same sex relationships and relationships in queer communities, and it fails to account more broadly for diverse care relationships that exist outside two adult couples, such as different sex polyamorous relationships, care relationships in extended Indigenous care networks, and care between close friends and neighbours.

In addition, some legal initiatives also reveal a strong primary caregiver model for babies and infants, again limiting the recognition of diversity in the form of care-giving spread more evenly between adults.¹⁴⁵ The minimum legal entitlement of

¹⁴³ ‘Australian Anti-Discrimination Law, Work, Care and Family’ (thesis chapter 4) 38.

¹⁴⁴ ‘The New National Scheme of Parental Leave Payment’ (thesis chapter 5) 8.

¹⁴⁵ Recent empirical research confirms that the primary caregiver model provides a poor fit with arrangements to look after babies and infants in lesbian relationships, where the care is shared more evenly between adults: Perlesz et al, ‘Organising Work and Home in Same-Sex Parented Families: Findings From the Work Love Play Study’, above n 22. For earlier research revealing a similar finding, see eg, Amaryll Perlesz and Ruth McNair, ‘Lesbian Parenting: Insiders’ Voices’ (2004) 25

unpaid parental leave contains this conventional vision of a two adult couple and primary caregiver model, as does the parental leave payment scheme,¹⁴⁶ and personal/carer's leave, compassionate leave and unpaid carer's leave,¹⁴⁷ although the primary carer model is less pronounced in personal/carer's leave. Anti-discrimination law, through its concept of 'immediate family' in its family and care responsibilities provisions, also uses the two adult couple that is marriage-like as its regulatory pivot.¹⁴⁸

A small number of legal initiatives in industrial law and anti-discrimination law step outside the two adult couple and recognize care in broader circumstances, and this offers more potential to recognize diverse work and care arrangements. Some anti-discrimination jurisdictions offer protection against discrimination in relation to care responsibilities or carer status per se, regardless of whether that care takes place in a couple or family setting, provided that it is not given in return for commercial reward.¹⁴⁹ The industrial right to request mechanism also refers broadly to care (of a pre-school aged child or a child with a disability), without requiring that the child be of a couple relationship.¹⁵⁰ These provisions offer recognition to care outside the two adult couple model, although these too include important limitations on the care recognized. For example, the Victorian anti-discrimination protection only recognizes care that is ongoing and substantial.¹⁵¹

There has been little consistency in definitions of care and care relationships across Australia, little consistency within the one jurisdiction, and even sometimes a lack of consistency in definitions and concepts within the one statute. For example, the provisions on working time in the *FW Act* recognize the concepts of 'personal

Australian and New Zealand Journal of Family Therapy 129 at 136, discussed in 'Challenging the Constitution of the (White and Straight) Family in Work and Family Scholarship' (thesis chapter 2).

¹⁴⁶ 'The New National Scheme of Parental Leave Payment' (thesis chapter 5).

¹⁴⁷ 'Employment Entitlements to Carer's Leave: Domesticating Diverse Subjectivities' (thesis chapter 3).

¹⁴⁸ 'Australian Anti-Discrimination Law, Work, Care and Family' (thesis chapter 4).

¹⁴⁹ 'Australian Anti-Discrimination Law, Work, Care and Family' (thesis chapter 4) 35.

¹⁵⁰ 'Reasonable Accommodation, Adverse Action and the Case of Deborah Schou' (thesis chapter 5). Notably the care in these provisions is limited in that it only relates to care of a pre-school aged child or a child with a disability up to the age of 18.

¹⁵¹ 'Australian Anti-Discrimination Law, Work, Care and Family' (thesis chapter 4) 38.

circumstances’ and ‘family responsibilities’,¹⁵² whilst ‘family or carer’s responsibilities’ is used in the *FW Act*’s adverse action provisions.¹⁵³ These concepts are not defined or further explained in the *FW Act*. In contrast, the concept of ‘family responsibilities’ is used in federal anti-discrimination legislation, and is defined for that purpose,¹⁵⁴ but it is unclear whether that definition applies in interpreting ‘family responsibilities’ in the *FW Act*.¹⁵⁵ Across statutes the differences in drafting can be pronounced, even within the one jurisdiction and even dealing broadly with the same policy topic. For example, the unpaid parental leave provisions in the *FW Act* contain quite a different understanding of a primary care-giver than is contained in the parental leave payment scheme.¹⁵⁶

This lack of consistency gives rise to much complexity, uncertainty and incoherency, undermining the effectiveness of these legal initiatives generally, including in relation to diverse work and care practices. Indeed, uncertainty of coverage is more likely to be a problem in relation to diverse work and care arrangements, which by their nature are susceptible of falling on the fuzzy margins of legal definitions built around conventional marriage relationships. Moreover, some members of diverse communities may face particular barriers of social and financial disadvantage in accessing appropriate legal advice in relation to such matters.

In these various ways it can be seen that the definitions and concepts of care and care relationships in the different legal initiatives in industrial law and anti-discrimination law provide important limits on the ability of the various schemes to adequately recognize diverse work and care practices.

¹⁵² *FW Act* s 62(3)(b) (maximum working time rule); ‘Industrial Law, Working Hours, and Work, Care, and Family’ (thesis chapter 3).

¹⁵³ *FW Act* s 351(1); ‘Reasonable Accommodation, Adverse Action and the Case of Deborah Schou’ (thesis chapter 5). The concept of ‘family or carer’s responsibilities’ is also used elsewhere in the Act, regarding the content of awards, the role of Fair Work Australia, and the unlawful termination rules: *FW Act* s 153(1), s 195, s 578(c), s 772(1)(f).

¹⁵⁴ ‘Australian Anti-Discrimination Law, Work, Care and Family’ (thesis chapter 4). The concept of ‘family responsibilities’ is also used in a number of State and Territory anti-discrimination statutes.

¹⁵⁵ ‘Reasonable Accommodation, Adverse Action and the Case of Deborah Schou’ (thesis chapter 5).

¹⁵⁶ ‘Uncovering the Normative Family of Parental Leave: Harvester, Law and the Household’ (thesis chapter 3); ‘Employment Entitlements to Carer’s Leave: Domesticating Diverse Subjectivities’ (thesis chapter 3); ‘The New National Scheme of Parental Leave Payment’ (thesis chapter 5).

1.7.4 Conclusion and Proposal

The fourth stage of the thesis provides a conclusion and a proposal.

The main conclusion of the thesis is that the legal initiatives of Australian industrial law and anti-discrimination law designed to address collision between work and care provide less than adequate recognition of diversity in work and care practices. In order to take account more fully of diverse work and care arrangements, attention is needed to a number of matters. First, the substantive shortcomings of the various schemes need to be addressed. In addition, the definitions and concepts of care articulated in the legal mechanisms of industrial law and anti-discrimination law require replacement. Law's separation of work from care also presents a thorny challenge in the project of recognizing diverse work and care arrangements. This latter implicates the very foundations of industrial law and anti-discrimination law which lie in the separation of labour market work from other aspects of life.

Chapter 6 of the thesis more fully articulates the thesis conclusion, and also maps out the broad contours of a proposal to address key inadequacies of the current legal framework regarding diversity in work and care practices. That proposal involves a broad definition of care as a standard for use across the different schemes, with an obligation on the employer to establish that the accommodation sought by the worker was not justifiable. In addition, chapter 6 deals with the deeper and more intractable problem of separation of work and care.

CHAPTER 2:

ESTABLISHING THE FOUNDATIONS OF THE THESIS

2.1 Introduction

Chapter 2 comprises three papers that together provide the foundations of the thesis:

- ‘Challenging the Constitution of the (White and Straight) Family in Work and Family Scholarship’ (2005) 23 *Law in Context* 65-87.
- ‘Work/Family, Australian Labour Law, and the Normative Worker’ in Joanne Conaghan and Kerry Rittich (eds), *Labour Law, Work, and Family: Critical and Comparative Perspectives* (Oxford University Press, 2005) 79-97.
- ‘Regulating Family through Employee Entitlements’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Federation Press, 2006) 454-469.

The importance for the thesis of the article published in (2005) *Law in Context* lies in three related matters. First, it provides a literature review of empirical research on work and family in Australia as it relates to the care of babies and infants, using Pocock’s *The Work/Life Collision* as a vehicle for that purpose.¹ It shows how *The Work/Life Collision* constitutes the two parent heterosexual couple as the normative care relationship for children. Secondly, the article presents qualitative empirical material on caring arrangements in Indigenous communities, and in same sex relationships, providing the empirical foundations underlying the thesis’ examination of diversity and legal rules.² The third aspect of this paper that is important for the

¹ Barbara Pocock, *The Work/Life Collision: What Work is Doing to Australians and What to Do about It* (Federation Press, 2003).

² Subsequent empirical research confirms the themes presented in this (2005) article. On diversity in terms of sexual orientation, see eg, Jennifer Power et al, ‘Diversity, Tradition and Family: Australian Same-Sex Attracted Parents and Their Families’ (2010) 6 *Gay and Lesbian Issues and Psychology*

thesis is that it uncovers a number of ways in which legal rules regarding workers with family responsibilities failed at that time to account for diversity in terms of Indigenous caring practices and arrangements in queer communities. This dimension of the paper underlines the reasons why paying attention to diversity is important in gaining a fuller understanding of the role of employment law legal initiatives in addressing work and care conflict.

Both the 2005 paper in the Conaghan and Rittich edited collection, and the 2006 paper in Arup et al, bring to the thesis a discussion of the *Harvester* breadwinner/homemaker model institutionalized in the industrial system in the early part of the 20th Century.³ This material is of central importance to the thesis' use of *Harvester* as the benchmark work and care relation against which to measure whether legal initiatives designed to address work and care collision have adequately recognized diversity in work and care practices. The 2005 paper focuses on the gender dimension of *Harvester*, and in this draws most closely on the work of Berns in *Women Going Backwards*, in addition to the scholarship of Owens and Gaze on gender.⁴ The 2006 paper builds on this earlier paper to focus on diversity in the form

Review 66; Amaryll Perlesz et al, 'Organising Work and Home in Same-Sex Parented Families: Findings From the Work Love Play Study' (2010) 31 *Australian and New Zealand Journal of Family Therapy* 374; Amaryll Perlesz et al, 'Family in Transition: Parents, Children and Grandparents in Lesbian Families Give Meaning to "Doing Families"' (2006) 28 *Journal of Family Therapy* 175. On diversity in Indigenous communities, see eg, Steering Committee for the Review of Government Service Provision, 'Overcoming Indigenous Disadvantage: Key Indicators 2011 Report' (Productivity Commission, 2011); ABS, 'Population Characteristics, Aboriginal and Torres Strait Islander Australians, 2006' (Report, Cat No 4713.0, ABS, reissued 2010); Albert Zhou et al, 'Kinship Care for Children in New South Wales' (2010) 5 *Communities, Children and Families Australia* 60; John Altman, 'Beyond Closing the Gap: Valuing Diversity in Indigenous Australia' (Working Paper No 54, Centre for Aboriginal Economic Policy Research, Australian National University, 2009); Frances Morphy, 'Lost in Translation? Remote Indigenous Households and Definitions of the "Family"' (2006) 73 *Family Matters* 12.

³ *Harvester* refers to *Ex parte H. V. McKay* (1907) 2 CAR 1.

⁴ The heteronormativity embedded within *Harvester* is noted, but not explored, at p 84, p 97 of this paper. Sandra Berns, *Women Going Backwards: Law and Change in a Family Unfriendly Society* (Ashgate Publishing, 2002); Rosemary Owens, 'Engendering Flexibility in a World of Precarious Work' in Judy Fudge and Rosemary Owens (eds), *Precarious Work, Women, and the New Economy: The Challenges to Legal Norms* (Hart Publishing, 2006) 329; Rosemary J Owens, 'Taking Leave: Work and Family in Australian Law and Policy' in Joanne Conaghan and Kerry Rittich (eds), *Labour Law, Work and Family: Critical and Comparative Perspectives* (Oxford University Press, 2005) 237; Rosemary Owens, 'The Traditional Labour Law Framework: A Critical Evaluation' in Richard Mitchell (ed), *Redefining Labour Law: New Perspectives on the Future of Teaching and Research* (Centre for Employment and Labour Relations Law, University of Melbourne, 1995) 3; Rosemary

of sexual orientation, revealing the institutionalization of the heterosexual two adult couple of the *Harvester* tradition. In addition to bringing to the thesis a discussion of the *Harvester* model of work and care, these two papers, and the 2005 *Law in Context* piece, contain a number of examples illustrating how Australian employment law initiatives on work and care did not in 2005 and 2006 adequately recognize diversity.

A note arising from the character of the thesis by publication should be made at this point. The examples of legal regulation used in the three papers in this chapter are drawn largely from Commonwealth law, with both the *Workplace Relations Act 1996* (Cth) ('*WR Act*') and the *Sex Discrimination Act 1984* (Cth) ('*SDA*') featuring prominently in this regard. Since each of these papers has been published the *WR Act* has been replaced by the *Fair Work Act 2009* (Cth) ('*FW Act*'), and the *SDA* has been amended in important respects. In addition, the award test case standards on leave and related matters discussed in some of this material are now encompassed as part of the legislated set of National Employment Standards contained in the *FW Act*. Some of the specific topics examined in these three papers, in addition to the substance of the recent legal developments, are examined in subsequent publications of the thesis (contained in chapters 3-5).

Although the law itself has changed in many important respects, the analysis of the Commonwealth legal rules in the three papers nonetheless remains important and relevant to the thesis in mapping the explicit heteronormativity of the statutory framework at the time of publication, and its failure to recognize forms of diverse work and care arrangements. It also provides a basis upon which to discuss later (but still inadequate) developments.

Owens, 'Women, "Atypical" Work Relationships and the Law' (1993) 19 *Melbourne University Law Review* 399; Beth Gaze, 'Working Part Time: Reflections on "Practicing" the Work-Family Juggling Act' (2001) 21 *Queensland University of Technology Law & Justice Journal* 199.

2.2 The Publications

- ‘Challenging the Constitution of the (White and Straight) Family in Work and Family Scholarship’ (2005) 23 *Law in Context* 65-87.
- ‘Work/Family, Australian Labour Law, and the Normative Worker’ in Joanne Conaghan and Kerry Rittich (eds), *Labour Law, Work, and Family: Critical and Comparative Perspectives* (Oxford University Press, 2005) 79-97.
- ‘Regulating Family through Employee Entitlements’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Federation Press, 2006) 454-469.

Chapman, A. (2005) Challenging the Constitution of the (White and Straight) Family in Work and Family Scholarship.
Law in Context, v. 23 (1), pp. 65-87.

NOTE:

This publication is included on pages 49-71 in the print copy of the thesis held in the University of Adelaide Library.

Chapman, A. (2005) 'Work/Family, Australian Labour Law, and the Normative Worker' in J. Conaghan & K. Rittich (eds), *Labour Law, Work, and Family: Critical and Comparative Perspectives*, Oxford University Press, Oxford, New York, pp. 79-97.

NOTE:

This publication is included on pages 73-91 in the print copy of the thesis held in the University of Adelaide Library.

Chapman, A. (2006) 'Regulating Family through Employee Entitlements' in C. Arup et al (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships*, Federation Press, Leichhardt, NSW, pp. 454-469.

NOTE:

This publication is included on pages 93-108 in the print copy of the thesis held in the University of Adelaide Library.

CHAPTER 3:

INDUSTRIAL LAW, WORK AND CARE

3.1 Introduction

Chapter 3 contains the following three papers on work and care in industrial law:

- ‘Uncovering the Normative Family of Parental Leave: Harvester, Law and the Household’ (2007) 33 *Hecate* 28-42.
- ‘Employment Entitlements to Carer’s Leave: Domesticating Diverse Subjectivities’ (2009) 18 *Griffith Law Review* 453-474.
- ‘Industrial Law, Working Hours, and Work, Care, and Family’ (2010) 36 *Monash University Law Review* 190-216.

These three articles examine industrial law initiatives designed to assist workers with care responsibilities, investigating whether each legal mechanism adequately recognizes diversity in work and care practices. Each paper maps changes to the legal framework over time. The article in (2007) *Hecate* examines legal entitlements to parental leave following birth or adoption of a child, from the development of unpaid maternity leave in the 1970s, to its encapsulation within a concept of unpaid parental leave in the *Workplace Relations Act 1996* (Cth) (‘*WR Act*’) (after the changes brought about by *Work Choices*).¹ The second paper in (2009) *Griffith Law Review* revisits the statutory standard of unpaid parental leave, doing so after the enactment of the *Fair Work Act 2009* (Cth) (‘*FW Act*’), and combines this with an examination of the leave known as ‘personal/carer’s leave’, compassionate leave and unpaid carer’s leave developed through test cases and then encapsulated in the National Employment Standards of the *FW Act*. The *Monash University Law Review* piece examines various moments in the development of working time standards and

¹ The Work Choices legislative package was contained in the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (‘*Work Choices*’). This Act amended the *WR Act*.

regimes from the mid 19th Century in Australia, to the current *FW Act* provisions on maximum working hours which attempt to take account of family responsibilities.

All three papers contribute to the thesis in a number of ways. They document the expansion of work and care legal mechanisms in industrial law since the early 1970s. They each show, to varying degrees, some displacement of the *Harvester* model,² especially in terms of supporting mothers as workers, male workers as carers, and in the shift to recognizing same sex couple relationships. As well as addressing some aspects of diversity relative to the *Harvester* model, each paper reveals various ways in which the legal initiatives contain an inadequate recognition of diversity. This occurs through the continuing separation of work from care, such as is seen in relation to working time rules where work and leisure (rather than care) provided the framework for thinking about standard hours throughout most of the 20th Century. Substantive limitations in the rules, such as the requirement for unpaid parental leave of 12 months of continuous service, and the articulation of the concept of reasonableness in the working time rules on additional hours, provide inadequate recognition of diverse work and care arrangements.

Finally, together the papers argue that the definitions and concepts of care used in these industrial law schemes provide an inadequate recognition of diverse work and care arrangements. Both the *Hecate* paper and the piece in the *Griffith Law Review* reveal in their analyses a two adult couple as the normative care relationship of the legal entitlements examined, especially as the legal rules relate to the care of babies and infants. The *Griffith Law Review* paper articulates this argument most fully by drawing out two interacting constructs in the legal rules: the normativity of the two adult couple of care responsibilities, and the normativity of the primary caregiver model. It is demonstrated that in these ways the legal initiatives do not adequately recognize diverse work and care practices. The *Monash University Law Review* paper explores the meaning of ‘personal circumstances’ and ‘family responsibilities’ used in the working time rules, and suggests that the narrow meaning of the latter term in

² *Harvester* refers to *Ex parte H. V. McKay* (1907) 2 CAR 1.

the *Sex Discrimination Act 1984* (Cth) – which references a marriage-like cohabiting couple of two adults – may be applicable in the context of this industrial standard on working time.³

As noted in 1.4.2 Minimum Standards (chapter 1), the thesis provides an Australia-wide study. This is achieved in the following manner. Although the *Hecate* article confines its examination to the federal standards of unpaid parental leave, as explained in that paper, State and Territory industrial jurisdictions were largely displaced by the *Work Choices* amendments to the *WR Act*, and for that reason were not examined in that paper. In contrast, the *Griffith Law Review* piece does draw on State and Territory jurisdictions regarding the relevant legal entitlements, to provide a fuller, and at times contrasting, picture to the federal provisions. The *Monash University Law Review* paper also provides an Australia-wide study, examining Commonwealth developments as well as State and Territory legal rules on working time.

3.2 The Publications

- ‘Uncovering the Normative Family of Parental Leave: Harvester, Law and the Household’ (2007) 33 *Hecate* 28-42.
- ‘Employment Entitlements to Carer’s Leave: Domesticating Diverse Subjectivities’ (2009) 18 *Griffith Law Review* 453-474.
- ‘Industrial Law, Working Hours, and Work, Care, and Family’ (2010) 36 *Monash University Law Review* 190-216.

³ Note that the *Sex and Age Discrimination Legislation Amendment Act 2011* (Cth) was enacted after the finalisation of the *Monash University Law Review* article. Although this 2011 Act did make some amendments to the definition of ‘family responsibilities’ in s 4A of the *Sex Discrimination Act 1984* (Cth), those alterations were stylistic only, in effect to substitute references to ‘employee’ with the word ‘person’. Although not of direct relevance to the paper in the *Monash University Law Review*, the 2011 Act did extend the scope of the ‘family responsibilities’ protections beyond the previous limitation of dismissal, to encompass all aspects of work engagement. The new provisions only encompassed direct discrimination though, and not indirect discrimination. See ‘Australian Anti-Discrimination Law, Work, Care and Family’ (thesis chapter 4) 4.

Chapman, A. (2007) Uncovering the Normative Family of Parental Leave: Harvester, Law and the Household.
Hecate, v. 33 (1), pp. 28-42.

NOTE:

This publication is included on pages 113-127 in the print copy of the thesis held in the University of Adelaide Library.

EMPLOYMENT ENTITLEMENTS TO CARER'S LEAVE Domesticating Diverse Subjectivities

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This article explores the normative underpinnings of two main sets of minimum employment standards in Australia: parental leave following birth or adoption of a child, and personal/carer's leave in order to attend to the short-term care needs of a member of the employee's 'immediate family' or 'household'. The article reveals how these leave arrangements are structured around a set of assumptions about what constitutes a real family. The rules normalise a conservative form of heterosexed nuclear family, especially in relation to the care of babies, where gendered understandings of care (and work) remain strong. Recently, both sets of leave entitlements have been explicitly extended to same-sex couples. This formal equality approach to law reform disrupts the opposite gender marker of the normative relationship, but largely continues the normativity of the two-adult couple and its conservative form of caring practice idealised in law.

Introduction

Conflict between paid work and care responsibilities has become a focus for psychologists, equal opportunity bodies, trade unions and community groups. Scholars from a range of disciplines have sought to explore the interconnections and tensions, especially as experienced by women, between what are often seen as the realms of work and family. Although legal scholars have examined the potential of various law reform initiatives, case decisions and structures of regulation to address the strain between employment and care responsibilities, the role of law in shaping normative understandings of work and care practices has not received thorough attention in Australia. In particular, much of the legal scholarship does not directly engage with, or seek to explore, the norms embedded in the legal rules themselves. Only a relatively small — albeit growing — body of work seeks to conduct such investigations. One of the more sustained examinations of this description was conducted by Sandra Berns in her 2002 text, *Women Going Backwards: Law and Change in a Family Unfriendly Society*.¹ This text, which

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¹ Berns (2002).

positions itself as an exploration at the theoretical and conceptual level, rather than as an empirical examination of legal rules, focuses on gender and the legal framework. In addition, Rosemary Owens has authored a substantial body of work over the course of 10 years at least that analyses various aspects of labour market legal regulation, for its gendering of legal norms around work and social reproduction.²

Neither the scholarship of Professor Berns nor that of Professor Owens has examined directly the norms of sexuality, family and care in Australian employment law.³ This article seeks to do that by engaging with the particularities of relationships and caring practices constituted as normative in two main groups of legal entitlements for employees to take leave to care for another person. Those provisions are parental leave following the birth or adoption of a baby or infant, and personal/carer's leave which has developed as an omnibus provision to cover an employee's own sickness, bereavement, and leave in order to provide care and support for members of the employee's 'immediate family' or 'household'.

The article seeks to reveal the normative caring relationships inscribed and reinforced through those rules. It will be shown that these leave arrangements are structured around a set of assumptions about what constitutes a real family. The rules have normalised a conservative form of heterosexed nuclear family, especially in relation to the care of babies, where gendered understandings of care (and work) remain strong. The ideal family of parental leave entitlements has been the one (male) worker, one (female) carer couple, where the worker has few care responsibilities and the carer is the primary caregiver to the child/children and does not, for that reason, engage in the labour market. Recently, these leave entitlements, with their breadwinner/carer dualism, have been explicitly extended to same-sex couples. This formal equality approach to law reform disrupts the opposite gender marker of the normative relationship, but largely continues the normativity of the two-adult couple and its conservative form of caring practice idealised in law.

Family studies literature reveals that parents in same-sex relationships (especially women, and especially where the child has been born into the relationship) do family and care differently than female-male couples.⁴ Notably, they share household and care work far more evenly than do parents in opposite-sex couples with children. The level of involvement of non-birthing female parents is generally as high as that for parents who gave birth. In addition, they also undertake the role of wage earner more equitably, with the main model being that both parents undertake less than full-time work, or alternate the role of being the main income earner.⁵ People in same-sex relationships come to parenting through diverse pathways, sometimes with children from an earlier heterosexual relationship, sometimes (and increasingly) through a birth within a lesbian relationship, and sometimes through foster parenting.⁶ This potentially creates wide networks of care

² See, in particular, Owens (1993, 1995, 2005, 2006).

³ Some scholarship has sought to do that in Australia, although that work remains disparate: Trabsky (2005); Chapman (2007).

⁴ The idea of doing family — that is, family as a verb — comes from Reid (2008).

⁵ Short et al (2007); Perlesz and McNair (2004), p 136; see also Kentlyn (2007), p 121.

⁶ Short et al (2007); Perlesz and McNair (2004), p 131.

relationships. Some researchers write of the importance of broader kinship networks and community in queer families,⁷ further potentially widening the care relationships shared between adults. A participant in an Australian study of lesbian parenting said:

Our daughter has very important relationships with other adults, somewhat independently of us. These include a bevy of adoring lesbian 'aunty' types. Because we question so much of the way(s) 'family' is constructed, we place a lot of importance on these other relationships.⁸

Although it is important to acknowledge that recent law reform initiatives which recognise same-sex couples in the employment field have generated tangible and substantial improvements for many people and their children,⁹ those initiatives have nonetheless reinscribed a hierarchy of relationship and family forms. Same-sex couples who most appear in these rules to be just like heterosexual unions move to insider status in this process, with same-sex relationships and broader intimate and care practices least like the heteronormative nuclear family being constructed as other — indeed, as non-family and non-care relation.

The article first sets out the legal developments examined. These legal rules provide mandatory minimum standards in employment law, within a framework that anticipates employers and employees bargaining and reaching enterprise agreements that produce more favourable outcomes. At least in relation to the sorts of legal standards examined in this paper, though, that picture of bargained outcomes is not realised for many employees in the Australian workforce. In 2005, the Full Bench of the Australian Industrial Relations Commission surveyed the available empirical evidence on bargaining and agreement-making in relation to care responsibilities and concluded that 'bargaining has not delivered family friendly arrangements uniformly. Certainly, some sectors and some workplaces have agreed to implement some family friendly measures — but the results are uneven and mixed.'¹⁰ The minimum standards examined in this paper are important as a topic of examination in their own right, as they set the mandatory minimum. Moreover, for many employees, these minima represent the actual entitlement, having not successfully bargained for a more favourable provision through an enterprise agreement.

After setting out the relevant legal rules on leave to care for others, I draw out two main interacting themes: the normativity of the couple, and the normativity of a primary caregiver model, especially in relation to the care of babies and young children. Together, these produce an understanding of a conservative couple as the ideal form through which care is provided.

⁷ Perlesz and McNair (2004), p 136; Reid (2008), pp 65–66.

⁸ Perlesz and McNair (2004), p 136.

⁹ The same cannot be said for the recent recognition of same-sex couples in the social security system, which has inscribed assumptions of financial dependence within same-sex relationships, resulting in loss of benefits to many people. On the cohabitation rule in social security law generally, see Tranter et al (2008).

¹⁰ *Parental Leave Test Case* (2005) 143 IR 245 at 277.

The Legal Landscape of Leave to Care

For most of the twentieth century, there was no entitlement in Australian law for employees to take leave for the purpose of providing care and support to another person. The first broad-based legal recognition of leave for this purpose came in 1973 when women employees in the Commonwealth public sector were given a right to maternity leave.¹¹ In 1979, maternity leave was recognised as a general legal entitlement for women in the private sector,¹² and women were granted adoption leave in 1985.¹³ In 1990, leave entitlements were extended to men in the form of adoption leave and paternity leave for 'spouses', 'former spouses' and 'de facto spouses' of women who gave birth.¹⁴

These entitlements to take leave in the private sector in relation to birth or adoption, which collectively became known as parental leave, arose through Commonwealth test cases in the award system, and subsequently became generalised through the Commonwealth and state award systems.¹⁵ The core feature

¹¹ The entitlement in the Commonwealth public sector was for 12 weeks of paid maternity leave: *Maternity Leave (Commonwealth Employees) Act 1973* (Cth). Notably, leave in relation to the death of a closely defined class of people developed first in state jurisdictions: *Re Foremen's (TAA) Award* (1964) 106 CAR 231 at 256; *HJ Harvey* (1963) AILR 228. The rationale for bereavement leave was not to care for the ill or injured person (or other grieving relatives). Rather, it was explicitly to attend to funeral and other arrangements, and to the employee's own grief: *Brass, Copper and Non-Ferrous Metals Case* (1968) 124 CAR 190 at 203; *Re Vehicle Industry Award* (1969) 130 CAR 711 at 712.

¹² The entitlement in the private sector was to unpaid leave, and arose through a federal award test case: *Federated Miscellaneous Workers Union of Australia v ACT Employers Federation* (1979) 218 CAR 120 (*Maternity Leave Test Case*). At the time of writing, there is still no national scheme, or broad-based minimum legal entitlement, to paid leave following birth (or adoption) in Australia, although the Commonwealth government has announced that it will establish a scheme from 2011 that provides 18 weeks of parental leave, paid at the level of the federal minimum wage, and limited to primary carers who earn less than \$150,000 per year: Productivity Commission (2008); Rudd (2009).

¹³ *Re Clothing & Allied Trades Union of Australia* (1985) 298 CAR 321 (*Adoption Leave Test Case*). The adoptions covered related to a child under the age of five years who had not previously lived continuously with the employee for a period of six months, or who was not a child or step-child of the employee or her spouse: at 328.

¹⁴ *Parental Leave Case* (1990) 36 IR 1; *Parental Leave Case (No 2)* (1990) 39 IR 344. The references to 'spouses', 'former spouses' and 'de facto spouses' are found in *Parental Leave Case (No 2)* (1990) 39 IR 344 at 344, 345.

¹⁵ These standards became generalised through both Commonwealth awards and legislation, and state awards and legislation. See, for example, *Master Builders' Association (NSW) v Building Workers' Industrial Union of Australia* (1985) 16 IR 284 at 287; *Award Simplification Decision* (1997) 75 IR 272 at 292-93; *Re Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1998* (1998) 44 AILR 3-893 (*Supplementary Award Simplification Decision*); *Industrial Relations Reform Act 1993* (Cth) Pt VIA Div 5, Sch 14, amending *Industrial Relations Act 1988* (Cth); *Reference by Minister of Labour and Industry Pursuant to sec 45 of Labour and Industry Act re Maternity Leave* (1980) 22(6) AILR 78 (which approved the *Maternity*

was to establish a right for employees with at least 12 months' continuous service to take an unpaid absence from work obligations for up to 52 weeks in total, in connection with a birth or adoption, with a protected path back to the person's former position once parental leave came to an end.¹⁶ Where the person's former position no longer existed, then the employee was to be returned to a position as nearly comparable in status and salary to that former position.¹⁷ The 52 weeks of unpaid leave was the total that a couple could take, so that no couple was to take more than 52 weeks of leave between them. Couples were permitted to concurrently take up to one week's maternity and paternity leave immediately following birth. In relation to the placement of a child for adoption, they were permitted to take up to three weeks of adoption leave at the same time as each other. Apart from those specified periods, only one person in the couple was to be on parental leave at the one time.¹⁸

Leave for the purpose of providing care and support, outside the exigencies of birth and adoption, was first recognised in a systematised form in Australia through a 1994–96 Commonwealth award test case.¹⁹ The package of measures granted in this case became standard legal entitlements across the federal award system,²⁰ and were adopted into state award jurisdictions.²¹ The central provision was to permit

Leave Test Case for flow on to Victorian state awards); *Referral by Minister for Labour for Flow-on of Federal Parental Leave Test Case Decision to Private Sector Awards* (1991) AILR 250(9) (which approved the flow on of the *Parental Leave Case (No 2) 1990* to Victorian awards); *Application by AWU (Queensland Branch) for a Declaration of Policy and/or a General Ruling by the Commission in Relation to Maternity Leave Standards* (1980) 22(8) AILR 109 (adoption of a statement of policy on maternity leave for Queensland state awards); *Re Australian Workers' Union, Queensland & Ors* (1992) AILR 40 (Queensland parental leave award on substantially the same terms as the *Parental Leave Case (No 2) 1990*); *Employee Relations Act 1992* (Vic), Sch 1; *Industrial Relations Act 1999* (Qld), Pt 2, Div 1 (as enacted).

¹⁶ The stipulation of a maximum of 52 weeks is found in: *Maternity Leave Test Case* (1979) 218 CAR 120 at 125; *Adoption Leave Test Case* (1985) 298 CAR 321 at 328; *Parental Leave Case (No 2)* (1990) 39 IR 344 at 353, 357, 360.

¹⁷ *Maternity Leave Test Case* (1979) 218 CAR 120 at 131; *Adoption Leave Test Case* (1985) 298 CAR 321 at 323, 331; *Parental Leave Case (No 2)* (1990) 39 IR 344 at 356, 359, 363.

¹⁸ *Parental Leave Case (No 2)* (1990) 39 IR 344 at 353–54, 357–58, 360–61.

¹⁹ *Family Leave Test Case — November 1994* (1994) 57 IR 121; *Family Leave Test Case, Supplementary Decision* (1995) AILR 3-060; *Personal/Carer's Leave Test Case — Stage 2 — November 1995* (1995) 62 IR 48; *Personal/Carer's Leave Test Case — Stage 2 — March 1996* (1996) 66 IR 138. The test case was prompted by a 1993 legislative amendment to the *Industrial Relations Act 1988* (Cth). That amendment was itself introduced following Australia's ratification in 1990 of ILO Convention 156 — *Workers with Family Responsibilities Convention*.

²⁰ This is implicit in the *Award Simplification Decision* (1997) 75 IR 272 at 292–93; *Supplementary Award Simplification Decision* (1998) 44 AILR 3-893.

²¹ See, for example, *ACTU, Qld Branch v Qld Confederation of Industry Ltd* (1995) AILR 9-030; *Industrial Relations Act 1999* (Qld), s 39 (as enacted); *Family Leave Test Case (NSW)* (1995) 59 IR 1; *Family Leave/Personal Leave Carer's Leave Case 1996 (Tas)*

employees to use their aggregated entitlements to paid sick leave and bereavement leave (to a maximum of five days per annum) to provide care or support to a member of their 'immediate family' or 'household' who was ill or injured, and needed their care.²² This aggregated entitlement became known as personal/carer's leave.²³ Importantly, prior to this test case employees were not generally entitled in a legal sense to use their sick leave for the purpose of caring for another person, although evidence during the case indicated that this was in fact a common practice amongst parents with a sick child.²⁴

In 2005, a Commonwealth test case formulated important extensions to the award parental leave entitlements following birth or adoption, and the 1994–96 personal/carer's leave provisions.²⁵ In relation to parental leave, the clause formulated entitled an employee to request an extension of unpaid maternity, adoption and paternity leave from 52 weeks to 104 weeks. The clause also provided a right to request an extension of the period that parents can simultaneously take immediately following the birth or placement of a child to a maximum of eight weeks. Employers were entitled to refuse each of these requests, but only on 'reasonable grounds' related to the employer's business.²⁶

In terms of personal/carer's leave, the parties reached agreement in the conciliation stage of the 2005 test case regarding a model leave clause. The new entitlement permitted the use of up to 10 days of paid personal leave each year for the purpose of caring for a member of the employee's 'immediate family' or 'household' who was ill or injured, or faced an unexpected emergency. This doubled the amount of personal leave available for caring purposes. In addition, by agreement an employee could use other accrued leave for caring purposes, and where all paid leave had been exhausted, the employee was entitled to take unpaid

(1997) 71 IR 231; *Re Application for Adoption of Provisions for Family Leave (SA)* (1997) 41 AILR 11-064.

²² The first decision extended this to sick leave alone and did not impose a cap: (1994) 57 IR 121 at 146. The second decision added bereavement leave to the aggregated pool of leave and imposed the cap of five days per annum: (1995) 62 IR 48 at 54, 59. In 1997, eligibility for sick leave, bereavement leave and carer's leave was made uniform by extending bereavement leave to the death of a member of the employee's 'immediate family' or 'household': *Award Simplification Decision* (1997) 75 IR 272 at 314.

²³ A second aspect of the 1994–96 test case was to formulate provisions that permitted the establishment of a system of identified measures that could be utilised at an employee's election, with the consent of their employer. The measures included being able to take up to five days of annual leave in single-day periods (or parts of a single day), and greater flexibility in working hours (to enable, for example, time off instead of paid overtime). Prior to the test case, those flexibilities were not generally permitted: (1994) 57 IR 121 at 145, 147–48; (1995) 62 IR 48 at 65–66; (1996) 66 IR 138 at 156.

²⁴ The decision indicates that generally employers chose to ignore that unlawful practice: *Family Leave Test Case — November 1994* (1994) 57 IR 121 at 145.

²⁵ *Parental Leave Test Case* (2005) 143 IR 245.

²⁶ *Parental Leave Test Case* (2005) 143 IR 245 at 333, 337. In addition, employees were given the right to request a return to work following parental leave on a part-time basis until the child reached school age; an employer could refuse such a request on 'reasonable' grounds only.

leave for caring purposes, either for a period agreed between the employer and the employee, or for up to two days per occasion.²⁷

The Work Choices legislation of the previous federal Parliament took effect from March 2006 to substantially wind back the improvements made to parental leave in the 2005 test case.²⁸ The result was that the pre-2005 minimum standards of parental leave continued in relation to many employees. In contrast, in terms of personal/carer's leave, Work Choices provided in a similar way (although at a slightly lower standard) to the agreement reached in the 2005 test case, thereby generalising those provisions more broadly through legislation.²⁹

The latest chapter in this legal account of leave to care for another person is dated to the *Fair Work Act 2009* (Cth), which passed both Houses of Parliament in March 2009. The relevant provisions — part of the National Employment Standards — are expected to commence in January 2010.³⁰ In relation to parental leave following birth or adoption, the *Fair Work Act* provides that each parent is entitled to up to 12 months' leave at separate times, or one parent may request an extra 12 months' leave, with such a request only to be refused on 'reasonable business grounds'.³¹ Employers are required to provide a written response to such a request within 21 days, and if the request is refused, the written response must 'include

²⁷ *Parental Leave Test Case 2005* (2005) 143 IR 245 at Appendix 2 (p 343).

²⁸ The Work Choices legislation is the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth). This Act amended the *Workplace Relations Act 1996* (Cth). For an assessment of how far the 2005 test case standards were adopted into awards, see Williamson and Baird (2007), p 59.

²⁹ For example, the 2005 test case provided for 10 days' paid leave per year for the purpose of caring for another (*Parental Leave Test Case* (2005) 143 IR 245 Appendix 2, p 343), while Work Choices provided 10 days' paid leave per year for the purpose of the employee's own sickness (as sick leave) and for the purpose of caring for another: *Workplace Relations Act*, s 246(2). Work Choices was further limited in that an employee was not entitled to take more than 10 days' paid carer's leave over a 12-month period: *Workplace Relations Act*, s 249.

³⁰ Stewart (2009), p 10. The *Fair Work Act* contains a provision enabling employees to request 'a change in working arrangements' (such as a change in hours of work, patterns of work or location of work) to assist them in caring for a child under school age, or a child under the age of 18 who has a disability. Employers must agree to such requests unless there are 'reasonable business grounds' to refuse: *Fair Work Act*, Part 2-2, Division 4. This new provision appears to have its genesis in the right to request provision of the *Parental Leave Test Case* (2005) 143 IR 245. It may offer important potential for employees to adjust the work and care dynamic of their lives, at least so far as young children and children with a disability are concerned. The provision is not examined further, and the focus of the article on statutory minimum standards of parental leave and personal/carer's leave is maintained.

³¹ *Fair Work Act*, Part 2-2, Division 5. This entitlement to parental leave applies to 'national system employee[s]' (see ss 13, 14) with at least 12 months' continuous service with that employer, and casual employees who have been employed on a 'regular and systematic basis' for a sequence of periods of at least 12 months and who have 'a reasonable expectation' of continuing employment by the employer on that basis: s 67(1), (2), s 12 (definition of 'long-term casual employee').

details of the reasons for the refusal'.³² A maximum of three weeks of concurrent leave is permitted to be taken by both parents.³³

In terms of personal/carer's leave, the *Fair Work Act* continues in substantively similar terms the Work Choices framework, which had encompassed the 2005 standards.³⁴ This is for 10 days' paid personal/carer's leave per year, plus paid compassionate leave of two days per occasion, and two days of unpaid carer's leave as needed.³⁵

The Normativity of the Couple

Parental Leave and Couples

From the recognition of paternity leave following birth in 1990, paternity leave at the Commonwealth level has been, and remains (until the commencement of the *Fair Work Act*), available specifically for male employees who are spouses (including de facto spouses and former spouses) of the woman who gave birth.³⁶ Clearly it is based on a model of a female-male couple — and a spousal, or spousal-like, couple at that. Although non-married female-male couples are recognised along with married female-male couples, a marriage-like relationship is privileged in that it remains the benchmark for the recognition of non-marriage relationships, in the sense of de facto although not de jure, spouses. These definitions emphasise the mother's primary intimate adult relationship, in that eligibility for paternity leave revolves around the status of the man's relationship with the woman who gave birth to the baby, and not the man's biological relationship, or social care relationship, with the baby. In this, a marriage, or marriage-like relationship is emphasised, and biological (and social) fatherhood is irrelevant. A biological father who is not a spouse or de facto spouse of the woman who gave birth is not entitled to paternity leave.

This spousal model in the recognition of paternity leave has remained dominant in the Commonwealth system, through both subsequent test case

³² *Fair Work Act*, s 76(3), (4).

³³ *Fair Work Act*, s 72(5).

³⁴ *Fair Work Act*, Part 2-2, Division 7. Work Choices capped the taking of paid carer's leave to a maximum of 10 days in a 12-month period (*Workplace Relations Act*, s 249); the *Fair Work Act* removes this.

³⁵ These forms of leave apply to 'national system employee[s]' (see ss 13, 14 for definition). While paid personal/carer's leave does not apply to casual employees (*Fair Work Act*, s 95), unpaid carer's leave and unpaid compassionate leave are available to casuals.

³⁶ *Parental Leave Case (No 2)* (1990) 39 IR 344 at 344, 345. The concepts of 'spouse' and 'de facto spouse' were not defined. The provisions were drafted to be gender specific: maternity leave was stated to be for women; paternity leave for men: at 353, 357. Note that in Australian law marriage is defined as the 'union of a man and a woman', and marriages between people of the same sex solemnised in a foreign jurisdiction are not recognised in Australian law: *Marriage Act 1961* (Cth), s 5, as amended by the *Marriage Amendment Act 2004* (Cth). This position seems unlikely to change under the current federal ALP government: Duffy (2007); House of Representatives *Hansard* (2008).

standards³⁷ and legislation.³⁸ Indeed, federal legislation has been quite specific on the marriage-like character of the concept of de facto spouse. Legislation enacted in 1993 defined 'de facto spouse' for these purposes inclusively as 'a person of the opposite sex to the employee who lives with the employee in a marriage-like relationship, although not legally married to the employee',³⁹ while the *Workplace Relations Act 1996* (Cth) defined de facto spouse to mean 'a person of the opposite sex to the employee who lives with the employee as the employee's husband or wife on a genuine domestic basis although not legally married to the employee'.⁴⁰

The new *Fair Work Act* moves beyond the female-male de facto couple to encompass same-sex de facto couples. It does this by replacing the definition of 'de facto spouse' in the parental leave provisions with 'de facto partner', which is then defined to mean 'a person who, although not legally married to the employee, lives with the employee in a relationship as a couple on a genuine domestic basis (whether the employee and the person are of the same sex or different sexes)' and includes a former de facto partner.⁴¹ This provides recognition to same-sex relationships, to the extent that they are couple relationships where the two people live together 'on a genuine domestic basis'. The centrality of the couple and the de facto character of the couple in this new definition are confirmed in the Explanatory Memorandum for the Bill.⁴²

Over the past five years or so, several state jurisdictions have extended state parental leave provisions to same-sex couple relationships. The state schemes continue to include spouses, and have broadened coverage by reshaping the concept of de facto spouse into, for example, a 'domestic partner' (in South Australia from 2007),⁴³ a 'de facto partner' (in Western Australia from 2003⁴⁴ and New South Wales from 2008),⁴⁵ and a 'partner' (in Tasmania from 2006).⁴⁶ In Queensland, provisions covering same-sex couples existed from 1999 to 2002 only.⁴⁷

³⁷ *Award Simplification Decision* (1997) 75 IR 272, 473-74; *Supplementary Award Simplification Decision* (1998) 44 AILR 3-893; *Parental Leave Test Case* (2005) 143 IR 1 at 338-9. The concept of de facto spouse was not further articulated in these decisions.

³⁸ *Workplace Relations Act*, s 263.

³⁹ *Industrial Relations Reform Act 1993* (Cth), Pt VIA, Div 5, Sch 14, amending *Industrial Relations Act 1998* (Cth).

⁴⁰ *Workplace Relations Act*, s 263.

⁴¹ *Fair Work Act*, s 12 (definition of 'de facto partner').

⁴² House of Representatives, *Explanatory Memorandum* (2008), para 26.

⁴³ 'Domestic partner' is then defined by reference to the concept of 'a close personal relationship': *Statutes Amendment (Domestic Partners) Act 2006* (SA), amending *Fair Work Act 1994* (SA) and the *Family Relationships Act 1975* (SA).

⁴⁴ See *Acts Amendment (Equality of Status) Act 2003* (WA), amending *Minimum Conditions of Employment Act 1993* (WA). See also the concept of 'de facto partner' and 'de facto relationship' in *Acts Interpretation Act 1984* (WA), amended by *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* (WA).

⁴⁵ See *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* (NSW), amending *Industrial Relations Act 1996* (NSW). See also the concept of 'de facto

Some shared understandings underlie these extensions of coverage. The characteristic of two adults, as a couple, is a central and common feature of these state legislative provisions.⁴⁶ Some jurisdictions explain this further. For example, South Australia requires that the two adults 'live together as a couple on a genuine domestic basis',⁴⁹ while Western Australia requires that the couple live together 'in a marriage-like relationship'.⁵⁰

The state jurisdictions typically provide that, in determining whether or not a particular relationship is covered in the legislative scheme, all relevant circumstances must be taken into account, including where appropriate an inclusive list of factors. The list in the South Australian jurisdiction is:

- (a) the duration of the relationship;
- (b) the nature and extent of common residence;
- (c) the degree of financial dependence and interdependence, or arrangements for financial support;
- (d) the ownership, use and acquisition of property;
- (e) the degree of mutual commitment to a shared life;
- (f) any domestic partnership agreement made under the *Domestic Partners Property Act 1996* [SA];
- (g) the care and support of children;
- (h) the performance of household duties;
- (i) the reputation and public aspects of the relationship.⁵¹

The lists in other jurisdictions are very similar, although the existence of a sexual relationship is specified as a potentially relevant factor to take into account in other state jurisdictions, except in the Tasmanian understanding of 'caring relationship' (discussed below).⁵² South Australia additionally requires either that the two people have been living together for three years, or alternatively that they

relationship' in *Property (Relationships) Act 1984* (NSW), amended by *Property (Relationships) Legislation Amendment Act 1999* (NSW).

⁴⁶ See *Industrial Relations Amendment (Fair Conditions) Act 2005* (Tas), amending *Industrial Relations Act 1984* (Tas). See also the concepts of 'partner', 'personal relationship', 'significant relationship' and 'caring relationship' in the *Relationships Act 2003* (Tas).

⁴⁷ Legislation enacted in 1999 included coverage of 'a de facto spouse, including a spouse of the same sex as the employee': *Industrial Relations Act 1999* (Qld), Sch 5 (dictionary). In 2002, the reference to de facto spouse and same sex partner was deleted from the parental leave provisions in the *Industrial Relations Act 1999* (Qld): *Discrimination Law Amendment Act 2002* (Qld), s 90, Sch.

⁴⁸ See, for example, *Family Relationships Act 1975* (SA), s 11; *Property (Relationships) Act 1984* (NSW), s 4(1); *Relationships Act 2003* (Tas), s 4(1) definition of 'significant relationship'; *Acts Interpretation Act 1984* (WA), s 13A(1).

⁴⁹ *Family Relationships Act 1975* (SA), s 11.

⁵⁰ *Acts Interpretation Act 1984* (WA), s 13A(1).

⁵¹ *Family Relationships Act 1975* (SA), s 11B(3) (emphasis removed).

⁵² See, for example, *Property (Relationships) Act 1984* (NSW), s 4(2); *Relationships Act 2003* (Tas), s 4(3), s 5(5); *Acts Interpretation Act 1984* (WA), s 13A(2).

are parents of a baby together.⁵³ Two state schemes — those of South Australia and Western Australia — contain an explicit statement to the effect that it does not matter whether the two adults are the same sex or not.⁵⁴

Tasmania potentially provides broader coverage than other state jurisdictions in that it identifies 'caring relationships' as covered by the statutory scheme. These are relationships between two adults where one of them provides the other with 'domestic support and personal care' (other than through a commercial arrangement). Such a relationship may exist whether those persons are related to each other by family or not.⁵⁵ This idea of a 'caring relationship' clearly does not, on its face, invoke a couple concept. This is further emphasised in that whether the parties have, or have had, a sexual relationship is not listed as a relevant factor to take into account in determining whether the relationship is indeed a 'caring relationship' within the meaning of the legislation.⁵⁶ This broad drawing of 'caring relationships' is, however, more ambivalent than is at first apparent. Its potential scope may be somewhat overshadowed because the list of factors to consider is, apart from the lack of reference to a sexual relationship, almost identical to the list provided in relation to identifying the more conventionally described couple relationships covered in the Tasmanian statute. For example, the list for 'caring relationships' brings in indicia of a shared residence, financial interdependence, 'the degree of mutual commitment to a shared life' and 'the reputation and public aspects of the relationship' — all resonant of a couple relationship.⁵⁷ This may reflect ambivalence and uncertainty within the Tasmanian parliament at stepping outside the familiar concept of the couple.

Leaving aside the potentially broader provisions in Tasmania regarding 'caring relationships', all these relatively new state statutory provisions both disrupt, and at the same time reinforce, law's privileging of marriage-like relationships. The same can be said for the new provisions in the *Fair Work Act* extending parental leave to same-sex 'de facto partners'. Broadening the couples recognised to include same-sex couples disrupts the female-male gendered character of parental leave's couple. However, and importantly, the ideology of the couple remains central, with indicia referencing marriage-like relationships — such as a shared residence and shared finances — continuing to play a central role in identifying those entitled to unpaid parental leave. Some commentators have written that lists such as these have their origins in early divorce case decisions dealing with separation under the same roof.⁵⁸ The ideology of the couple remains central, even in Tasmania's attempt to move towards a broader recognition of 'caring relationships'. Some jurisdictions, namely Western Australia, are explicit, ruling that recognition attaches only to relationships that are 'marriage-like'. In other words, some forms of diversity are recognised in these extensions of parental leave standards to same-sex couples, but

⁵³ *Family Relationships Act 1975* (SA) s 11A(a), (b).

⁵⁴ *Family Relationships Act 1975* (SA) s 11; *Acts Interpretation Act 1984* (WA) s 13A(3).

⁵⁵ *Relationships Act 2003* (Tas) s 5(1), (2), (3).

⁵⁶ *Relationships Act 2003* (Tas) s 5(5).

⁵⁷ *Relationships Act 2003* (Tas) s 5(5).

⁵⁸ Fehlberg and Behrens (2008), p 136.

only where they are able to be identified as a two-adult marriage-like couple. Non-couple relationships — between, for example, close friends and people in multiple intimate and/or caring relationships, aunts, uncles and grandparents, and more broadly extended community, appear unlikely — at least outside Tasmania — to be able to establish a relationship with the birth mother such as to attract an entitlement to the minimum standard of unpaid parental leave.

Personal/Carer's Leave, Couples and Households

Since its inception in 1994–96, the minimum standard of personal/carer's leave has revolved around the eligibility concepts of 'immediate family' and 'household'. The leave has been available to provide care and support for a member of the employee's 'immediate family', or 'household', who is ill or injured or faces an unexpected emergency.

In the initial recognition of this type of leave, 'immediate family' was defined to mean substantially the same as that concept in the *Sex Discrimination Act 1984* (Cth).⁵⁹ At that time, the *Sex Discrimination Act* defined 'immediate family' around spouses, former spouses, (opposite-sex) de facto spouses and former (opposite-sex) de facto spouses, in addition to parents, grandparents and siblings of the employee, or the employee's spouse or opposite-sex de facto spouse.⁶⁰ That concept of 'immediate family' privileged marriage-like relationships of female–male couples, and conventional understandings of family as parents, siblings, grandparents and children, and not understandings of family based on diverse intimate, caring or kinship relationships.

The second — mutually exclusive — group recognised initially in the 1994–96 test case in relation to which the employee is entitled to carer's leave consists of people who are members of the employee's 'household'.⁶¹ This concept of 'household' was formulated for the purpose of ensuring that the entitlement to personal/carer's leave was 'non-discriminatory'. Interveners in the hearing, including the Australian Council for Lesbian and Gay Rights (in a joint submission with the Australian Federation of AIDS Organisations) and the NSW Aboriginal Women's Legal Resources Inc group,⁶² had argued that 'immediate family' would

⁵⁹ (1994) 57 IR 121 at 146; (1995) AILR 3-060; (1996) 66 IR 138 at 145. Although note that 'child' was added to the concept of 'immediate family' in the test case: (1995) AILR 3-060, order C1 1.3(iii)(b). 'Child' was not part of the *Sex Discrimination Act* concept of immediate family.

⁶⁰ *Sex Discrimination Act 1984* (Cth), s 4A (definitions of 'family responsibilities', 'immediate family member' and 'spouse'), s 4 ('de facto spouse') (prior to December 2008). The *Same-Sex Relationships (Equal Treatment in Commonwealth Laws — General Law Reform) Act 2008* (Cth) amended the *Sex Discrimination Act* concept of 'immediate family' to include same-sex couple relationships.

⁶¹ (1994) 57 IR 121 at 146; (1995) 62 IR 48 at 56-58.

⁶² (1994) 57 IR 121 at 130; (1995) 62 IR 48 at 56-57. The NSW Aboriginal Women's Legal Resources Inc is reported in the decision as stating that many Aboriginal people live in extended family arrangements and that the concept of 'immediate family' will not cover established caring practices in Indigenous communities. HREOC argued that family leave should recognise the diversity of family structures. The Carers'

not adequately cover same-sex partners, carers of people with disabilities and Indigenous caring arrangements. Both the federal ALP government at the time, and initially the Australian Council of Trade Unions (ACTU), supported limiting carer's leave to 'dependent children' and 'immediate family'.⁶³ Ultimately, in the second decision in the test case, the commission agreed with the interveners, and now with the ACTU, on the need to formulate the new carer's leave standard in a non-discriminatory manner.⁶⁴

The legislative amendment that prompted the 1994–96 test case (and the international convention upon which the legislation drew) referred to establishing entitlements to leave to provide care and support in relation to the category of 'immediate family'.⁶⁵ In stepping beyond the way that concept was defined at the time in the *Sex Discrimination Act*, to embrace members of the employee's 'household', the test case disrupted, to some degree, the normativity of the marriage-like female–male couple concept of 'immediate family'. It did recognise and constitute in some way its subject worker as having potentially wider care and family responsibilities than contained within the concept of 'immediate family'. That recognition, though, was fraught. Notably, the entitlement in relation to a member of the employee's 'household' is weaker and more constrained in that it appears to require a residence-type link, whereas there was no such requirement in relation to 'immediate family'. Indeed, the commission recognised this in noting that the 'household' concept would not necessarily cover all Indigenous caring arrangements, stating that this would be determined on a case-by-case basis.⁶⁶ Secondly, the bifurcation of the entitlement into 'immediate family' and member of the employee's 'household' reserved the appellation of 'immediately family' for the

Association of Australia Inc supported the extension of leave in relation to people with whom the employee had a 'primary caring relationship', including friends, same-sex partners and sometimes neighbours. The Australian Family Association argued against the inclusion of same-sex partners. See (1994) 57 IR 121 at 130; (1995) 62 IR 48 at 56–57.

⁶³ In relation to the ACTU's claims, see: (1994) 57 IR 121 at 123 (claim (a)(i)). The first commission summarised the ACTU claim as supporting a minimum definition of 'family' as applied in relation to award bereavement leave provisions, which it identified as spouse, de facto spouse, parents, step-parents, siblings, children, step-children, parents in law and grandparents: (1994) 57 IR 121 at 126–127. In relation to the federal government's position, see: (1994) 57 IR 121 at 127. By the November 1995 hearing, the ACTU supported the provision of the entitlement in respect of 'immediate family', member of the 'household', a same-sex partner 'who lives with the employee as the de facto partner of that employee on a bona fide domestic basis', and 'traditional kinship' relationships: (1995) 62 IR 48 at 56. The ACTU drew on the *State Family Leave Case (NSW)* (1995) 59 IR 1.

⁶⁴ (1995) 62 IR 48 at 58. Owens and Riley make the point that the AIRC was '[u]ndoubtedly influenced' by the NSW Family Provisions test case, which had been handed down and explicitly extended eligibility to same-sex couples: Owens and Riley (2007), p 317.

⁶⁵ *Industrial Relations Act 1988* (Cth), s 170KAA; ILO Convention 158, Art 1(2). Neither instrument further defined or articulated the meaning of 'immediate family'.

⁶⁶ (1994) 62 IR 48 at 57.

narrow band of relationships covered at that time under the *Sex Discrimination Act*, relegating relationships outside that norm as merely 'household[s]'. Notably, there was no real discussion in the case of extending the entitlement to cover providing care and support to close friends, people in broader intimate and caring relationships, neighbours and extended community.

Interestingly, the first decision in the 1994–96 test case used the language of 'family' consistently, in describing the type of leave being discussed, in identifying that an employee's 'family' consists of 'immediate family' members and 'household' members, and in the title of the decision.⁶⁷ By stage two, though, the commission (constituted by the same members) expressed its view that 'personal/carer's' leave was the more appropriate expression to use, and this was reflected in the altered title given to the leave, and the name of the case.⁶⁸ The reason the commission gave for this shift in nomenclature was its agreement on this point with the Australian Catholic Commission for Industrial Relations (ACCIR).⁶⁹ ACCIR's definition of family (as recorded in the Full Bench decision) was a unit 'whose members are committed to each other through marriage, blood or adoption'.⁷⁰ For ACCIR, once the provision for leave extended to other (non-family) groupings where people care for each other (an extension which it notably supported), the broader label of carer's leave 'more appropriately reflected the range of domestic arrangements under which individuals care for each other, than implied in the term "family leave"'.⁷¹ The assumption of ACCIR, and by adoption the Full Bench, was that same-sex relationships and other caring relationships formed outside 'marriage, blood or adoption' are not families at all, and so cannot be appropriately included under the banner of family leave. For ACCIR and implicitly the Full Bench, once leave was extended to non-marriage, blood and adoption caring practices, the appellation of family needed to be replaced.

This framework of 'immediate family' and 'household' was not revisited in any substantive sense in the 2005 test case extensions,⁷² or the Work Choices

⁶⁷ *Family Leave Test Case — November 1994* (1994) 57 IR 121 at 146; *Family Leave Test Case, Supplementary Decision* (1995) AIR 3-060.

⁶⁸ *Personal/Carer's Leave Test Case — Stage 2 — November 1995* (1995) 62 IR 48 at 58. And see *Personal/Carer's Leave Test Case — Stage 2 — March 1996* (1996) 66 IR 138.

⁶⁹ (1995) 62 IR 48 at 58. In the 1995 NSW test case that provided carer's leave in the state jurisdiction, the Catholic Hierarchy of New South Wales, like its counterpart in the federal case, was described by the New South Wales commission as being 'particularly concerned' should the commission's order (covering unmarried opposite sex partners and same sex partners) be cast as family leave rather than, for example, carer's leave or compassionate leave: *Family Leave Test Case (NSW)* (1995) 59 IR 1 at 10.

⁷⁰ (1995) 62 IR 48 at 57.

⁷¹ (1995) 62 IR 48 at 57–58.

⁷² The interveners present in the 1994–96 test case — the Indigenous women's legal service, the gay and lesbian group and the AIDS organisation — were not present in the 2005 test case. Notably, the main written submission made by the ACTU in the 2005 case contained no reference or discussion of the need to extend protection to Indigenous caring arrangements, or the caring arrangements of lesbians and gay men, in either the discussion in the submission of the changing social context of families in Australia (section 3) or elsewhere in the 363-page submission.

amendments in 2006.⁷³ The *Fair Work Act* also continues the 'immediate family' and 'household' categories.⁷⁴ Importantly, though, the Act reconstitutes 'immediate family' by replacing 'de facto spouse' with 'de facto partner'.⁷⁵ That term — 'de facto partner' — means the same as it does in relation to parental leave (discussed above).

Some state jurisdictions extend personal/carer's leave to same-sex couple relationships, with New South Wales the first jurisdiction to do so. In 1996, the New South Wales commission formulated a test case award clause that was not framed around the two broad eligibility categories of 'family' and 'household'. Rather, the clause contained a list of people in relation to whom carer's leave was available. That list included 'a same sex partner who lives with the employee as the de facto partner of that employee on a bona fide domestic basis'. The clause also covered 'a relative of the employee who is a member of the same household', defining 'household' to mean 'a family group living in the same domestic dwelling'.⁷⁶

Other state jurisdictions have more recently recognised same-sex couple relationships for the purposes of personal/carer's leave. For example, from 2007 the South Australian legislative framework has provided a minimum standard of carer's leave in relation to members of the employee's 'family'. That concept is defined to include a 'domestic partner', 'any other member of the person's household' and 'any other person who is dependent on the person's care'.⁷⁷ Western Australia provides carer's leave in relation to one category — identified as a 'member of the employee's family or household'. That phrase is defined to include the sorts of relationships covered under the federal concept of 'immediate family', plus from 2003 it has included a 'de facto partner'.⁷⁸ These concepts — 'domestic partner' in South Australia and 'de facto partner' in Western Australia — are used also in relation to entitlements to parental leave and as discussed above are defined in ways that reference a two-adult couple, including a same-sex couple.⁷⁹ The same can be said for the New South Wales description of a same-sex partner covered under the standard state clause.⁸⁰ In contrast, Queensland legislation on minimum carer's leave does not provide any recognition of same-sex relationships, and most closely tracks the Work Choices provisions on personal/carer's leave.⁸¹

⁷³ *Workplace Relations Act*, s 250.

⁷⁴ *Fair Work Act*, ss 97(b), 102, 104.

⁷⁵ *Fair Work Act*, s 12 (definition of 'immediate family').

⁷⁶ *Family Leave Test Case (NSW)* (1995) 59 IR 1 at 13. The state commission consciously contracted the scope of the household to relatives only: at 10.

⁷⁷ *Fair Work Act 1994* (SA), Sch 3, s 4.

⁷⁸ *Minimum Conditions of Employment Act 1993* (WA), s 20A.

⁷⁹ On the meaning of 'domestic partner' in South Australia, see *Family Relationships Act 1975* (SA) (referred to above). On the meaning of 'de facto partner' in Western Australia, see *Acts Interpretation Act 1984* (WA) (referred to above).

⁸⁰ *Family Leave Test Case (NSW)* (1995) 59 IR 1 at 13.

⁸¹ *Industrial Relations Act 1999* (Qld), s 39, Sch 5 (Dictionary).

Eligibility for personal/carer's leave reflects the tenacity of the two-adult couple. Although that model is potentially decentred through the extension of eligibility to 'household' members, it is reinscribed through the recognition of same-sex couple relationships. Over this time, the determination to withhold the appellation of family from same-sex couples has become less vociferous, and relevant, especially at state level and now also at the federal level. The origin of the legal recognition of personal/carer's leave was the concept of 'immediate family' in the *Sex Discrimination Act*. At that time, that Act contained a strong normative couple, and an explicitly female-male couple at that. The development of the concept of 'household' in the 1994-96 test case broadened eligibility beyond the couple to people sharing a household. Although there are reasons to critique the decision in the test case to create this separate category for caring relations identified and labelled as non-family — including same-sex relations and Indigenous caring relations — the recognition of 'household' did disrupt to some degree the couple as the ideal care relation. 'Household' recognises that people provide care and support to each other outside the couple, albeit within a shared residence. Some state jurisdictions have taken a broader vision of care relations than 'household', namely the South Australian inclusion of 'any other person who is dependent on the person's care'.⁸² Notably, though, the growing inclusion of same-sex couple relationships, and often as cohabitants, ensures that the couple remains at the fore at the state level, and in the new *Fair Work Act* provisions.

The Normativity of One Carer (and One Worker)

To date, the parental leave schemes have strongly reinforced a model of caring based on one adult being the main or sole carer for the baby or infant, rather than caring and labour market work being shared more evenly and/or widely between adults. This model is seen in two interacting legal rules. The first rule imposes constraints on the amount of parental leave that the two adults can take at the same time as each other. In some sets of legal entitlements, the permissible length of concurrent leave is very short — a maximum of one week following birth and three weeks from an adoption placement.⁸³ Other jurisdictions provide even less to employees — a maximum of one week of concurrent leave following both birth and adoption.⁸⁴ The 2005 test case extended the time period to a right to request a maximum of eight weeks' concurrent leave following birth or adoption; an employer may reject such a request on 'reasonable' business grounds only.⁸⁵ The *Fair Work Act* adopts a middle path, permitting a maximum of three weeks of concurrent leave in relation to both birth and adoption.⁸⁶ Apart from these various

⁸² *Fair Work Act 1994 (SA)*, s 4 (definition of 'family').

⁸³ See, for example, *Parental Leave Case (No 2)* (1990) 39 IR 344 at 353-54, 357, 360; *Workplace Relations Act*, ss 282(1)(a), 284, 300(1)(a), 302; *Industrial Relations Act 1996 (NSW)*, ss 55(3)(a), 55(4)(a).

⁸⁴ *Fair Work Act 1994 (SA)*, Sch 5; *Industrial Relations Act 1984 (Tas)*, Sch 2; *Minimum Conditions of Employment Act 1993 (WA)*, s 33(3).

⁸⁵ *Parental Leave Test Case* (2005) 143 IR 245 at 332-33.

⁸⁶ *Fair Work Act*, s 72(5).

provisions for concurrent leave, the legal framework has contemplated — and indeed required — that only one of the adults entitled to parental leave will be on leave at the one time.⁸⁷

The second rule of relevance is the requirement in several sets of provisions that parental leave is for the purpose of being the 'primary caregiver' of the baby or infant.⁸⁸ Some provisions define that concept as being 'a person who assumes the principal role of providing care and attention to' the child.⁸⁹ Notably, the *Fair Work Act* encompasses a potentially more flexible approach in providing that parental leave arises if 'the employee has or will have a responsibility for the care of the child'.⁹⁰ The new wording does not seem to necessitate that the employee must be the only or primary caregiver to the child. As against that, though, the Act continues the idea of only one member of an 'employee couple' being on leave at the one time, outside the permitted short periods of concurrent leave.⁹¹

Putting to one side the new provisions in the *Fair Work Act*, these jurisdictions that constrain concurrent leave and require that the person on parental leave be the 'primary caregiver' assume a particular type of caring relationship — that one adult in the couple takes the sole, or at least main, role in caring for the baby or infant and for that reason does not engage in labour market work for a time. The rules inscribe that model, rather than a model of two or more adults sharing the care (and presumably reduced labour market engagement), without one of them being the principal caregiver as such. This reinforces a couple relationship of two adults comprising one (full-time) carer on parental leave and one wage earner, rather than fluid relationships of shared caring and wage-earning. The *Fair Work Act*, with its apparent abandonment of the 'primary caregiver' rule, may support more diverse forms of work and care than articulated to date. This remains to be seen.

In contrast to the parental leave provisions, the legal rules relating to personal/carer's leave have been more ambivalent about the need for the employee taking the leave to be the primary caregiver. In the 1994–96 test case, the Australian

⁸⁷ See, for example, *Parental Leave Case (No 2)* (1990) 39 IR 344 at 353–54, 357–58, 360–61; *Parental Leave Test Case* (2005) 143 IR 245 at 339; *Workplace Relations Act*, ss 285, 303; *Fair Work Act 1994* (SA), Sch 5; *Industrial Relations Act 1999* (Qld), s 25; *Industrial Relations Act 1996* (NSW), s 60; *Industrial Relations Act 1984* (Tas), Sch 2; *Minimum Conditions of Employment Act 1993* (WA), s 33(3). See also *Fair Work Act*, s 72(3)(b), (4)(b).

⁸⁸ See, for example, *Parental Leave Case (No 2)* (1990) 39 IR 344 at 357, 360; *Parental Leave Test Case* (2005) 143 IR 245 at 340–41; *Workplace Relations Act*, ss 277, 282(1)(b), 300(1)(b); *Industrial Relations Act 1999* (Qld), ss 18(2)(b), 31; *Industrial Relations Act 1996* (NSW), s 55(3)(b), (4)(b).

⁸⁹ *Parental Leave Case (No 2)* (1990) 39 IR 344 at 357, 360; *Workplace Relations Act*, s 263. The following sets of provisions (which include this requirement) do not define the concept of 'primary caregiver': *Parental Leave Test Case* (2005) 143 IR 245; *Industrial Relations Act 1999* (Qld); *Industrial Relations Act 1996* (NSW).

⁹⁰ *Fair Work Act*, s 70(b). If the employee 'ceases to have any responsibility for the care of the child' during unpaid parental leave, then the employer may require (by written notice) that the employee return to work: s 78. Unfortunately, the Explanatory Memorandum for the Bill does not provide any explication of this change in s 70(b).

⁹¹ *Fair Work Act*, s 72.

Chamber of Commerce and Industry (ACCI) argued that it would be consistent with the earlier 1990 test case on paternity leave to provide that only one employee should take leave to care for the same family member at the one time. The ACTU opposed this, arguing that there may be circumstances where leave for two employees in relation to the same ill person would be appropriate. The union cited the example of two employee-parents who both take leave to attend to their critically ill child in hospital. The commission expressed the view that both the ACCI position and the ACTU position had merit, and adopted the following provision: 'In normal circumstances an employee shall not take carer's leave under this clause where another person has taken leave to care for the same person.'⁹² The commission expressed the opinion that the opening words of 'In normal circumstances' would allow sufficient flexibility to address the concern raised by the ACTU.⁹³

Since the late 1990s, the federal jurisdiction on personal/carer's leave has not continued with this 'normal circumstances' constraint, and has indeed been silent on this matter of two employees taking leave to care for the same person.⁹⁴ The jurisdictions have merely required that the leave be taken for the purpose of providing care and support to a person who needs the employee's care and support.⁹⁵

Some state provisions have constituted a default position of one employee only on leave at the one time to care for a person, while others have not.⁹⁶ For example, Queensland imposed a strict rule in its statutory scheme from 1999 that 'an employee can not take carer's leave if another person has taken leave to care for the same person'.⁹⁷ The current provision in Queensland is more flexible, providing that: 'An employee can not take carer's leave if another person has take leave to care for the same person unless there are special circumstances requiring more than one person to care to the person.'⁹⁸ The New South Wales jurisdiction established a default position of only one employee on leave at the one time, by providing that: 'In normal circumstances an employee shall not take carer's leave ... where another person has taken leave to care for the same person.'⁹⁹

⁹² *Personal/Carer's Leave Test Case — Stage 2 — November 1995* (1995) 62 IR 48 at 59.

⁹³ *Personal/Carer's Leave Test Case — Stage 2 — November 1995* (1995) 62 IR 48 at 59.

⁹⁴ The 'normal circumstances' constraint was continued in the *Award Simplification Decision* (1997) 75 IR 272 at 319 (proposed clause 31.5.1), but discontinued in sets of provisions after this date, including the *Supplementary Award Simplification Decision* (1998) 44 AILR 3-893, *Parental Leave Test Case* (2005) 143 IR 245, *Workplace Relations Act*, and *Fair Work Act*.

⁹⁵ See *Personal/Carer's Leave Test Case — Stage 2 — November 1995* (1995) 62 IR 48 at 58; *Personal/Carer's Leave Test Case — Stage 2 — March 1996* (1996) 66 IR 138 at 146; *Parental Leave Test Case* (2005) 143 IR 245 at 343; *Workplace Relations Act*, ss 244(b), 250(1); *Fair Work Act*, ss 97(b), 102.

⁹⁶ For example, the *Fair Work Act 1994* (SA) and the *Minimum Conditions of Employment Act 1993* (WA) do not impose this constraint or impose a default position of this form.

⁹⁷ *Industrial Relations Act 1999* (Qld), s 39(3) (as enacted).

⁹⁸ *Industrial Relations Act 1999* (Qld), s 39(4).

⁹⁹ *Family Leave Test Case (NSW)* (1995) 59 IR 1 CI F.1.2.

Parental leave contains a strong vision of a two-adult couple comprising one carer (and one wage earner). Essentialist assumptions about a woman's role in nurturing babies and infants and a man's role as a wage earner, and the natural complementarity of those different functions, appear to percolate through the history of these legal rules. Personal/carer's leave is, by contrast, more ambivalent about the primary caregiver concept, providing currently at the federal level and in some state jurisdictions that two or more adults may take leave to care for the same person at the one time. These jurisdictions recognise that employees can engage in shared short-term caring, and do so without one of them being the primary caregiver as such. They countenance and reinforce more diverse forms of caring, with the greater flexibility in relation to shorter term personal/carer's leave underlining the rigidity of the model reinforced through the rules of parental leave.

Conclusions

This article has sought to explore the normative underpinnings of two main sets of employment entitlements in Australia to take leave for the purpose of providing care and support to another person. Those entitlements were parental leave following birth or adoption of a child, and personal/carer's leave in order to attend to the short-term care needs of another person, where that person is a member of the employee's 'immediate family' or 'household'. The rules examined provide the minimum standards on these topics, although for many employees they represent the actual legal entitlement operative in their work arrangements.

The exploration has shown that these legal rules are built on, and in turn reinforce, a strong model of a couple as the natural caregiving unit. This is particularly so in relation to parental leave following the birth or adoption of a child, which also contains a model of a couple in which one adult is the primary caregiver of the baby or infant, rather than diverse forms of caring (and presumably labour market engagement). Until recently, law's couple has been a female-male couple, although more limited recognition was given to same-sex relationships and Indigenous relationships of caring through the 'household' category developed in relation to personal/carer's leave in 1994-96. The explicit extension of both parental leave and personal/carer's leave entitlements to same-sex couples at state-level over the past five years or so, and recently at the Commonwealth level, disturbs the gendered character of the couple that holds law's gaze, even as it reinforces the two-adult couple as the ideal caregiving unit, especially in relation to babies and infants. This two-adult couple is less strong in the personal/carer's leave provisions, because the legal framework recognises the 'household' as a caring unit, although certainly it is revealed there as well through the concept of 'immediate family', and in the way that relationships have been labeled in those developments. In short, a two-adult couple has been, and remains, the ideological gatekeeper to employment law entitlements in Australia in relation to the care of others.

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Industrial Relations Act 1999 (Qld)

Industrial Relations Act 1996 (NSW)

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Sex Discrimination Act 1984 (Cth)

Same-Sex Relationships' (Equal Treatment in Commonwealth Laws — General Law Reform) Act 2008 (Cth)

Statutes Amendment (Domestic Partners) Act 2006 (SA)

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Workplace Relations Amendment (Work Choices) Act 2005 (Cth)

Chapman, A. (2010) Industrial Law, Working Hours, and Work, Care, and Family
Monash University Law Review, v. 36(3), pp. 190-216.

NOTE:

This publication is included on pages 151-177 in the print copy
of the thesis held in the University of Adelaide Library.

CHAPTER 4:

ANTI-DISCRIMINATION LAW, WORK AND CARE

4.1 Introduction

Chapter 4 contains one paper on anti-discrimination law, work and care:

- ‘Australian Anti-Discrimination Law, Work, Care and Family’ (Working Paper No 51, Centre for Employment and Labour Relations Law, University of Melbourne, January 2012) 41pp.

This January 2012 working paper examines Commonwealth, State and Territory anti-discrimination law in Australia as it has developed in relation to responsibilities to care for others, and critically evaluates whether these legal initiatives adequately recognize diversity in work and care practices. Its contribution to the thesis lies in a number of matters. Importantly, it documents the expansion over the years of attributes relating to family responsibilities, carer responsibilities or status, in addition to others such as sex, breastfeeding and the status of being a parent. It also notes the recognition in the Northern Territory and Victorian jurisdictions of an expansive form of discrimination as an unreasonable failure to accommodate a person’s care responsibilities, in addition to the use of human rights considerations in some jurisdictions. In this way the paper reveals a level of support for diversity in work and care practices through prohibiting workers with care responsibilities, or another attribute such as breastfeeding, from being discriminated against in their work arrangements.

However the focus of the paper lies in detailing the ways in which the various schemes have been inadequate in the recognition of diversity, and this is the paper’s main contribution to the thesis. Substantive limitations are referred to, including the range of exceptions and exemptions found in the various schemes. Close attention is

paid to anti-discrimination law's separation of work from care. The paper reveals how the different schemes construct their vision of the public sphere of employment and work in ways that confirm that care is separate to, and cannot count as, work under the statutes. The jurisdictions' production of an unencumbered benchmark worker without care responsibilities is also examined, revealing a second way in which anti-discrimination law separates work from care. A third dimension of the separation of work from care is found in the value of formal equality, which gives carers access only to the work arrangements of the unencumbered benchmark worker.

Shortcomings in the recognition of diverse work and care arrangements are also found in the definitions and concepts of care used in the different anti-discrimination statutes. The particularities of gender, race and sexual orientation are examined. The statutes and case decisions tend to gender care as female (and work as male), with the care responsibilities of men, people in queer communities and people in Indigenous communities less well protected. Intersectional claims involving race and sexual orientation may have been distorted or indeed erased in the case decisions, suggesting that care may have been constituted as Anglo-Australian and as heterosexual. Although all anti-discrimination schemes recognize same sex couple relationships, only those that comprise a marriage-like two adult couple are likely to count for these purposes. Notably, this requirement parallels entitlements to unpaid parental leave discussed in the *Griffith Law Review* article (thesis chapter 3). In these various ways the working paper documents how anti-discrimination legal initiatives designed to address collision between work and care fail to adequately recognize diverse work and care arrangements.

The examination of anti-discrimination law and diversity contained in this working paper is further developed by an analysis of the reasonable accommodation provisions in the Victorian anti-discrimination jurisdiction, in 'Reasonable Accommodation, Adverse Action and the Case of Deborah Schou' (thesis chapter 5). It is also supplemented by a legislative note on these reasonable accommodation provisions, 'Care Responsibilities and Discrimination in Victoria: The Equal

Opportunity Amendment (Family Responsibilities) Act 2008 (Vic)' (thesis appendix).

4.2 The Publication

- 'Australian Anti-Discrimination Law, Work, Care and Family' (Working Paper No 51, Centre for Employment and Labour Relations Law, University of Melbourne, January 2012) 41pp.

Chapman, A. (2012) Australian Anti-Discrimination Law, Work, Care and Family (Working Paper No 51), *Centre for Employment and Labour Relations Law*, University of Melbourne, 41pp.

NOTE:

This publication is included on pages 183-222 in the print copy of the thesis held in the University of Adelaide Library.

CHAPTER 5:

WORK AND CARE ACROSS LAW'S DISCIPLINARY BOUNDARIES

5.1 Introduction

For most of the 20th Century the traditions of industrial law, anti-discrimination law and the social security system were seen in Australia to occupy separate realms, each with a focus on different concerns. However the spheres were never sealed from each other, and intersections between them existed.¹ With the enactment of the *Fair Work Act 2009* (Cth) ('*FW Act*') and the *Paid Parental Leave Act 2010* (Cth) ('*PPL Act*'), the boundaries between them have become more blurred.²

Chapter 5 contains three papers that examine legal initiatives on work and care that respectively cross the categories of industrial law and anti-discrimination law, and industrial law and social security. They are:

- 'Reasonable Accommodation, Adverse Action and the Case of Deborah Schou' (2012) 33(1) *Adelaide Law Review* (forthcoming).
- 'Requests for Flexible Work under the Fair Work Act' (unpublished manuscript, January 2012).
- 'The New National Scheme of Parental Leave Payment' (2011) 24 *Australian Journal of Labour Law* 60-70.

The first article, forthcoming in the 2012 *Adelaide Law Review*, sits at the boundaries of industrial law and anti-discrimination law. It uses a hypothetical factual scenario

¹ See eg, Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work* (Oxford University Press, 2nd ed, 2011) 441-4; Rosemary Hunter, 'Representing Gender in Legal Analysis: A Case/Book Study in Labour Law' (1991) 18 *Melbourne University Law Review* 305; Margaret Thornton, 'Discrimination Law/Industrial Law: Are They Compatible?' (1987) *The Australian Quarterly* 162.

² See eg, Owens, Riley and Murray, above n 1, 441-452.

drawn from the well-known case of *Schou v Victoria*,³ to explore how more recent reforms in the law potentially operate in relation to those facts. The legal initiatives explored are: a claim of discrimination in the form of a failure to provide reasonable accommodation under the *Equal Opportunity Act 2010* (Vic) (also discussed in ‘Australian Anti-Discrimination Law, Work, Care and Family’, thesis chapter 4); an adverse action claim under the *FW Act* (not previously explored in the thesis); and, thirdly the right to request mechanism in the *FW Act* (not previously explored in the thesis).

The paper makes a number of contributions to the thesis. First, it documents the further expansion in work and care legal developments through the two 2009 *FW Act* mechanisms, noting how these schemes interact with each other and with existing legal entitlements regarding work and care. Secondly, it acknowledges that these new mechanisms, along with the Victorian reasonable accommodation provision, recognize diversity in work and care practices in the sense of prohibiting discrimination and adverse action on the grounds of a person’s care responsibilities, in addition to providing employees with a right to request a change in work arrangements to better accommodate certain care responsibilities. Thirdly, while these mechanisms represent a further move away from the *Harvester* model,⁴ the article uncovers important substantive limitations in all three new schemes. These include the uncertain interpretation of the test of reasonableness articulated in the Victorian provisions, the preconditions of service in the right to request mechanism, and the unclear meaning of several key concepts in the adverse action provisions, such as the test of ‘discriminates between’ and the exemption in relation to action that is ‘not unlawful under’ anti-discrimination law.⁵ These aspects undermine the recognition of diverse work and care arrangements, as does the lack of a direct enforcement mechanism in relation to the *FW Act* right to request scheme.

³ *Schou v Victoria* (2000) EOC 93-100, 93-101; *Victoria v Schou* (2001) 3 VR 655; *Schou v Victoria* (2002) EOC 93-217; *Victoria v Schou* (2004) 8 VR 120.

⁴ *Harvester* refers to *Ex parte H. V. McKay* (1907) 2 CAR 1.

⁵ *FW Act* s 342(1) item 1(d); s 351(2)(a).

Lastly, and importantly, this *Adelaide Law Review* article reveals how the definitions and concepts of care used in the different schemes may undermine the adequacy of the legal mechanism in recognizing diverse work and care practices. For example, the Victorian provisions regarding care responsibilities recognize only a relatively high level of care provided on an ongoing basis. The adverse action provisions protect on the basis of a ground identified (but not defined) as ‘family or carer’s responsibilities’. As the *Adelaide Law Review* article investigates, it is unclear how that *FW Act* concept will be interpreted.

Interestingly, and in contrast, the new federal right to request entitlement in the *FW Act* contains an explicitly broader drawing of care, requiring only that it be by a ‘parent’ or alternatively by a person who ‘has responsibility for the care’ of a child under school age or a child with a disability under the age of 18 years. Although the care responsibilities that are recognized are limited to those groups of children, and do not cover for example adults in need of care, notably the rules do not contain a model of a two adult couple relationship. This contrasts with entitlements to leave (‘Employment Entitlements to Carer’s Leave: Domesticating Diverse Subjectivities’, thesis chapter 3), and likely understandings in working time limits as well (‘Industrial Law, Working Hours, and Work, Care, and Family’, thesis chapter 3). Nonetheless, all three legal mechanisms are marked by a constrained recognition of care, in one form or another.

The lack of a direct enforcement mechanism attaching to the right to request scheme under the *FW Act*, discussed in the *Adelaide Law Review* article, is explored in greater depth in the second paper in this chapter – the 2012 unpublished manuscript, ‘Requests for Flexible Work under the Fair Work Act’.⁶ This paper investigates the scope of the subsidiary rules in the request mechanism that are directly enforceable, and how those might be interpreted to build a fuller enforcement regime. In this way

⁶ A non-government Bill proposes to enact a full enforcement mechanism into the federal right to request regime: Fair Work Amendment (Better Work/Life Balance) Bill 2012 (Cth). At the time of writing it seems unlikely that this Bill will be enacted.

the paper investigates the extent to which this legal initiative has capacity to bring care into work considerations in an enforceable manner.

The third paper in this chapter – the 2011 *Australian Journal of Labour Law* note – provides an examination of the national scheme of parental leave payment enacted with the *PPL Act*, and which commenced operation on 1 January 2011. This scheme sits on a continuum between social security law and industrial law. It provides an entirely tax payer funded payment, although the payment is generally administered by employers under the authority and supervision of the Family Assistance Office in the Department of Families, Housing, Community Services and Indigenous Affairs. The parental leave payment scheme intersects with the *FW Act* in complex ways, in particular in relation to the legal entitlement to unpaid parental leave (examined in ‘Uncovering the Normative Family of Parental Leave: Harvester, Law and the Household’ and ‘Employment Entitlements to Carer’s Leave: Domesticating Diverse Subjectivities’, both in thesis chapter 3). This paper in the *Australian Journal of Labour Law* highlights how the scheme is an important addition to the field of Australian legal initiatives designed to address conflict between work and care.

The paper also explores how the scheme provides for the recognition of diversity. In important respects the system of payment under the *PPL Act* reflects a more genuine attempt to take account of diverse work and care arrangements than is contained in the unpaid parental leave provisions in the *FW Act*. For example, the *PPL Act* provides that claims can be made in (undefined) ‘exceptional circumstances’. No such catch all clause exists in the unpaid parental leave provisions in the *FW Act*. This open-ended criterion of ‘exceptional circumstances’ was constructed with the explicit intention of enabling claims outside biological and two parent couples to be granted. As noted in the paper, care arrangements in Indigenous communities were identified as potentially covered by this category. Although recognizing broader care relationships in this respect, the paper notes that the parental leave payment scheme nonetheless continues to reiterate a primary care-giver model, and in this way imposes constraints on the extent of diversity recognized in this legal entitlement.

Two developments regarding parental leave payments have occurred since the paper was published in the 2011 *Australian Journal of Labour Law*. The first is that the *Paid Parental Leave Rules 2010* (Cth) ('*PPL Rules*') have been made. They further articulate the meaning of 'exceptional circumstances', and do so in ways that retain the potentially broad application of the provision.⁷ This confirms the scope of the scheme to recognize diverse work and care arrangements, including those in Indigenous communities.

The second development is the proposed 'dad and partner pay' scheme, contained in the Paid Parental Leave and Other Legislation Amendment (Dad and Partner Pay and Other Measures) Bill 2012 (Cth).⁸ The objective of the new payment is stated to be to assist fathers and other partners to take more time off work to support birth mothers and primary carers, and to spend time bonding with their baby or adopted child.⁹

The 2012 Bill will amend the *PPL Act* to provide eligible fathers and partners of the birth mother or primary carer with two weeks of 'dad and partner pay' following the birth or adoption of a child. The new payment will take effect in relation to a child born or adopted from 1 January 2013, with the amount of payment set at the national minimum wage. Similar to the paid parental leave scheme, 'dad and partner pay' will not provide an entitlement to leave from work. That leave will need to be sourced elsewhere, presumably in most instances in the statutory standard of unpaid parental leave under the *FW Act*. 'Dad and partner pay' will have the same eligibility requirements as the current parental leave payment scheme in terms of the residency requirement, the means test, and the work test.

⁷ *Paid Parental Leave Rules 2010* (Cth) Division 2.4.1.

⁸ Introduced into the House of Representatives and read a first time on 22 March 2012. See also Department of Families, Housing, Community Services and Indigenous Affairs, 'Paid Parental Leave: Dad and Partner Pay – A Policy Statement from the Australian Government September 2011' (Policy Statement, Commonwealth of Australia, September 2011); Erin McCarthy, Elise Jenkins and Andrew Stewart, *Parental Leave: A User-Friendly Guide* (Thomson Reuters, 2012) [1.390], [3.150].

⁹ Paid Parental Leave and Other Legislation Amendment (Dad and Partner Pay and Other Measures) Bill 2012 (Cth) Schedule 1, Part 1, clause 8; Explanatory Memorandum, Paid Parental Leave and Other Legislation Amendment (Dad and Partner Pay and Other Measures) Bill 2012 (Cth) 2; Department of Families, Housing, Community Services and Indigenous Affairs, above n 8, 4.

Although the concept of a two adult couple, whether comprised of people of a different sex or of the same sex, resonates throughout the new ‘dad and partner pay’ scheme, the 2012 Bill does provide potential for a broad recognition of diverse work and care arrangements in Indigenous care networks, and beyond the two adult couple. For example, the Bill enables claims for ‘dad and partner pay’ to be made by biological fathers (who are not the partner of the birth mother or primary carer), and by other claimants who satisfy the special circumstances prescribed by the *PPL Rules*.¹⁰ This latter category reflects the concept of ‘exceptional circumstances’ under the parental leave payment scheme established in the *PPL Act* and, like the parental leave payment scheme, is broad in its potential to recognize diverse work and care arrangements.

5.2 The Publications

- ‘Reasonable Accommodation, Adverse Action and the Case of Deborah Schou’ (2012) 33(1) *Adelaide Law Review* (forthcoming).
- ‘Requests for Flexible Work under the Fair Work Act’ (unpublished manuscript, January 2012).
- ‘The New National Scheme of Parental Leave Payment’ (2011) 24 *Australian Journal of Labour Law* 60-70.

¹⁰ Paid Parental Leave and Other Legislation Amendment (Dad and Partner Pay and Other Measures) Bill 2012 (Cth) Schedule 1, Part 1, item 67 (proposed s 115DD of the *Paid Parental Leave Act 2010* (Cth)).

REASONABLE ACCOMMODATION, ADVERSE ACTION AND THE CASE OF DEBORAH SCHOU

ANNA CHAPMAN*

This article examines three relatively new legal mechanisms designed to assist workers with care responsibilities. These are a claim of discrimination in the form of a failure by an employer to provide reasonable accommodation under the Equal Opportunity Act 2010 (Vic), as well as two legal mechanisms under the Fair Work Act 2009 (Cth). Those federal avenues involve a request for changed work arrangements, and the capacity to make a claim for redress in relation to adverse action. The well-known case of Deborah Schou is used as a hypothetical to explore possible meanings and issues within, and between, the different legal frameworks. Ms Schou sought to be permitted to work at home two days a week, whilst her young son recovered from a temporary medical ailment. Ultimately Schou was not successful in her litigation. The article inquires whether she would now be successful under the three new mechanisms. The examination reveals both possibilities for redress, as well as significant complexity and uncertainty.

In 1996 Deborah Schou requested permission from her employer to work at home two days a week. She sought this as a temporary arrangement whilst her young son recovered from recurrent chest infections, childhood asthma and separation anxiety. The medical advice was to the effect that he would likely grow out of these difficulties within a year or so, as indeed he did. Although Ms Schou's employer, the State of Victoria, initially agreed to her request, eleven weeks later the necessary technology in the form of a modem had not been installed, and finding the conflict between her work and care responsibilities at a crisis point, she resigned.

Schou lodged a complaint of discrimination under the *Equal Opportunity Act 1995* (Vic) ('*EOA 1995* (Vic)'), alleging discrimination on the basis of parental status and status as a carer.¹ Schou's case turned on the interpretation and application of the indirect discrimination provisions in the *EOA 1995* (Vic), and in particular whether her employer's requirement that she attend on site for all working days was 'not

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¹ The original complaint also relied on the *Equal Opportunity Act 1984* (Vic) in respect to earlier incidents. In addition to parenting and carer grounds, the original complaint also alleged discrimination on the ground of 'industrial activity'. All claims under the 1984 Act were dismissed, and all claims relating to 'industrial activity' were also dismissed in an early hearing: *Schou v Victoria* (2000) EOC 93-100.

reasonable' in the circumstances.² After two tribunal decisions in her favour,³ a Supreme Court decision against her,⁴ the Victorian Court of Appeal ultimately dismissed her complaint in its entirety.⁵

The course of the Schou litigation was closely followed over the seven years it ran, with the case coming to occupy a central place in the Australian debate regarding work and care conflict, especially as experienced by women workers with young children.⁶ Early writings expressed excitement at the radical potential of the first tribunal decision in Schou's favour, only to have that turn to dismay and exasperation when the decisions of the Victorian Supreme Court and then Court of Appeal were handed down. At the least the Schou litigation raised doubt about the efficacy of the indirect discrimination provisions as they stood at that time in the *EOA 1995 (Vic)*. More broadly it may continue to raise doubts about the ability of law to challenge long-held and taken-for-granted understandings of work arrangements, including (as here) place of work.

Numerous changes to the legislative landscape regulating conflict between work and care have occurred since the final decision in Schou was handed down in 2004. The *EOA 1995 (Vic)* was itself amended in 2008 to recognize a new type of discrimination in the form of a failure by an employer to make reasonable accommodation for the responsibilities that an employee has as a parent or carer.⁷ This amendment may have been prompted by the final decision in Schou.⁸ Only a few anti-discrimination statutes in Australia provide an obligation of accommodation

² *EOA 1995 (Vic)* s 9(1)(c). The Act provided that indirect discrimination arose where an employer had imposed a work requirement with which the complainant could not comply, and a higher proportion of people not of the complainant's group could comply, in circumstances in which the imposition of the requirement was not reasonable.

³ *Schou v Victoria* (2000) EOC 93-100, 93-101; *Schou v Victoria* [2002] VCAT 375 (24 May 2002).

⁴ *Victoria v Schou* [2001] VSC 321 (31 August 2001).

⁵ *Victoria v Schou* [2004] VSCA 71 (30 April 2004).

⁶ See eg, Therese MacDermott and Rosemary Owens, 'Equality and Flexibility for Workers with Family Responsibilities: A Troubled Union?' (2000) 13 *Australian Journal of Labour Law* 278; K Lee Adams, 'A Step Backwards in Job Protection for Carers' (2002) 15 *Australian Journal of Labour Law* 93; Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26 *Melbourne University Law Review* 325; Marilyn Pittard, 'The Dispersing and Transformed Workplace: Labour Law and the Effect of Electronic Work' (2003) 16 *Australian Journal of Labour Law* 1; Fiona Knowles, 'Misdirection for Indirect Discrimination' (2004) 17 *Australian Journal of Labour Law* 185; Belinda Smith and Joellen Riley, 'Family-friendly Work Practices and the Law' (2004) 26 *Sydney Law Review* 395; Margaret Thornton, 'Sex Discrimination, Court and Corporate Power' (2008) 36 *Federal Law Review* 31.

⁷ *EO Act 1995 (Vic)* s 13A, s 14A, s 15A, s 31A. These amendments were made by the *Equal Opportunity Amendment (Family Responsibilities) Act 2008 (Vic)*. See generally, Anna Chapman, 'Care Responsibilities and Discrimination in Victoria: The Equal Opportunity Amendment (Family Responsibilities) Act 2008 (Vic)' (2008) 21 *Australian Journal of Labour Law* 200.

⁸ In the second reading debate on the Equal Opportunity Amendment (Family Responsibilities) Bill some members of Parliament explicitly acknowledged the link between the new provisions and the Schou litigation: Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 2007, 3676 (Mr Clark); 3683 (Mr Wakeling).

on employers.⁹ These Victorian provisions were re-enacted in substantively identical terms in the new *Equal Opportunity Act 2010* (Vic) ('*EOA* (Vic)').¹⁰ They have moreover been bolstered by new legislative objectives in the 2010 Act which cite 'substantive equality' and refer to 'promoting and facilitating the progressive realization of equality'.¹¹ The general trajectory of the *EOA* (Vic) towards a substantive conception of equality is also confirmed in the new and broad positive duty on employers and other duty holders to 'take reasonable and proportionate measures' to eliminate discrimination 'as far as possible'.¹²

In addition to these developments in Victorian anti-discrimination law, the federal *Sex Discrimination Act 1984* (Cth) ('*SDA*') was amended in June 2011 to extend the protections for 'family responsibilities' to direct discrimination in relation to all aspects of employment.¹³ Prior to this, the family responsibilities provisions in the *SDA* were more narrowly drawn to cover only direct discrimination leading to dismissal from employment.¹⁴

Federal industrial legislation has also been reshaped around the issues of work, parents and care. The *Fair Work 2009* (Cth) ('*FW Act*') extended existing protections in the industrial sphere to provide redress in relation to 'adverse action' across all stages of employment, from hiring onwards, on various grounds including 'family or carer's responsibilities'.¹⁵ In addition, the 2009 Act introduced a new statutory mechanism for parents and carers to request a change in working arrangements in

⁹ See *Anti-Discrimination Act* (NT) s 24; *Equal Opportunity Act 1984* (SA) s 66(d). On the ground of disability, see *Disability Discrimination Act 1992* (Cth) ('*DDA*') s 5(2), s 6(2). A positive obligation on employers may be imposed by the *Anti-Discrimination Act 1977* (NSW) s 49V(4), s 49U, although this has not been tested in case decisions. In addition, in the context of indirect discrimination claims and the reasonableness component, the New South Wales tribunal has required employers to at least consider and sometimes to make reasonable efforts to accommodate an employee's request to alter her working arrangements: *Tleyji v The TravelSpirit Group Pty Ltd* [2005] NSWADT 294 (15 December 2005) [105]; *Reddy v International Cargo Express* [2004] NSWADT 218 (30 September 2004) [84].

¹⁰ *EOA* (Vic) s 17, s 19, s 22, s 32. Note also that the *EOA* (Vic) has altered the meaning of indirect discrimination in important respects: see footnote 12. The *EOA* (Vic) also imposes an obligation to make reasonable adjustments in relation to disability: s 20.

¹¹ *EOA* (Vic) s 3.

¹² *EOA* (Vic) s 15(2). See Part 3. However this duty cannot be enforced through a claim, but such issues may be the subject of an investigation conducted by Victorian Equal Opportunity and Human Rights Commission ('*VEO&HRC*'): s 15(3), (4). The *EOA* (Vic) also amended the meaning of indirect discrimination in important respects. The new provisions refer to the requirement 'disadvantaging persons' with an attribute, in a way 'that is not reasonable'. Notably the employer has the onus of establishing the reasonableness of the requirement. The new rules also provide a greater articulation of relevant factors in determining reasonableness. See *EOA* (Vic) s 9.

¹³ *SDA* s 7A. New provisions in relation to 'breastfeeding' were also enacted: s 7AA. The amendments were made to the *SDA* by the *Sex and Age Discrimination Legislation Amendment Act 2011* (Cth). Note that the federal government is proposing to consolidate federal anti-discrimination legislation: Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper*, September 2011.

¹⁴ *SDA* s 7A, s 14(3A) (now repealed).

¹⁵ *FW Act* s 351(1). These provisions commenced on 1 July 2009. They consolidate and expand upon the previous freedom of association protections and unlawful termination provisions in the previous *Workplace Relations Act 1996* (Cth) ('*WR Act*').

order to accommodate care responsibilities to young children and children with a disability.¹⁶ Although an employer is only entitled to refuse an employee request on 'reasonable business grounds',¹⁷ there are limits on the ability to challenge an employer's decision.

This article investigates the reasonable accommodation provisions in the *EOA* (Vic), and the ability to seek a remedy in relation to 'adverse action' under the *FW Act*. These two new grievance avenues are innovative and their scope is uncertain, and for those reasons an exploration is warranted. They are the obvious alternatives to each other. The request mechanism in the *FW Act* is also examined, as it is likely to be considered and utilized by an employee prior to recourse being made to either the *EOA* (Vic) or adverse action under the *FW Act*.¹⁸

It remains to be seen whether and how the potential of these relatively new mechanisms is realized. It is early days and case decisions under the Victorian accommodation provisions and the federal adverse action rules are only beginning to emerge. For this reason it is useful to use a hypothetical to explore the likely meaning and operation of the new mechanisms. The facts that emerge from the decisions in the Schou litigation are valuable for these purposes, and especially salient for two reasons. First, by today's standards Schou's request is a relatively modest one. It is now not unusual for employees to work remotely, including from home for part of the week.¹⁹ In addition, Schou was a full-time, long standing and senior employee,²⁰ and as such her claim for accommodation would be expected to be strong.²¹ Her circumstances represent a strong claim for legal protection, and so provide a litmus

¹⁶ *FW Act* Part 2-2 Div 4. These provisions commenced on 1 January 2010.

¹⁷ *FW Act* s 65(5).

¹⁸ Other possible legal avenues include a claim of indirect discrimination related to 'parental status or status of a carer' under the *EOA* (Vic), unfair dismissal under Part 3-2 of the *FW Act*, or less likely, direct discrimination on the attribute of 'family responsibilities' under the *SDA*. In contrast to the reasonable accommodation provisions in the *EOA* (Vic) and adverse action under the *FW Act*, there is nothing particularly new or untested in these other avenues, and for that reason they are not explored in this paper.

¹⁹ Australian Bureau of Statistics, *6275.0 - Locations of Work, Nov 2008*, ABS, 2008. Although a growing number of public and private sector awards and agreements have provided for home based work from the early 1990s, the provisions tend to give employers much discretion as to whether to permit working from home in any particular case. Early award and agreement provisions from the early 1990s often specified that home based work was not a substitute for dependant care. See Marilyn Pittard, 'The Dispersing and Transformed Workplace: Labour Law and the Effect of Electronic Work' (2003) 16 *Australian Journal of Labour Law* 69; Marilyn Pittard, 'Rethinking Place of Work: Federal Labour Law Framework for Contemporary Home-Based Work and Its Prospects in Australia' in Jill Murray (ed), *Work, Family and the Law* (Federation Press, 2005) 148.

²⁰ As an employee of the Victorian public sector, Schou is covered by the *FW Act*, whereas public sector employees elsewhere in Australia are generally not. See n 57.

²¹ Joo Cheong Tham, 'Towards an Understanding of Standard Employment Relationships under Australian Labour Law' (2007) 20 *Australian Journal of Labour Law* 123; Sara Charlesworth, 'The Sex Discrimination Act: Advancing Gender Equality and Decent Work?' in Margaret Thornton (ed), *Sex Discrimination In Uncertain Times* (ANU E Press, 2010) 133, 137-8.

test. If these new legal mechanisms are not able to provide a modern day Schou²² with accommodation and assistance, what hope is there for the vast numbers of women parents working in vulnerable sectors of the labour market, who are engaged in the private sector by medium and small businesses, and in insecure part-time and casual work?²³

The *EOA* (Vic) failure to accommodate claim and the *FW Act* adverse action framework provide alternative and distinctive paths for grievances.²⁴ Time frames in which to lodge a claim vary between the two jurisdictions,²⁵ as does the range of dispute resolution processes through which a claim potentially proceeds,²⁶ and the remedies that may be ordered.²⁷ In addition, a notable difference lies in the potential role of the Fair Work Ombudsman in enforcing the adverse action provisions in the *FW Act*.²⁸ In contrast, there is no analogous enforcement agency under the *EOA*

²² Throughout this article the pronoun she is used to refer to a modern day, or contemporary, Schou. This approach is taken for grammatical simplicity; it is not intended to suggest that a modern day Schou will necessarily be a woman, although empirically that person is likely to be.

²³ The first and only decision (at the time of writing) under the *EOA* (Vic) accommodation provisions involved a casual prison officer, and her casual status was a strong factor against her claim that her employer had unreasonably refused to accommodate her needs as a parent and carer. The Victorian Civil and Administrative Tribunal ('VCAT') determined that 'the very nature of casual employment which is what Ms Richold is offered by the State grants the fullest possible flexibility': *Richold v Victoria* [2010] VCAT 433 (14 April 2010) [42].

²⁴ Both the *FW Act* and the *EOA* (Vic) attempt to prevent multiple claims in relation to the same conduct: *FW Act* Part 6-1 Div 3; *EOA* (Vic) s 116. See *Freeman v Ambulance Victoria* [2011] FCA 1141 (6 October 2011). See also *Birch v Wesco Electrics (1966) Pty Ltd* [2012] FMCA 5 (9 January 2012).

²⁵ The time frame for lodging in relation to discrimination under the *EOA* (Vic) is generally 12 months (*EOA* (Vic) s 116(a)) whereas for adverse action involving a dismissal it is 60 days after the dismissal took effect (*FW Act* s 366), and for adverse action not involving a dismissal it is 6 years (*FW Act* s 544).

²⁶ Under the *EOA* (Vic) dispute resolution by the VEO&HRC is now voluntary (*EOA* (Vic) s 112) whilst VCAT conducts processes of 'compulsory conference' and 'mediation' followed by a hearing (*Victorian Civil and Administrative Tribunal Act 1988* (Vic) Part 4 Div 5, *EOA* (Vic) s 122). In relation to an adverse action claim involving dismissal, Fair Work Australia ('FWA') conducts a compulsory 'conference' (*FW Act* s 368) and a voluntary 'conference' where the claim does not involve dismissal (*FW Act* s 374). This may be followed by a hearing in the Federal Court or the Federal Magistrates Court: *FW Act* s 539(2) item 11.

²⁷ Whilst orders for damages under Victorian anti-discrimination law have 'generally been low' (Neil Rees et al, *Australian Anti-Discrimination Law: Text, Cases and Materials* (Federation Press, 2008) [11.4.18]), the adverse action provisions provide for a broad range of possible orders, including compensation, monetary penalty orders and importantly interim injunctions (*FW Act* s 545, s 546). Costs have generally been awarded less often in relation to Victorian anti-discrimination matters (Rees et al, [11.10.3]); adverse action litigation is expected in most instances to be costs-free (*FW Act* s 570).

²⁸ *FW Act* Part 5-2. See further, Rosemary Owens, Joellen Riley & Jill Murray, *The Law of Work* (Oxford University Press, 2nd edn, 2011) [12.4.2]-[12.4.3]; Breen Creighton & Andrew Stewart, *Labour Law* (Federation Press, 5th edn, 2010) [6.38]-[6.46]. See also Belinda Smith, 'Fair and Equal in the World of Work: Two Significant Federal Developments in Australian Discrimination Law' (2010) 23 *Australian Journal of Labour Law* 199; Therese MacDermott, 'Challenging Age Discrimination in Australian Workplaces: From Anti-Discrimination Legislation to Industrial Regulation' (2011) 34 *UNSW Law Journal* 182 at 206-7.

(Vic), where employees and others pursue their claims without the formal support of a public enforcement body.²⁹

Whilst the focus of the exploration in this article is on the legal rules themselves, it is acknowledged that the meaning and utility of all legal rules, including these new mechanisms, is shaped by the context in which they operate. This includes the dynamics of individual work relations and broader cultural understandings and values of work, care and gender. Also relevant and important is the impact of other legal mechanisms such as the contract of employment, and industrial regulation in the form of National Employment Standards, enterprise agreements and modern awards under the *FW Act*. These will all shape the meaning of the grievance mechanisms of discrimination and adverse action as they operate. As there is no full and direct enforcement mechanism attached to the request mechanism under the *FW Act*, the dynamics of individual work contexts and the broader landscapes of normative understandings regarding work and care may play an even greater role in shaping the meaning of the request provisions, as operationalised in work situations.

The paper first sets out the background and circumstances of Schou's case, as revealed through the eight decisions in the litigation. What is remarkable in this material is the proactive and creative efforts of Schou, under very stressful circumstances, in trying to find a workable solution for both herself and her employer. Also remarkable is the quite unreceptive and passive approach of the Department. From there the article investigates some main questions that arise under the federal request mechanism. It then moves to consider a claim by a modern day Schou for discrimination in the form of a failure to make reasonable accommodation under the *EOA* (Vic), followed by an argument of adverse action under the *FW Act*.

1 SCHOU AND THE DEPARTMENT

Schou commenced employment with the Department of Victorian Parliamentary Debates, State of Victoria in 1979, working her way up from a trainee parliamentary reporter to a sub-editor.³⁰ The Department's function was (and remains) to produce Hansard, the record of parliamentary debates.³¹ The work of the Department's reporters and sub-editors was described as being 'highly skilled'.³² Sub-editors such as Schou were responsible to supervise and manage the work of reporters, through editing and liaising with them to produce the final version of Hansard.³³ The

²⁹ Whilst the *EOA 1995* (Vic) did require the VEO&HRC to assist complainants in formulating their complaints (s 106), that provision has been removed with the *EOA* (Vic).

³⁰ *Schou v Victoria* (2000) EOC 93-100 at 74,418-9. Although in *Schou v Victoria* [2002] VCAT 375 (24 May 2002) Duggan J stated that Schou commenced employment in 1977: [11]

³¹ Hansard is substantially a verbatim record of all parliamentary speeches and debates, and the work of Parliamentary Committees, although with obvious errors corrected and repetitions removed: *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [7]-[8].

³² *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [50].

³³ *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [50]-[51].

Department was relatively small, employing four sub-editors at the relevant time, and around a dozen permanent reporters plus some casual reporters.³⁴

The working patterns of Schou and her colleagues reflected the time imperatives involved in producing Hansard. Members of Parliament expected to receive an edited proof of debates within two to three hours of the debate occurring, and Parliament required a hard copy of Hansard by 8.30am on the day following the debate.³⁵

During the relevant period the Victorian Parliament sat in two sessions each calendar year, with each session being between six to ten weeks in duration. From 1994 sitting days were extended from 3 to 4 days per week so that in sitting weeks full-time staff in the Department (including Schou) usually worked around 45 hours over 4 days, although towards the end of the Parliamentary session working hours would reach 60 over the 4 days.³⁶ Daily hours were highly irregular. Staff did not usually work on Mondays. On Tuesdays and Wednesdays Schou would commence work between 10am to noon, and finish around 1am or 2am the following morning. On Thursdays she would commence around 10am and finish at around 8pm. Parliament did not sit on Fridays, and as a consequence Schou would usually finish for the week by 2pm or 3pm.³⁷ In contrast, during non-sitting weeks employees were required to work between around 10am – 4pm on three days of their choice, although on occasion the requirements of Parliamentary Committees would necessitate working particular days.

In 1994 when Parliamentary sitting days increased to 4 a week Schou sought to change her employment from full-time to part-time. Her request was met by her supervisor asking her to ‘hold on’ and ‘stick it out’ until the end of the current session, after which sitting days were expected to revert to 3 days per week.³⁸ Two years later, in a routine interview with her supervisor, Schou spoke of the recurrent illnesses that her pre-school age son was experiencing, and the medical prognosis that he was expected to grow out of those difficulties within a year or so.³⁹ Schou requested that for this reason she be permitted to work part-time until his health improved. She was told in response to prepare some part-time work options for her supervisor’s consideration. Schou (and two other employees) put together such a proposal, and engaged an industrial negotiator to pursue the matter on their behalf with the Department. After around six months those discussions with the Department

³⁴ Hansard was a relatively small department. In addition to reporters and sub-editors, there were two Assistant Chief Reporters and a Chief Reporter who was the Head of the Department. There were two administrative staff and a clerk: [2004] VSCA 71 (30 April 2004) [12].

³⁵ *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [9].

³⁶ *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [14].

³⁷ *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [15].

³⁸ VCAT determined that Schou did not pursue her request to move to part-time employment, and so her request in this regard lapsed or was withdrawn. On this basis VCAT dismissed this aspect of her complaint: *Schou v Victoria* (2000) EOC 93-100 at 74,423.

³⁹ *Schou v Victoria* (2000) EOC 93-100 at 74,423. It appears from the decisions that in 1996 Schou’s son was of pre-school age, as in November 1993 she returned from maternity leave following his birth: *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [17].

stalled.⁴⁰ Schou then requested 12 months leave without pay, but this did not proceed.⁴¹

At this point Schou raised the possibility of a new arrangement. This involved continuing in full-time employment but being permitted to work from home via modem on Thursdays and Fridays on sitting days when her son was sick.⁴² This became known in the various decisions as the modem proposal. In August 1996 Schou's supervisors agreed that the modem proposal was the best course and would be implemented. This was approved by the Chief Reporter (who was Head of Department). Other staff were advised of the decision and arrangements were made with the IT section for the installation of the necessary technology.⁴³ Eleven weeks later the modem had not been installed and Schou resigned.⁴⁴ The evidence of Schou's supervisors was that they knew that her situation had reached a 'crisis point' and that if the modem was not installed within a reasonable time she would likely resign.⁴⁵

It is hard to imagine that Schou could have done more to explore the options with her employer over the years that were involved. She went to considerable lengths to find a workable solution for herself and the Department. It was she and her colleagues who produced the part-time work proposal, and engaged a professional negotiator to confer with the Department. It was she who initiated the options of 12 months leave without pay, and the modem proposal. The Department showed itself to be highly passive in the management of this issue. It is as if the Department saw this as solely Schou's problem, and not one that the Department might play a role in managing for their mutual benefit. Notably, the Department demanded and received from its employees flexibility to meet its needs, requiring them to work up to 45 (and sometimes 60) hours over 4 days, whilst largely refusing even to countenance flexibility in terms that would assist employees.

⁴⁰ VCAT took the view that the modem proposal had superseded the part-time work proposal, and that the Department had not as such rejected the part-time work proposal. On this basis Schou's claim that the Department had rejected her proposal for part-time work was dismissed: *Schou v Victoria* (2000) EOC 93-100 at 74,425.

⁴¹ VCAT took the view that Schou only floated the idea of leave without pay and did not pursue it when it was not well received by her supervisors. For this reason VCAT dismissed this aspect of the complaint that alleged that the Department had refused to grant her leave without pay: *Schou v Victoria* (2000) EOC 93-100 at 74,426.

⁴² *Schou v Victoria* (2000) EOC 100 at 74,425. The proviso that her son was sick was omitted from the explicit description of the modem proposal recited in later judgments: *Victoria v Schou* [2004] VSCA 71 (30 April 2004) [20].

⁴³ In the second VCAT hearing it was determined that there were no technological barriers to putting the modem proposal into effect: *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [59]-[60].

⁴⁴ *Schou v Victoria* (2000) EOC 100 at 74,426. Some 9 months after her resignation Schou applied for a position with the Department as Chief Reporter, her son now being back to good health. Schou was not granted an interview, and challenged that decision as discriminatory. VCAT dismissed this aspect of her complaint, not being satisfied that her parent or carer responsibilities were a substantial reason for the decision not to grant her an interview: *Schou v Victoria* (2000) EOC 93-100 at 74,429.

⁴⁵ *Schou v Victoria* (2000) EOC 93-100 at 74,427.

Schou's legal claim rested on the interpretation and application of the indirect discrimination provisions in the *EOA 1995* (Vic), and in particular whether her employer's requirement that she attend Parliament House on all her working days was 'not reasonable' in the circumstances.⁴⁶ The Victorian Civil and Administrative Tribunal ('VCAT') determined twice that the employer's attendance requirement was 'not reasonable' within the meaning of the Act. VCAT drew on a number of matters in reaching this decision, including findings of fact that the needs of the Department would be met with Schou working from home part of the week, and that the moderm proposal was inexpensive, especially given the financial circumstances of the employer. In response, both the Victorian Supreme Court and the Court of Appeal determined that VCAT had successively fallen into error in its approach to interpreting and applying the meaning of 'not reasonable' in the test of indirect discrimination. These courts took a narrow and technical approach to the task of statutory interpretation, a methodology strongly critiqued in the literature as undermining the beneficial purposes of anti-discrimination legislation.⁴⁷

2 THE REQUEST MECHANISM IN THE *FW ACT*

The request mechanism is part of the National Employment Standards, and is contained in Part 2-2 Division 4 of the *FW Act*. The Division enables an employee, who falls within certain closely defined categories, to request a change in 'working arrangements'⁴⁸ in order to accommodate care responsibilities to a child under school age,⁴⁹ or a child with a disability under the age of 18.⁵⁰ The employee's request must be in writing and 'set out details of the change sought and of the reasons for that change'.⁵¹ The employer is required to give the employee a written response within

⁴⁶ *EOA 1995* (Vic) s 9(1)(c). The Act provided that indirect discrimination arose where an employer had imposed a work requirement with which the complainant could not comply, and a higher proportion of people not of the complainant's group could comply, in circumstances in which the imposition of the requirement was not reasonable.

⁴⁷ See, eg, Gaze, above n 6; Adams, above n 6; Knowles, above n 6.

⁴⁸ The concept of 'working arrangements' is undefined, although a legislative note gives the examples of 'hours of work', 'patterns of work', and 'location of work': *FW Act* s 65(1) note.

⁴⁹ *FW Act* s 65(1)(a), (b). On the meaning of 'school age' see *FW Act* s 12. In Victoria the 'school age' is 6 years of age: *Education and Training Reform Act 2006* (Vic) s 2.1.1.

⁵⁰ The *FW Act* does not define or explain the meaning of 'disability', and Explanatory Memorandum, Fair Work Bill 2009 (Cth) ('EM Fair Work Bill') is silent on the question of how that concept should be interpreted. This lack of statutory definition or explanation may indicate that the concept should be given its ordinary meaning (*Acts Interpretation Act 1901* (Cth) s 15AB) rather than reference made to technical definitions found in anti-discrimination legislation such as the *DDA*. In two recent decisions the word 'disability' in the adverse action provisions has been given its ordinary meaning, and not the extended meaning found in the *DDA*: *Hodkinson v Commonwealth* [2011] FMCA 171 (31 March 2011) [145]-[146]; *Stephens v Australian Postal Corporation* [2011] FMCA 448 (8 July 2011) [86]-[87]. Requests for accommodation under the NES mechanism can only be made by a 'parent' of a 'child', or a 'national system employee' who 'has responsibility for the care' of a 'child': *FW Act* s 65(1). The concept of 'parent' is not defined in the Act, but 'child' of a person is defined to include a person who is a child of the person within the meaning of the *Family Law Act 1975* (Cth), and an adopted child or step-child of the person: *FW Act* s 17, s 12 definitions of 'step-child'. These all provide relatively broad definitions.

⁵¹ *FW Act* s 65(3). The Fair Work Ombudsman has formulated a template letter of request for use by employees: www.fairwork.gov.au/info/workandfamily.

21 days, stating whether the request is granted or refused.⁵² If the employer refuses the request the employer's written response 'must include details of the reasons for the refusal'.⁵³ The employer 'may refuse the request only on reasonable business grounds'.⁵⁴ There is no definition of 'reasonable business grounds' in the Act, or a list of factors that might assist in understanding its meaning.

Not only is the request mechanism narrowly drawn to the care of young children and older children with a disability, it is restrictive in terms of the categories of workers that can use it. It applies only in relation to 'national system employees',⁵⁵ and only to those who have completed 12 months 'continuous service' with their employer prior to making the request, or are a 'long term casual employee' with 'a reasonable expectation of continuing employment by the employer on a regular and systematic basis'.⁵⁶

A modern day Schou is entitled to use this request mechanism. Such a person is a 'national system employee',⁵⁷ with several years of continuous service.⁵⁸ In addition, the care responsibilities are to a pre-school aged child,⁵⁹ and the employee's attempts at accommodation relate to 'working arrangements'.⁶⁰

A A Static Legislative Process

It is interesting to explore how the statutory scheme might operate in practice, and whether the use of the new request mechanism would actually assist a modern day Schou in securing accommodation from her employer. Notably the legislation

⁵² *FW Act* s 65(4). Note that the legislation does not to explicitly identify the time from which the 21 days runs. Presumably time starts to run from when the employer receives the request.

⁵³ *FW Act* s 65(6).

⁵⁴ *FW Act* s 65(5).

⁵⁵ *FW Act* s 60. Generally, only employees in the common law sense of being engaged under contracts of service are included within the concept of 'national system employees': *FW Act* s 13.

⁵⁶ *FW Act* s 65(2). The concept of 'continuous service' is defined in s 22. The concept of 'long term casual employee' is defined in s 12 to be a casual employee who has been employed by that employer 'on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months'.

⁵⁷ *FW Act* s 13, s 30B, s 30C, s 30M. A modern day Schou would be covered as a Victorian public sector employee; the type of matters requested are not excluded subject matters: *Fair Work (Commonwealth Powers) Act 2009* (Vic). Schou's status as a (full-time) employee in the common law sense is not put into contention in any of the decisions. In contrast, were a modern day Schou a public sector employee elsewhere in Australia, she would most likely not be a 'national system employee', due to the more limited referrals of power from those states: Andrew Lynch, 'The Fair Work Act and the Referrals Power – Keeping the States in the Game' (2011) 24 *Australian Journal of Labour Law* 1 at 16-17.

⁵⁸ Schou took two periods of maternity leave, the last of which occurred a number of years before the modern proposal was raised. Assuming that maternity leave was authorized, which seems most likely, it would count as 'service' for these purposes: *FW Act* s 22(4).

⁵⁹ Were Schou's son to be of school age, his care needs would nonetheless be covered if his recurring illnesses and separation anxiety constituted a 'disability'. On the likely meaning of 'disability' see n 50.

⁶⁰ The concept of 'working arrangements' is undefined, although a legislative note gives the examples of 'hours of work', 'patterns of work', and 'location of work': *FW Act* s 65(1) note.

establishes a static process comprising of a formal request followed by a written approval or rejection within 21 days. It is not clear how that framework operates in contexts characterized by ongoing discussions between employers and employees, where the settlement of a request for flexibility may emerge over the course of several conversations. Notably, such dynamism appears likely to characterize discussions engaged in by employers who are committed to the legislative objective of flexibility in terms that support employees, and for that reason should be encouraged by the legislative scheme.⁶¹ Schou's situation illustrates how the statutory request mechanism may not align easily with the realities of workplace negotiations over flexibility. For example, would a modern day Schou submit a formal request under the scheme following each occasion on which her supervisor asked her to 'hold on', or discussions stalled, or a proposal put by Schou did not proceed? Alternatively, would she not raise the various options with her supervisor in an informal manner at all, relying instead solely on submitting a formal written request in relation to each of her successive suggestions? A third possibility is that a modern day Schou would only submit a formal request under the scheme once informal discussions with her supervisor or relevant human resource officer had crystallized into an agreement in principle. These different possibilities all point to the need to consider how the federal request mechanism should be operationalised within individual workplaces to best fulfill the legislation's objective of assisting employees with care responsibilities. Desirably, employers would develop their existing policies on discrimination, flexibility and work and care, in order to provide the machinery for the federal request mechanism, and would do so in a way that captures the fluid and sometimes ongoing character of discussions and requests for accommodation. Notably there is nothing in the legislation that encourages those developments.

B *Enforceability*

If a modern day Schou did submit a request to the Department under the federal mechanism, would this increase the prospects of being permitted to work from home for part of the week? Notably the problem for Schou was not simply that her employer refused to grant her request. Rather, it was that her employer changed its mind after initially agreeing to the request. Using the *FW Act* statutory framework centered around a written request and a response within a set time frame may render it more likely that an employer would actually put into place the arrangements that had been requested and that it had agreed to, at least initially. This might be due to the normative force of the federal scheme. It would certainly not be due to the legal reach of the legislation. This is because an employer's inaction after agreeing to an employee's request would itself be irremediable under the *FW Act* scheme.

⁶¹ In its illustrative example the EM suggests that processes of negotiation and compromise are desirable: EM Fair Work Bill, above n 50, [270]. Empirical research indicates that negotiations in workplaces around flexible working arrangements are in fact characterized by dynamism: Natalie Skinner and Barbara Pocock, 'Flexibility and Work-Life Interference in Australia' (2011) 53 *Journal of Industrial Relations* 65. In the context of the *EOA* (Vic), Guidelines encourage employers and employees to engage in discussions to move towards reasonable accommodation: Industrial Relations Victoria & VEO&HRC, *Building eQuality in the Workplace, Family Responsibilities – Guidelines for Employers and Employees* ('Commission Guidelines').

Although the requirement on the employer to provide a written response within 21 days is directly enforceable as a civil remedy provision, as is the requirement on the employer (where the request is refused) to 'include details of the reasons for the refusal',⁶² the central requirement on the employer to refuse the request 'only on reasonable business grounds' is not directly enforceable.⁶³ The merits of an employer's refusal cannot be challenged directly, as no cause of action arises where an employer refuses a request on unreasonable grounds.⁶⁴ Equally, an employer's change of heart after granting a request is also not able to be directly challenged under the request scheme in the *FW Act*.⁶⁵

C Concluding Thoughts on the Request Mechanism

It is unclear whether the request mechanism in the *FW Act* would assist a modern day Schou. Much depends on the attitude taken by the employer. Indeed it lies wholly within the employer's discretion as to whether to grant flexibility to the employee, regardless of how reasonable is the claim for accommodation. This is because ultimately the legislation provides very little that can be enforced against an unwilling employer.

Difficult questions arise as to whether a retreat by an employer from an initial agreement to a request might be open to challenge as an unreasonable failure to accommodate under the *EOA* (Vic), or as a form of adverse action under the *FW Act*. The intersections between the federal request mechanism and these two grievance procedures are complex and uncertain, especially in relation to adverse action. Importantly, the request mechanism does not exclude the operation of state law such as the *EOA* (Vic) that provides more beneficial entitlements for employees to flexible work arrangements. Indeed, the *FW Act* contains an explicit direction in that regard,⁶⁶

⁶² *FW Act* s 65(4), (6), s 44(1), s 539.

⁶³ *FW Act* s 44(2). See also s 739(2), s 740(2). Other indirect avenues may exist though for reviewing the merits of an employer's refusal. These include where the employer has consented, under an enterprise agreement or an employment contract, to dispute resolution over a refusal of an employee's request (*FW Act* s 739(2), s 740(2)), and where an enterprise agreement contains a term that provides a similar request mechanism, a contravention of that term is able to be pursued as a breach of the enterprise agreement (*FW Act* s 50). See further Anthony Forsyth et al, *Navigating the Fair Work Laws* (Lawbook Co, 2010) 45.

⁶⁴ For an exploration of the limited enforcement framework attaching to the right to request mechanism, see Anna Chapman, 'Requests for Flexible Work under the Fair Work Act' (unpublished manuscript, January 2012).

⁶⁵ Scholars have argued though that the request mechanism may offer important potential to generate cultural change around work and care: Sara Charlesworth and Iain Campbell, 'Right to Request Regulation: Two New Australian Models' (2008) 21 *Australian Journal of Labour Law* 116; Jill Murray, 'Work and Care: New Legal Mechanisms for Adaptation' (2005) 15 *Labour & Industry* 67. These authors draw on the experience of earlier similar developments in the United Kingdom granting a right to request which are said to have led to a cultural change in employer attitudes. On these UK developments, see Sue Himmelweit, 'The Right to Request Flexible Working: A "Very British" Approach to Gender (In)Equality?' (2007) 33 *Australian Bulletin of Labour* 246.

⁶⁶ *FW Act* s 66; EM [272].

indicating perhaps that the *EOA* (Vic) is the preferred form of redress in relation to a refusal by an employer, over a claim under the adverse action provisions.

3 UNREASONABLE FAILURE TO ACCOMMODATE UNDER THE *EOA* (VIC)

As noted above the *EOA 1995* (Vic) was amended in 2008 to provide for a new type of discrimination, in the form of a failure by an employer to provide reasonable accommodation for the responsibilities that an employee has as a parent or carer.⁶⁷ The central provision in the 2008 package stated that an employer ‘must not, in relation to the work arrangements’ of the complainant, ‘unreasonably refuse to accommodate the responsibilities that the person has as a parent or carer’.⁶⁸ This was enacted as a third and separate form of discrimination, in addition to direct discrimination and indirect discrimination.⁶⁹ These provisions have been continued in substantively identical terms with the replacement of the *EOA 1995* (Vic) by the 2010 *EOA* (Vic).⁷⁰

Schou potentially sought accommodation of her responsibilities to her son, through her attempts to negotiate a move to part-time work, her offer to take leave without pay, and her final efforts to gain permission to work at home part of the week. The Department’s rejection in relation to each might singularly (and cumulatively) ground a complaint under the Victorian failure to accommodate provisions. A number of preliminary matters in relation to such a complaint are clearly met. Schou was a current employee of the Department of Victorian Parliamentary Debates.⁷¹ The concepts of ‘parent’ and ‘carer’ are both articulated (inclusively) in the Act, and Schou is presented in the decisions unproblematically as a person who falls within both definitions.⁷² Indeed, one of the decisions reveals that she took ‘maternity leave’

⁶⁷ The new provisions, effected by the *Equal Opportunity Amendment (Family Responsibilities) Act 2008* (Vic), applied in relation to conduct occurring after 1 September 2008.

⁶⁸ *EOA 1995* (Vic) s 13A(1), s 14A(1), s 15A(1), s 31A(1).

⁶⁹ *EOA 1995* (Vic) s 7(1); Chapman, above n 7, 201-2.

⁷⁰ See *EOA* (Vic) s 7(1), s 17, s 19, s 22, s 32. The claimant may be an employee in the common law sense of engaged under a contract of service (whether full-time, part-time or casual), or a worker engaged under a contract for services. Whilst the *EOA 1995* (Vic) explicitly excluded unpaid workers and volunteers, those references have been removed from the 2010 Act. See *EOA* (Vic) s 4(1) definition of ‘employee’. The 2010 Act, like the 1995 Act, continues to cover people paid by commission, contract workers, and firms with five or more partners.

⁷¹ *EOA* (Vic) s 4(1) definition of ‘employee’, s 19.

⁷² *EOA* (Vic) s 4(1). The inclusive definition of ‘parent’ draws on legal concepts of parenthood and as such the statutory definition may not reflect diverse practices of parenting found in, for example, kinship and friendship networks, and same sex relationships. Notably though the VEO&HRC interprets parent to include the ‘domestic partner of a parent’: Commission Guidelines, above n 61, 5. The definition of ‘carer’ requires that there be ‘ongoing care and attention’ in relation to a person who is ‘wholly or substantially dependent’ on the carer (excluding paid care). This may not cover short term care needs towards a person who is not usually dependent on the worker. In its guidelines, the VEO&HRC provides that ‘[c]arers provide care and support to family members and friends with a disability, mental illness or disorder, chronic condition, terminal illness or who are frail. Care giving may occur occasionally, continuously, in the short-term or over the long-term’: Commission Guidelines, above n 61, 5.

in relation to her son's birth.⁷³ In addition, her responsibilities in that regard to her son were clearly the reason for her requests for flexibility over the years.

Schou's 'work arrangements' as a current employee are defined to mean 'arrangements applying to the employee or the workplace',⁷⁴ and this clearly countenances the types of accommodation that Schou sought. Indeed, the legislation provides that working from home is an illustrative example of what might be reasonable accommodation under the new provisions.⁷⁵ In addition, Guidelines produced by Industrial Relations Victoria and the Victorian Equal Opportunity & Human Rights Commission ('VEO&HRC') ('Commission Guidelines') also list working from home as an example of a flexible work arrangement that might be granted under the *EOA* (Vic).⁷⁶ The Commission Guidelines anticipate the possibility of several changes in work arrangements over time, countenancing and reflecting the dynamic character of the accommodation that many worker-carers, including a modern day Schou, might seek.⁷⁷

A Request and Rejection

The Victorian statutory framework does not explicitly require that there be a request for accommodation by the employee. Notably though, in the first decision under the new rules VCAT has held that the need for a request by the employee 'is necessarily implicit' in the legislation, and arises so that the employer is able to fully comprehend the nature of the accommodation sought, and be in a position to consider the request properly.⁷⁸ The Commission Guidelines appear to assume that a request will have been made, in the view expressed in that document that a request may be made informally or through a more formal mechanism, whether in writing, or verbally.⁷⁹

Relevantly, the first VCAT decision in Schou provides a strong sense that the more formal a request is, the easier it will be to establish as a factual matter that the employer has rejected the request. This issue arose in relation to Schou's claim that she had applied for 12 months leave without pay, and that her application had been rejected. Schou's evidence was that she raised the idea of leave without pay with her two supervisors on different occasions, and that her suggestion was 'categorically

⁷³ *Schou v Victoria* [2002] VCAT 375 [17]. This terminology suggests that she is the birth mother of her son, and not for example a same sex co-parent taking parental leave. It is unclear whether a same sex co-parent would fall within the definition of 'parent', although such a parent would in any event be covered as a 'carer'.

⁷⁴ *EOA* (Vic) s 4(1) definition of 'work arrangements'. The definition covers both legally enforceable terms and conditions of engagement, and other practices and requirements of the work arrangement.

⁷⁵ *EOA* (Vic) s 19 example.

⁷⁶ Commission Guidelines, above n 61, 4.

⁷⁷ Commission Guidelines, above n 61, 6.

⁷⁸ *Richold v Victoria* [2010] VCAT 433 (14 April 2010) [38], [40]. The need for a request to have been made under the Victorian provisions was approved in the context of an adverse action claim in *Bayford v MAXXIA Pty Ltd* [2011] FMCA 202 (12 April 2011) [144]-[145]. Riley FM considered that a request under the Victorian legislation 'would have to include a specific proposal for alteration of the existing arrangements': [144].

⁷⁹ Commission Guidelines, above n 61, 8.

rejected' by them.⁸⁰ Schou admitted some ambivalence on her own part in that she was not sure that leave without pay would provide an adequate solution to her situation.⁸¹ The tribunal determined as a matter of fact that Schou had merely 'floated' the idea of 12 months leave without pay, and that she had not made 'an actual formal, albeit oral, application'.⁸² For this reason the tribunal was not satisfied as a factual matter that the Department had refused to grant her 12 months leave without pay.⁸³ This reasoning suggests that were Schou's situation to be pursued under the *EOA* (Vic) accommodation provisions, the Department may not have 'refuse[d] to accommodate' her, at least so far as the proposal for leave without pay goes.

In terms of the idea of part-time work, the evidence as revealed in the decisions indicates strongly that Schou made a formal request, through drawing up (with two colleagues) a proposal for part-time work and engaging an industrial negotiator to pursue the matter with the Department on her behalf. Although a formal request for part-time work is apparent, on the facts VCAT determined that the Department had not actually rejected the part-time work proposal. Rather, for VCAT the part-time work idea had simply been superseded by the modem proposal. Applying this view of the evidence to the *EOA* (Vic) provisions is likely to lead again to the conclusion that the Department has not 'refuse[d] to accommodate' Schou's responsibilities.⁸⁴ This highlights the contrast between the Victorian legislative test of a 'refus[al] to accommodate' and the broader question of whether an employer has failed to reasonably accommodate.

This leaves only the modem proposal as a potential instance of the Department refusing to accommodate Schou's responsibilities. VCAT was 'not satisfied that management's intentions to implement the modem proposal survived past September 1996'.⁸⁵ It seems likely that such an abandonment of the modem proposal reflects a rejection of it by the Department. In addition, the evidence seems likely to establish that a request by Schou to work at home was made, leading to a view that the modem proposal may be the only matter that Schou could rely on to show that she has requested accommodation, and that her request was refused by the Department.

This exploration suggests that a too rigid application of the need to find conduct amounting to a request and then a subsequent rejection may fail to capture adequately the character of dynamic negotiations over flexible work arrangements between employers and employees. Those conversations may be ongoing and informal. Schou showed herself to be conciliatory and flexible throughout the years of discussions, initiating conversations and suggesting successive options when a proposal did not

⁸⁰ *Schou v Victoria* (2000) 93-100 at 74,425.

⁸¹ *Schou v Victoria* (2000) 93-100 at 74,425-6.

⁸² *Schou v Victoria* (2000) 93-100 at 74,426.

⁸³ This aspect of Schou's complaint was dismissed: *Ibid.*

⁸⁴ Potentially Schou and her two colleagues could jointly bring a dispute to the VEO&HRC alleging an unreasonable failure to accommodate by the Department: *EOA* (Vic) s 113.

⁸⁵ *Schou v Victoria* (2000) EOC 93-100 at 74,427. In September, no doubt in desperation, Schou requested 12 months leave without pay. This was not forthcoming: 74,425.

find favour with the Department. It would be undesirable if that approach ultimately counted against her claim of discrimination under the *EOA* (Vic). A preparedness to explore options and consider alternatives in a flexible and informal manner appear to be the markers of a desirable process towards accommodation, and one which the legislation ought to encourage. Informality, adaptability and the consideration of different possibilities should likewise not necessarily be interpreted against an employer as a refusal to accommodate a specific request. The challenge is for interpretations of the accommodation provisions in the *EOA* (Vic) to adequately recognise and take account of the realities of workplace discussions between employees, their supervisors, and human resource managers. At its core this challenge is analogous to that faced in relation to the federal request mechanism – how to interpret these provisions in a way that takes adequate account of the realities of work relations.

B Reasonableness Factors

Apart from the possible need to find a request and then a rejection of it on the evidence, the main issue in a claim that a person in Shou's position might bring today under the *EOA* (Vic) is whether the employer has 'unreasonably' refused to accommodate the responsibilities that the employee has as a parent or carer. The relevant sections provide that in determining whether an employer 'unreasonably refuses to accommodate', all relevant facts and circumstances must be considered, including—

- (a) the employee's circumstances, including the nature of his or her responsibilities as a parent or carer; and
- (b) the nature of the employee's role; and
- (c) the nature of the arrangements required to accommodate those responsibilities; and
- (d) the financial circumstances of the employer; and
- (e) the size and nature of the workplace and the employer's business; and
- (f) the effect on the workplace and the employer's business of accommodating those responsibilities, including—
 - (i) the financial impact of doing so;
 - (ii) the number of persons who would benefit from or be disadvantaged by doing so;
 - (iii) the impact on efficiency and productivity and, if applicable, on customer service of doing so; and
- (g) the consequences for the employer of making such accommodation; and
- (h) the consequences for the employee of not making such accommodation.⁸⁶

This provides an inclusive articulation of the concept of reasonableness. None of the listed matters are determinative on their own, and other factors not included in the list may be highly relevant and important in assessing reasonableness in any particular case.⁸⁷ The Explanatory Memorandum and second reading speech to the 2008 legislation themselves suggest some additional factors that are apparent in the Schou decisions — how long the proposed work arrangements are to continue; the ability of

⁸⁶ *EOA* (Vic) s 17(2), s 19(2), s 22(2), s 32(2).

⁸⁷ Explanatory Memorandum, Equal Opportunity Amendment (Family Responsibilities) Bill 2007 (Vic) ('EM Family Responsibilities Bill') 4–6; Victoria, *Parliamentary Debates*, Legislative Assembly, 11 October 2007, p 3468 (B Cameron).

the employer to reorganise the employee's work, including whether there are any legal or other constraints that affect the feasibility of accommodating those responsibilities.⁸⁸

There are many factors that point to the Department's refusal of the modern proposal as being unreasonable in all the circumstances. Schou's circumstances were that she had (to the knowledge of her supervisors) reached a 'crisis point' in managing her responsibilities to her young son and her work commitments.⁸⁹ Her request was for a limited time, expected to be a year or so until his health improved.⁹⁰ The evidence does not directly reveal whether Schou was the sole or main carer of her child, although certainly it seems clear that she had run out of options for his care.

Both VCAT decisions investigated the nature of Schou's role, the nature of the arrangements required to accommodate her responsibilities to her son, and the effect of providing the accommodation on the employer's operational interests and concerns. VCAT examined the feasibility of the modern proposal, and explored the impact of the proposal on work flow and the supervision responsibilities of Schou. In addition, concerns over confidentiality and security were examined. VCAT found as matters of fact that security concerns were met, and that the accurate and timely production of Hansard would not be compromised by adoption of the modern proposal.⁹¹ Notably, the Department had itself investigated the work from home proposal including in terms of its health and safety legal obligations, and had not found any legal impediments with it.⁹² The initial support for the proposal within the Department was strong evidence that the employer's needs and concerns, including those relating to efficiency and productivity, were able to be met in the work from home proposal.⁹³ In addition, the Department's own policy documents that promised flexibility to employees were seen by VCAT as relevant in assessing the reasonableness of the Department's refusal.⁹⁴

⁸⁸ EM Family Responsibilities Bill, above n 87, 5; Victoria, *Parliamentary Debates*, Legislative Assembly, 11 October 2007, p 3468 (B Cameron). For other similar articulations of factors, see Commission Guidelines, above n 61, 8.

⁸⁹ *Schou v Victoria* (2000) EOC 93-1000 at 74,427.

⁹⁰ In the second hearing VCAT determined this was relevant to the meaning of reasonableness under indirect discrimination: *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [44]. Schou's son's health issues did resolve themselves less than a year after she resigned: *Schou v Victoria* (2000) EOC 93-100 at 74,429.

⁹¹ *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [59]-[60].

⁹² *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [21]. Industrial agreements that provide for home based work commonly address occupational health and safety aspects, sometimes prescribing that those requirements be taken into account prior to permission being given by the employer, and sometimes specifying those requirements as a reason to terminate the home based work agreement: Pittard, above n 6, 173.

⁹³ *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [58].

⁹⁴ In the second hearing VCAT expressed the view that the Parliamentary Officers' Employment Agreement, which included a promise for the 'adoption of flexible and progressive work practices and reasonable changes in the way work is organised', shaped the meaning of reasonableness in indirect discrimination: *Schou v Victoria* [2002] VCAT 375 (24 May 2002)[40], [43].

The modem proposal was described by VCAT as presenting a 'modest cost', and this description is apt regardless of whether the budgetary unit is seen as the Department itself, or the Victorian State public sector as a whole.⁹⁵ In either case, the cost of the modem would have very little financial impact on the employer. It is noted in the decisions that Schou's workplace itself was relatively small, in comprising four sub-editors, and around a dozen permanent reporters. It appears that Schou's Department Head (and the Departmental Heads more broadly) were concerned that granting flexibility to Schou would open the floodgates to similar claims by other employees.⁹⁶ In the second VCAT hearing Judge Duggan noted that in any event Schou was at that time the only sub-editor with children, the inference being that she was likely to be the only employee seeking to work from home due to care responsibilities towards children.⁹⁷ Importantly though, granting accommodation to Schou would not necessarily tie the Department's hands in relation to subsequent requests to work from home. The Commission Guidelines confirm this,⁹⁸ and encourage employers to '[c]onsider each request individually ... [as] [e]ach will have different facts and circumstances.'⁹⁹ This confirms that it may be lawful under the Victorian provisions to grant one request for a particular type of accommodation but not another for the same accommodation, due to the different contexts in which those decisions will inevitably be made. Interestingly though, the approach of treating employees differently in this way may not, at first glance, sit well with the adverse action provisions in the *FW Act* which articulate one form of adverse action as arising where an employer 'discriminates between the employee and other employees of the employer'.¹⁰⁰ This is discussed further below.

Schou was a senior long-standing and highly specialized employee who her immediate supervisors recognised was 'for all practical purposes irreplaceable'.¹⁰¹ Her efforts to find a feasible solution for herself and the Department reveal much good will on her part. So too do her attempts to 'hold on' and 'stick it out' as she was requested to do in 1994,¹⁰² and this in the face of the unusually onerous working hours regime that operated in the Department during sitting weeks. The consequences

⁹⁵ *Schou v Victoria* (2000) EOC 93-100 at 74,427. The modem proposal was costed by the Department as being between \$2,000-\$2,500 in total.

⁹⁶ The Chief Reporter's evidence was that he 'took every step to implement the proposal in the face of opposition ... [from his] Departmental Head Colleagues': *Schou v Victoria* (2000) EOC 100 at 74,426.

⁹⁷ *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [43].

⁹⁸ The Guidelines pose a hypothetical question by an employer: '[i]f I have an ongoing flexible work arrangement with one employee with family responsibilities, am I also required to provide the same arrangement to other employees?' In response the Guidelines provide: '[e]ach case should be assessed individually. Depending on the circumstances it may be reasonable to accept one person's request for a changed work arrangement and refuse another person.' The Guidelines conclude '[e]xplain to employees the reasons behind any decisions, and address any concerns about equity in work arrangements.' Commission Guidelines, above n 61, 14.

⁹⁹ Commission Guidelines, above n 61, 8.

¹⁰⁰ *FW Act* s 342.

¹⁰¹ This was the conclusion of her supervisors in their initial agreement with her request to work at home two days per week: *Schou v Victoria* (2000) EOC 93-100 at 74,427.

¹⁰² VCAT determined that Schou did not pursue her request to move to part-time employment, and so her request in this regard lapsed or was withdrawn. On this basis VCAT dismissed this aspect of her complaint: *Schou v Victoria* (2000) EOC 93-100 at 74,423.

for Schou in not being granted accommodation was the loss of her job and moreover the loss of a highly specialised career that she had built over 18 years. For the Department the consequence was the loss of an irreplaceable employee who was one of only four sub-editors working in the Department.

C Reasonableness as a Legal Standard

Although the facts of Schou as revealed in the decisions do appear to provide a strong case indicating that accommodation in the form of the modern proposal ought to have reasonably been provided by the Department, the use of a reasonableness concept in a legal rule never permits a high level of confidence in the likely outcome of the rule's application.

The concept of reasonableness in anti-discrimination law has tended to be interpreted by judges in ways that reinforce the status quo. This is seen in the Schou litigation itself where both the Victorian Supreme Court and a majority of the Court of Appeal interpreted the meaning of reasonableness in a way that gave great weight to the Department's interests as identified by it in the hearings, and little (if any) weight to Schou's concerns and position.¹⁰³ Considerable deference to managerial authority was reflected in particular in the judgment of Harper J in the Supreme Court.¹⁰⁴ The judgments in both courts reveal a deep focus on the employer's preference for the status quo, and a dismissal of alternatives that might provide a less discriminatory way of meeting the employer's needs.

Although on the face of it such judicial approaches to interpreting reasonableness do not bode well for employees seeking to challenge long standing norms of work organisation, there are good reasons to confine the Supreme Court and Court of Appeal judgments to the indirect discrimination provisions as they existed under the *EOA 1995 (Vic)*.¹⁰⁵ Importantly, the wording of the new accommodation provisions now in the *EOA (Vic)* focuses the issue of reasonableness on the employer's refusal,

¹⁰³ See eg, *Victoria v Schou* [2001] VSC 321 (31 August 2001) [12], [17], [24]; *Victoria v Schou* [2004] VSCA 71 (30 April 2004) [24], [37], [39] (Phillips JA). For example, great weight was given to the contract term identifying parliament house as the location of the position, and little weight was given to the promise regarding flexibility contained in the Parliamentary Officers' Employment Agreement: *Victoria v Schou* [2001] VSC 321 (31 August 2001) [20]-[22]; *Victoria v Schou* [2004] VSCA 71 (30 April 2004) [24] (Phillips JA). In contrast, VCAT gave considerably more weight to the promise of flexibility: *Schou v Victoria* (2000) EOC 93-100 at 74,428; *Schou v Victoria* [2002] VCAT 375 [66]-[72].

¹⁰⁴ *Victoria v Schou* [2001] VSC 321 (31 August 2001) [30] where Harper J cautioned that courts and tribunals 'must act with an appropriate degree of diffidence. The expertise of judges and tribunal members does not generally extend to the management of a business enterprise or the reporting of parliamentary debates'. '[C]ourts and tribunals concerned with equal opportunity legislation should resist the temptation unnecessarily to dictate to persons who manage, and work on, the shop floor.' See also [17] where great deference is shown to employment law, awards and agreements. For a contrasting approach of VCAT, see *Schou v Victoria* [2002] VCAT 375 [76]-[79].

¹⁰⁵ Notably, there is much force in the argument that in various respects the decisions of the Supreme Court and Court of Appeal are not in line with earlier High Court authority on these matters, and for that reason are not sound: Knowles, above n 6, 192-3.

and not the reasonableness of the original requirement or condition to work full time on site (as the indirect discrimination provisions in the *EOA 1995* (Vic) did). Clearly a balancing process is envisaged under the *EOA* (Vic), between the interests of the employer and those of the employee.¹⁰⁶ The accommodation provisions are intended to offer an additional entitlement to employees, above the protection afforded by indirect discrimination. As noted above, they are part of a general theme in the 2010 *EOA* (Vic) regarding the desirability of moving towards a substantive conception of equality in the workplace. Substantive equality looks beyond an ideal of treating people the same as each other, looking to equality in terms of outcomes and results. In contrast, formal equality sees equality as lying in consistency, or sameness, of treatment of employees. The accommodation provisions in the *EOA* (Vic) evidence a clear attempt to move beyond a formal equality understanding of discrimination, an approach that has plagued the interpretation of both direct discrimination and indirect discrimination across Australia. It is this formal equality framework of understanding that appeared to underlie much of the thinking of Harper J and the Court of Appeal.¹⁰⁷ For example, Harper J described that Schou had ‘sought a favour; one which (it would seem) had not been granted by her employer to any other employee’. His honour went on to say that Schou’s situation was not discrimination within the meaning of the Act as ‘Schou was simply treated as all other sub-editors were and are treated: not better, but certainly not worse’.¹⁰⁸ In furthering substantive equality this third form of discrimination is of a different character to the indirect discrimination provisions that were before the Supreme Court and the Court of Appeal, and for that reason those judgments should not be seen as applicable in interpreting these new provisions on reasonable accommodation.

D *The Victorian Charter*

Victoria has enacted a human rights statute since the final decision in the Schou litigation.¹⁰⁹ The *Charter of Human Rights and Responsibilities Act 2006* (Vic) (*‘Charter’*) is likely to take effect to strengthen the claim of a modern day Schou. The *Charter* requires that all Victorian legislation, including the *EOA* (Vic) must, so far as is possible consistently with its purpose, be interpreted ‘in a way that is compatible

¹⁰⁶ Such an approach was taken in *Richold v Victoria* [2010] VCAT 433 (14 April 2010) at [41]-[45].

¹⁰⁷ *Victoria v Schou* [2001] VSC 321 (31 August 2001) [12], [13]-[15], [17], [24]; *Victoria v Schou* [2004] VSCA 71 (30 April 2004) [27], [30]-[32] (Phillips JA). See also Buchanan J (who agreed with Phillips JA): [47]-[48]. Anti-discrimination cases at the Commonwealth level regarding work and care conflict also evidence the strong normative pull of formal equality. See eg, *Evans v National Crime Authority* [2003] FMCA 375 (5 September 2003); *Thomson v Orica Australia Pty Ltd* [2002] FCA 939 (30 July 2002).

¹⁰⁸ *Victoria v Schou* [2001] VSC 321 (31 August 2001) [24]. Harper J continued that ‘the Act forbids discrimination. It does not compel the bestowing of special advantage. The unreasonable refusal to extend a benefit to an individual or individuals where that benefit is, with good reason, not available to others, is not discrimination’: [24]. Contrast the Commission Guidelines on the reasonable accommodation provisions which encourage employers to ‘[c]onsider each request individually ... [as] [e]ach will have different facts and circumstances’: Commission Guidelines, above n 61, 8.

¹⁰⁹ The ACT is the only other state or territory in Australia to have a human rights statute requiring that legislation be interpreted in a way that respects certain rights recognised under international law: *Human Rights Act 2004* (ACT).

with human rights'.¹¹⁰ In addition, the *Charter* provides that it is unlawful for a 'public authority' 'to act in a way that is incompatible with a human right' or 'to fail to give proper consideration to a relevant human right.'¹¹¹ The Department of Parliamentary Debates and its officers are within the definition of a 'public authority'.¹¹²

The human rights that are possibly engaged in a complaint brought by a contemporary Schou are several, including the 'right to enjoy human rights without discrimination', and the right to 'effective protection against discrimination'.¹¹³ In addition, every eligible person 'has the right, and is to have the opportunity, without discrimination', 'to have access, on general terms of equality, to the Victorian public service'.¹¹⁴ Importantly, the human right to equality in the *Charter* has been interpreted to mean a substantive conception of equality, and not merely equality in a formal sense.¹¹⁵ In addition to non-discrimination, the *Charter* provides that '[f]amilies are the fundamental group unit of society and are entitled to be protected by society and the State' and that '[e]very child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.'¹¹⁶ In ensuring that the refusal to accommodate provisions in the *EOA* (Vic) are interpreted in a human rights-compatible way, a person in Schou's position today would be strengthened in her claim that her employer unreasonably refused to accommodate her request to work at home for two days each week. In addition, because Schou's employer was a 'public authority', a modern day Schou has additional options arising out of a breach by the public authority of its direct responsibilities regarding human rights.¹¹⁷

E Concluding Thoughts on Reasonable Accommodation

It seems most likely that a person in Schou's position would have a strong claim today under the *EOA* (Vic) for discrimination in the form of an unreasonable failure to accommodate her parenting and care responsibilities. No exemptions or exceptions

¹¹⁰ *Charter* s 32(1).

¹¹¹ *Charter* s 38. Section 4 contains a definition of 'public authority'.

¹¹² Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and the ACT Human Rights Act* (LexisNexis, 2008) 1.59-1.62. In *Richold v Victoria*, VCAT determined that the Department of Justice, and its officers that made the impugned decision are within the definition of 'public authority' in s 4 of the *Charter*: [2010] VCAT 433 (14 April 2010) [47].

¹¹³ *Charter* s 8(2), (3), (4). Section 3 defines 'human rights' as the civil and political rights set out in Part 2 of the *Charter*.

¹¹⁴ *Charter* s 18(2)(b).

¹¹⁵ *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869 (22 September 2009) [107], [290]. This understanding of equality and non-discrimination is in keeping with international law, which can be used in construing the human rights in the *Charter*. See *Charter* s 32(2); *Lifestyle Communities* [105]-[303].

¹¹⁶ *Charter* s 17.

¹¹⁷ *Charter* s 39. Section 39(3) provides that remedies for breach of s 38 of the *Charter* by a public authority cannot include damages. Evans and Evans argue that breach of s 38 does not give rise to a new cause of action. Rather it may play a role in supplementing existing legal claims. See Evans and Evans, above n 112, 4.22-4.28.

appear to be relevant to such a claim.¹¹⁸ Two points though remain to be made. First, a claimant broadly bears the evidentiary onus of establishing all aspects of the claim are made out, including that the employer's refusal of accommodation was unreasonable within the meaning of the legislation. It has proven to be particularly difficult for claimants under anti-discrimination law to establish discrimination, including unreasonableness, as they are not generally privy to the employer's reasons for its decisions, policies and requirements, and especially at the outset of a claim. For this reason there have been many calls, and subsequent legislative amendment in some jurisdictions, to shift the onus - in the context of indirect discrimination - so that the employer is obliged to justify the reasonableness of its own requirements.¹¹⁹ Notably, although the *EOA* (Vic) does shift the onus on reasonableness in the new indirect discrimination provisions,¹²⁰ an analogous shift of onus in relation to an unreasonable failure to accommodate has not occurred. This will mean that a claimant relying on discrimination in the form of a failure to accommodate will continue to face a difficult task in identifying and then establishing the factual basis of the claim, and especially as it relates to unreasonableness. Where a claimant has earlier used the request mechanism under the *FW Act*, the employer ought to have provided a written response rejecting the request that included 'details of the reasons for the refusal'.¹²¹ This statement by the employer will be relevant in an evidentiary sense and may provide assistance to a modern day Schou in factually establishing her claim for an unreasonable failure to accommodate under the *EOA* (Vic).

The second point to be made is that the individual grievance framework typical of anti-discrimination law across Australia has posed many challenges and difficulties for claimants, including disparities in resources and knowledge between employee and employer.¹²² The *EOA* (Vic) contains a number of innovations in dispute resolution, including direct access to VCAT and early dispute resolution services by the VEO&HRC. These will apply in relation to claims regarding an unreasonable failure to accommodate. It remains to be seen how these new mechanisms will shape dispute resolution processes. The reactive and largely individual grievance path,

¹¹⁸ The *EOA* (Vic) contains some exemptions and exceptions that may be potentially relevant to a failure to reasonably accommodate, including hiring for personal or domestic services in the employer's own home (s 24) and religious conduct and beliefs (ss 81-84).

¹¹⁹ See eg, Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report* (Dept of Justice, 2008) 5.32-5.43. The onus has been shifted to the employer under the *SDA* s 7C; *Age Discrimination Act 2004* (Cth) s 15(2); *Anti-Discrimination Act 1991* (Qld) s 205.

¹²⁰ *EOA* (Vic) s 9(2). The Explanatory Memorandum suggests that the reason for this shift is that the employer has access to the relevant information: Explanatory Memorandum, Equal Opportunity Bill 2010 (Vic) 13.

¹²¹ *FW Act* s 65(6).

¹²² Beth Gaze and Rosemary Hunter, 'Access to Justice for Discrimination Complainants: Courts and Legal Representation' (2009) 32 *UNSWLJ* 699; Beth Gaze and Rosemary Hunter, *Enforcing Human Rights: An Evaluation of the New Regime* (Themis Press, 2010); Anna Chapman and Gail Mason, 'Women, Sexual Preference and Discrimination Law: A Case Study of the NSW Jurisdiction' (1999) 21 *Sydney Law Review* 525; Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990).

albeit with these new and as yet untested innovations,¹²³ remains the mode of enforcement for the reasonable accommodation provisions.

4 ADVERSE ACTION UNDER THE FW ACT

The adverse action provisions, contained as part of the General Protections in Part 3-1 of the *FW Act*, enable certain employees to seek a remedy in relation to adverse treatment they experience at work. The interaction of the adverse action rules with the federal request mechanism gives rise to a number of questions. Although prior unsuccessful use of the request mechanism does not on the face of the *FW Act* exclude a subsequent claim under the adverse action provisions, it is possible that attempting to use the adverse action rules to indirectly enforce a request against an employer may be seen to run counter to Parliamentary intention.¹²⁴ The argument would be that Parliament decided against including a direct enforcement mechanism by which an employee can challenge the merits of an employer's refusal of their request.¹²⁵ It is unclear how an indirect challenge to those merits under the adverse action provisions would be received by a court.

Leaving aside that issue of interaction, the adverse action protections are themselves complex and uncertain in scope. As a starting point a modern day Schou is a worker who is entitled to lodge a claim under the adverse action provisions.¹²⁶ Her rights under the provisions will centre around whether it is established that she experienced 'adverse action' within the meaning of the legislation, and whether such conduct was 'because' of one of the prescribed grounds. These matters all give rise to much doubt.

A Grounds of Adverse Action

The *FW Act* provides that an employer must not take 'adverse action' against an employee on a range of grounds.¹²⁷ There are two main grounds of potential relevance to Schou's situation. The first is that Schou has, or proposes to exercise, a 'workplace right'.¹²⁸ A person has a 'workplace right' where the person:

- is entitled to the benefit of 'a workplace law';
- is able to initiate, or participate in a process or proceeding under a 'workplace law';

¹²³ Those innovations include the ability of the VEO&HRC to undertake an investigation under *EOA* (Vic) Part 9.

¹²⁴ Given this, might it be better for a modern day Schou to go directly to initiating an adverse action claim, and not use the request mechanism first? The potential downside of that approach is that an employer may then credibly argue that it was not aware of her request and was not given an opportunity to respond to the issue.

¹²⁵ As noted above, arguably the *FW Act* indicates that state legislation (such as the *EOA* (Vic)) may be the preferable form of redress in relation to a refusal by an employer under the request mechanism, over an application under the adverse action provisions: *FW Act* s 66.

¹²⁶ *FW Act* s 15, s 30G, s 335. See also n 57. Note that Inspectors of the Fair Work Ombudsman also have power to initiate a court application: *FW Act* s 539(2) item 11.

¹²⁷ *FW Act* s 340(1), s 351(1).

¹²⁸ *FW Act* s 340. The provisions also cover not exercising, and not proposing to exercise, a 'workplace right'.

- is able to make a complaint to a body having the capacity under a ‘workplace law’ to seek compliance with that law; or
- ‘is able to make a complaint or inquiry’ ‘in relation to his or her employment’.¹²⁹

The *FW Act* explicitly provides that when a parent or carer makes a request to alter working arrangements under that statute’s request mechanism, this amounts to initiating a process or proceeding under a ‘workplace law’.¹³⁰ The concept of ‘workplace law’ is defined more broadly to include the *FW Act*, and any ‘law of the Commonwealth, a State or Territory that regulates the relationships between employers and employees’.¹³¹ Even though the *EOA* (Vic) is not solely concerned with the relationships between ‘employers and employees’ in the common law sense, and regulates broader work contexts, in addition to the commercial provision of goods, services and accommodation for example, it appears to be a ‘workplace law’ in that it is a statute that directly impacts on the legal rights and obligations between employers and employees.¹³² Accordingly, Schou has a ‘workplace right’ in the form of being entitled to initiate a grievance under the *EOA* (Vic) in relation to an unreasonable refusal to accommodate her care responsibilities. Finally, she also has a ‘workplace right’ in the form of being ‘able to make a complaint or inquiry’ ‘in relation to ... her employment’.¹³³ Schou clearly did make inquiries with her employer in relation to flexibility and her employment, and this appears sufficient to constitute this last type of ‘workplace right’.¹³⁴

The second prohibited reason potentially relevant to a claim made by a modern day Schou is ‘family or carer’s responsibilities’.¹³⁵ The *FW Act* does not define or explain the meaning of that concept, and the Explanatory Memorandum does not assist in this regard. While the ground of ‘family responsibilities’ has been part of industrial law since 1993, it has never been defined, and cases have not explored its parameters. The insertion of the reference to carer into the statutory formula indicates that Parliament intended to broaden the ground beyond ‘family responsibilities’. Two main interpretative options present themselves for understanding ‘family or carer’s

¹²⁹ *FW Act* s 341.

¹³⁰ *FW Act* s 341(2)(i).

¹³¹ *FW Act* s 12. In this context ‘employee’ and ‘employer’ have their ordinary meanings: s 11.

¹³² It has been determined that the *EOA 1995* (Vic) is a ‘workplace law’ within the *FW Act* meaning: *Bayford v MAXXIA Pty Ltd* [2011] FMCA 202 (12 April 2011) [141]. Occupational health and safety legislation has also been determined to be a ‘workplace law’: *Stephens v Australia Post* [2011] FMCA 448 (8 July 2011) [16]; *AFMEPKIU v Visy Packaging Pty Ltd (No 2)* [2011] FCA 953 (31 August 2011) [10]. See also *ALAEA v International Aviations Service Assistance Pty Ltd* [2011] FCA 333 (8 April 2011) at [234].

¹³³ *FW Act* s 341(1)(c)(ii).

¹³⁴ It is sufficient that the inquiry or complaint was made to the employer: EM Fair Work Bill, above n 50, [1370]; *ALAEA v International Aviations Service Assistance Pty Ltd* [2011] FCA 333 (8 April 2011) [347]; *George v Northern Health (No 3)* [2011] FMCA 894 (28 November 2011) [50]-[55].

¹³⁵ The full list is: the ‘person’s race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin’: *FW Act* s 351. The decisions do not reveal whether any of these subjectivities are also relevant to Schou. None of these concepts is defined or explained in the *FW Act*.

responsibilities' - the ordinary meaning of the words,¹³⁶ or anti-discrimination law's understanding of similar family and carer grounds.¹³⁷ Regardless of which approach is adopted or emphasised, it seems that Schou's situation would fit comfortably within the concept of family or carer's responsibilities.

B Causal Link and Onus

In order for a modern day Schou to succeed, it would need to be established that a causal link existed between at least one of the grounds discussed above, and the Department's 'adverse action' (discussed below). In short, was any 'adverse action' taken by the Department 'because of' her 'family or carer's responsibilities' or 'because' she has, or proposes to exercise, a 'workplace right'?

The legislation does not require that the identified reason be the sole or dominant reason for the employer's adverse conduct. It must however be an operative reason.¹³⁸ In addition, and importantly, a reversed onus of proof applies so that once Schou establishes her factual case, in that she possessed a relevant ground and that 'adverse action' within the meaning of the legislation factually occurred, the onus shifts to the Department to show, on the balance of probabilities, that the ground was not a reason for its conduct.¹³⁹ This placement of the onus on the employer stands in stark contrast to the provisions on discrimination in the form of an unreasonable failure to

¹³⁶ No decisions have to date interpreted the meaning of 'family or carer's responsibilities', although two decisions of the Federal Magistrates Court have given the word 'disability', as it appears in the adverse action provisions, its ordinary meaning: *Hodkinson v Commonwealth* [2011] FMCA 171 (31 March 2011) [145]-[146]; *Stephens v Australian Postal Corporation* [2011] FMCA 448 (8 July 2011) [86]-[87]. Disability is also not defined and its meaning is not explained in the *FW Act*. See n 50.

¹³⁷ '[F]amily responsibilities' is defined in the *SDA* around the concept of a two adult couple: Anna Chapman, 'Industrial Law, Working Hours, and Work, Care and Family' (2011) *Monash University Law Review* (forthcoming); Anna Chapman, 'Employment Entitlements to Carer's Leave: Domesticating Diverse Subjectivities' (2009) 18 *Griffith Law Review* 453 at 464-5. Anti-discrimination statutes of some states and territories, including the *EOA* (Vic) provide for a broader recognition of care responsibilities per se, and do not require that the care take place in any particular setting, other than it not be provided for commercial reward: *EOA* (Vic) s 6(i) status of being a 'carer', s 4(1) definition of 'carer'.

¹³⁸ *FW Act* s 360. In contrast, the *EOA* (Vic) s 8(1)(2)(b) provides that the prohibited ground must be 'a substantial reason' for the direct discrimination. This aspect of the adverse action provisions is a factor in favour of claimants opting to lodge under the *FW Act*: Carol Andrades, 'Intersections Between 'General Protections' under the Fair Work Act 2009 (Cth) and Anti-Discrimination Law: Questions, Quirks and Quandaries' (Working Paper No 47, Centre for Employment and Labour Relations Law, University of Melbourne, 2009) 11.

¹³⁹ *FW Act* s 361. A reverse onus of proof has been a long-standing feature of the freedom of association and unlawful termination protections in industrial law. The EM acknowledges that in the absence of such a reverse onus, 'it would often be extremely difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason': EM Fair Work Bill, above n 50 [1461]. The reversed onus in relation to adverse action still requires an applicant to prove the factual case that adverse action occurred and that they possessed a relevant ground: *Ramos v Good Samaritan Industries (No 2)* [2011] FMCA 341 (24 August 2011) [44]; *Hodkinson v Commonwealth* [2011] FMCA 171 (31 March 2011) [130]; *Jones v Queensland Tertiary Admissions Centre Ltd (No 2)* [2010] FCA 399 (29 April 2010).

accommodate in the *EOA* (Vic), and is a strategic attraction for employees to use the adverse action provisions rather than the *EOA* (Vic).¹⁴⁰

In the first, and to date only, appellate decision dealing with adverse action, the Full Federal Court (by majority) held that in determining whether the conduct of the employer was 'because' of a prohibited reason, the subjective intention of the employer is 'centrally relevant, but it is not decisive'. The search is for the 'real reason' for the employer's conduct, which is a search for 'what actuated the conduct' of the employer, and not a search for what the employer thinks its conduct was actuated by. The 'real reason' may be conscious or unconscious.¹⁴¹ In order to exonerate itself of liability, the employer must show that the real reason is 'disassociated from the circumstances' that the applicant had the prohibited reason.¹⁴² The majority of the court came to this interpretation by drawing on the purpose and protective objective of the adverse action provisions, the ordinary or usual meaning of the word 'because', and the approach taken to the causal nexus in anti-discrimination cases.¹⁴³

C Adverse Action and Dismissal, Injury, Prejudice and Discrimination

The concept of 'adverse action' is articulated to mean a number of matters, namely, that the employer:

- 'dismisses the employee';
- 'injures the employee in his or her employment';
- 'alters the position of the employee to the employee's prejudice'; or
- 'discriminates between the employee and other employees of the employer'.¹⁴⁴

Threatening to do any of those things, and organizing to that end are also included within the concept of 'adverse action'.¹⁴⁵

¹⁴⁰ Creighton & Stewart, above n 28, [17.39]; Andrades, above n 138, 11; Simon Rice and Cameron Roles, "It's a Discrimination Law Julia, But Not as We Know It": Part 3-1 of the Fair Work Act' (2010) 21 *The Economic and Labour Relations Review* 13 at 20. The lack of a reverse onus of proof presents difficult challenges for complainants in anti-discrimination law: Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31 *Sydney Law Review* 579.

¹⁴¹ *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14 (9 February 2011) ('*Barclay*') [28] (Gray and Bromberg JJ), citing *Bowling v General Motors-Holden Pty Ltd* (1975) 8 ALR 197 at 617 (Mason J). Contra Lander J [197]-[199], [208]. Note that special leave to appeal to the High Court has been granted: Transcript of Proceedings, *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2011] HCATrans 243 (2 September 2011).

¹⁴² *Barclay* [2011] FCAFC 14 (9 February 2011) [32] (Gray and Bromberg JJ), citing *Bowling v General Motors-Holden Pty Ltd* (1975) 8 ALR 197 at 617 (Mason J).

¹⁴³ *Barclay* [2011] FCAFC 14 (9 February 2011) [29] (Gray and Bromberg JJ), citing *Purvis v New South Wales* (2003) 217 CLR 92 and *Toben v Jones* (2003) 129 FCR 515. Lander J in dissent also cited *Purvis* as authority: [199].

¹⁴⁴ *FW Act* s 342.

¹⁴⁵ *FW Act* s 342(2). Adverse action does not however include action that is authorized by the *FW Act* or any other law of the Commonwealth, or a law of a state or territory prescribed by the Regulations: s 342(3). At the time of writing no such laws have been prescribed.

The concept of 'dismisses' is not defined in Part 3-1, although 'dismissed' in the general definitions section of the *FW Act* references the unfair dismissal meaning of dismissal to include a situation where although a person resigned from their employment, they were 'forced to do so because of conduct' of the employer.¹⁴⁶ This definition has been applied in the adverse action context.¹⁴⁷ The Explanatory Memorandum explains that this description includes a situation 'where the employee quits their job in response to conduct by the employer which gives them no reasonable choice but to resign'.¹⁴⁸ It does seem that factually a modern day Schou faced, in the words of the Explanatory Memorandum, 'no reasonable choice but to resign'.¹⁴⁹ The evidence is clear that, to the knowledge of her supervisors, Schou's situation had reached a 'crisis point' and that if the modem was not installed within a reasonable time she would likely resign.¹⁵⁰ There is no evidence that the employer intended that Schou resign, but such an intention is not, in any event, required.¹⁵¹ The Department's omission in its failure to install the modem constitutes 'conduct' under the *FW Act*,¹⁵² and it can be credibly claimed that omission was such that 'resignation was the probable result or that the ... [employee] had no effective or real choice but to resign'.¹⁵³ Importantly though, decisions emphasise that the employer's conduct must be weighed objectively, and that all the circumstances and not only the action of the employer must be considered in determining whether the employer's conduct 'forced' the resignation of the employee.¹⁵⁴ That involves a consideration of all 'the circumstances giving rise to the termination, the seriousness of the issues involved and the respective conduct of the employer and the employee'.¹⁵⁵ The argument is likely to be made by the Department that it was Schou's own pressing responsibilities to her son that was the primary factor accounting for her lack of choice leading to her resignation, and not the Department's conduct in withdrawing agreement to the modem proposal.¹⁵⁶ It is unclear whether that argument would succeed. Notably,

¹⁴⁶ *FW Act* s 12 definition of 'dismissed', s 386(1)(b).

¹⁴⁷ *Ramos v Good Samaritan Industries (No 2)* [2011] FMCA 341 (24 August 2011) [47]-[54].

¹⁴⁸ EM Fair Work Bill, above n 50, [1530]. The EM states that s 386(1)(b) is designed to reflect the common law concept of constructive dismissal: [1530].

¹⁴⁹ EM Fair Work Bill, above n 50, [1530].

¹⁵⁰ *Schou v Victoria* (2000) EOC 93-1000 at 74,427.

¹⁵¹ *Australian Hearing v Peary* (2009) 185 IR 359 [30]; *O'Meara v Stanley Works Pty Ltd* [2006] AIRC 497 (11 August 2006) [23]; *Mendicino v Tour-Dex Pty Ltd* [2010] FWA 9114 (1 December 2010) [9], [46].

¹⁵² *FW Act* s 12 definition of 'conduct'.

¹⁵³ *O'Meara v Stanley Works Pty Ltd* [2006] AIRC 497 (11 August 2006) [23].

¹⁵⁴ *ABB Engineering Construction Pty Ltd v Doumit* (unreported, AIRCFB, 9 December 1996, Print N6999); *Australian Hearing v Peary* (2009) 185 IR 359 [36]; *O'Meara v Stanley Works Pty Ltd* [2006] AIRC 497 (11 August 2006) [23]; *Ramos v Good Samaritan Industries (No 2)* [2011] FMCA 341 (24 August 2011) [50].

¹⁵⁵ *Pawel v Advanced Precast Pty Ltd* (unreported AIRCFB, 12 May 2000, Print S5904) [13].

¹⁵⁶ The AIRC Full Bench has used the example of an employee who sought a pay rise and then resigned when that was not forthcoming to illustrate the point that not all terminations of employment which can be said to result from the act of the employer are accurately described as terminations at the initiative of the employer: *Pawel v Advanced Precast Pty Ltd* (unreported, AIRCFB, 12 May 2000, Print S5904) [13]. In a similar vein, the AIRC Full Bench has stated that '[w]here the conduct of the employer is ambiguous, and the bearing it has on the decision to resign is based largely on the perceptions and subjective response of the employee made unilaterally, considerable caution should be

recent decisions under the *FW Act* indicate that a high level of misconduct by an employer may be required in order to conclude that a resignation was 'forced' by the employer's conduct. For example, in one case involving close supervision of an employee which was alleged by the applicant to constitute bullying, it was asked whether the employer's conduct was 'oppressive' or 'repugnant' such that it 'could not reasonably be endured.'¹⁵⁷

Finally, even if it were able to be said that Schou's situation amounted to adverse action in the form of dismissal, it would still need to be established that the dismissal was causally linked to one of the grounds identified above, namely, her 'workplace right' or her 'family or carer's responsibilities', and not for example, the business needs of the Department.

Leaving aside the issue of whether Schou was dismissed within the meaning of the adverse action provisions, the Department may have 'injure[d]' her in her employment, or, altered her position to her 'prejudice'. These two items have been part of industrial law for some time, in the form of freedom of association, and both have been interpreted in a relatively broad manner.¹⁵⁸ There is no reason to suppose that these concepts in the adverse action provisions will be interpreted more narrowly than their history in industrial law suggests.¹⁵⁹ Whilst injury in employment has been interpreted to mean harm of 'any compensable kind', the concept of altering a person's position to their prejudice is a 'broad additional category' that covers both 'legal injury' and 'any adverse affection of, or deterioration in, the advantages enjoyed by the employee before the conduct in question.'¹⁶⁰ The Department's conduct was its failure to install the modem. This might be recognized as a harm of a 'compensable kind' in the sense of giving rise to a claim of discrimination in the failure to reasonably accommodate under the *EOA* (Vic). In addition, the withdrawal or abandonment by the Department of its earlier promise to provide this form of accommodation to Schou clearly caused deterioration in her position. Prior to the change of mind Schou was the beneficiary of an agreement or at least a promise by her employer that she would be permitted to work from home once the modem was installed. After the Department's conduct she no longer had the benefit of that promise. From there it would need to be assessed whether that injury in employment

exercised in treating the resignation as other than voluntary': *ABB Engineering Construction Pty Ltd v Doumit* (unreported, AIRCFB, 9 December 1996, Print N6999) 12. Both these quotations have been cited with approval in a recent decision: *Ramos v Good Samaritan Industries (No 2)* [2011] FMCA 341 (24 August 2011) [50].

¹⁵⁷ *Ramos v Good Samaritan Industries (No 2)* [2011] FMCA 341 (24 August 2011) [53]. See also *Mendicino v Tour-Dex Pty Ltd* [2010] FWA 9114 (1 December 2010) [10], [52], [64], [66] on unfair dismissal law.

¹⁵⁸ Creighton & Stewart, above n 28 [17.78].

¹⁵⁹ The EM appears to confirm this: EM Fair Work Bill, above n 50 [1384]. Case decisions under the adverse action provisions confirm this: *ALAEA v International Aviations Service Assessment Pty Ltd* [2011] FCA 333 (8 April 2011) [289]-[301]; *ALEAE v Qantas Airways Ltd* [2011] FMCA 58 (11 February 2011) [25]-[29] (currently under appeal).

¹⁶⁰ *Patrick Stevedores Operations No 2 Pty Ltd v MUA* (1998) 195 CLR 1 [4]. This case was cited in *Automotive, Food, Metals, Engineering, Printing and Kindred Union v Visy Packaging Pty Ltd* [2011] FCA 1001 (12 August 2011) [46].

or prejudicial altering of her position (through the abandonment of the promise by the Department) were linked in terms of causation to Schou's 'workplace right', or her 'family or carer's responsibilities'. As with dismissal, the Department is likely to credibly assert that the reason for its change of mind was solely operational need, and that Schou's 'workplace right' and her family and carer responsibilities played no role at all in the change of mind.

There is in addition the complex and difficult question of whether the Department has engaged in adverse action by 'discriminat[ing] between ... [Schou] and other employees of the employer'.¹⁶¹ The concept of 'discrimination' (and its derivatives) is not defined in the *FW Act*. Nor has that concept been defined in federal industrial legislation since it first appeared some thirty years ago. It has however been interpreted from the early days to include both direct and indirect discrimination, articulated in ways that broadly captured the meanings of anti-discrimination law.¹⁶² Anti-discrimination law meanings of discrimination have continued to be adopted by Fair Work Australia ('FWA') in a number of recent decisions across different provisions in the *FW Act*.¹⁶³ In contrast, another recent decision used a dictionary to ascertain the ordinary meaning of the concept of discriminate in terms of adverse action.¹⁶⁴ Importantly though none of these recent decisions were directly on the adverse action provisions themselves. In contrast, in two decisions directly on point,

¹⁶¹ *FW Act* s 342(1) item 1.

¹⁶² See, eg, *Flight Attendants' Association of Australia v Qantas Airways Limited* (2006) AIRC 282 (10 May 2006) [36]-[52] (on potentially discriminatory content of a certified agreement); not contested on appeal: *Flight Attendants' Association of Australia v Qantas Airways Limited* (2006) AIRC 537 (1 September 2006) [11]-[15]; *Sapevski v Katies Fashions (Australia) Pty Ltd* (1997) IRCA 219 (8 July 1997) (on discrimination in unlawful termination). Direct and indirect discrimination have also been used in interpreting the equal remuneration principles in federal industrial law: Meg Smith, 'Gender Pay Equity Reform in Australia: What is the Way Forward?' (2009) 35 *Australian Bulletin of Labour* 652 at 659-660.

¹⁶³ See eg, *Deng v Inghams Enterprises Pty Ltd* [2010] FWA 8797 (23 November 2010) [55]-[56] where in the context of an unfair dismissal hearing, FWA interpreted the concept of discrimination in the Part 3-1 General Protections as involving direct and indirect discrimination; *Australian Catholic University Limited T/A Australian Catholic University* [2011] FWA 3693 (10 June 2011) [11]-[14] where 'discriminatory term' under *FW Act* s 195 was interpreted to mean both direct and indirect discrimination; *Shop, Distributive and Allied Employees Association* [2011] FWAFB 6251 (14 September 2011) [30] where the prohibition in the *FW Act* s 153 on modern awards containing terms 'that discriminate' was assumed (without a firm view being expressed) to include indirect discrimination.

¹⁶⁴ *D H Gibson Pty Limited* [2011] FWA 911 (10 February 2011) [27] where in the context of an application for approval of an agreement, FWA relied on the Macquarie Dictionary definition of discriminate to interpret the meaning of s 342 adverse action. Section 15AB of the *Acts Interpretation Act 1901* (Cth) indicates that words are to be given their ordinary meaning. The Macquarie Dictionary provides (in part) that discriminate means 'to make a distinction, as in favour of or against a person or thing; to discriminate against a minority', 'to note or observe a difference; distinguish accurately: to discriminate between things': Macquarie Dictionary (5th edn, 2009). In *Street v Queensland Bar Association* (1989) 168 CLR 461 at 570 Gaudron J stated that in its ordinary meaning discrimination 'refers to the process of differentiating between persons or things'. See further Rice & Roles, above n 140, 22.

the Federal Magistrates used a combination of a dictionary meaning and the Federal Magistrates' understandings of direct discrimination.¹⁶⁵

One of the main exceptions to the listed grounds of race, sex and so on requires reference to anti-discrimination law and so there is a clear linking between the adverse action concept and anti-discrimination law in this regard.¹⁶⁶ Some commentators have suggested that the legislative formula of discrimination as 'between the employee and other employees of the employer' is quite narrowly drawn and may indicate that only the idea of direct discrimination is covered.¹⁶⁷ The suggestion is that the formula 'between the employee and other employees' invokes a methodology of comparison, examining how the claimant was treated in comparison to other employees.¹⁶⁸ Support for this approach is found in the main decision to date on adverse action, although the decision was not on the discrimination provisions. The Full Federal Court (by majority) indicated that the adverse action discrimination provisions involve a comparator test of the kind applied in direct discrimination in anti-discrimination law.¹⁶⁹ Adopting such an approach leads to the view that so long as the employer treats the claimant the same as its other employees, as the Department did with Schou, there will be no adverse action in the form of 'discriminat[ing] between' within the meaning of the legislation.¹⁷⁰

In addition, or alternatively to referencing domestic anti-discrimination law, international conventions may be used to flesh out the bare framework of the *FW Act* on discrimination. Although the adverse action provisions do not rely on the external affairs head of power in the Australian Constitution for their support, 'taking into

¹⁶⁵ *Ramos v Good Samaritan Industries (No 2)* [2011] FMCA 341 (24 August 2011) [59]-[62]. The Federal Magistrate determined that as the claimant alleged direct discrimination, he was required to prove that the employer 'deliberately treated him less favourably than its other employees': [62]. With respect this appears to misunderstand the role of the reverse onus of proof, and the decision of the majority in *Barclay* on intention and consciousness. In *Hodkinson v The Commonwealth* [2011] FMCA 171 (31 March 2011) at [178] the Federal Magistrate concluded that discrimination in s 342 'involves an employer deliberately treating an employee, or a group of employees, less favourably than others of its employees'.

¹⁶⁶ Interestingly, the Fair Work Ombudsman appears to use anti-discrimination law to understand the meaning of discrimination, interpreting the adverse action provisions as prohibiting both direct and indirect discrimination: Fair Work Ombudsman, *Guidance Note No 6 – Discrimination Policy* (2009) [5.4]. Notably the Guidance Note also refers to 'systemic discrimination', which is not a term used in anti-discrimination statutes themselves. The Note does not refer to the 2008 Victorian developments, or the post 2009 meaning of discrimination under the *DDA* as a failure to make reasonable adjustments in relation to a disability. Assertions that there are conventional or standard meanings of direct and indirect discrimination in Australian anti-discrimination law are becoming more problematic, perhaps especially since the enactment of the 2008 Victorian amendments. In reality there are now many variations in the definitions and meanings of discrimination throughout Australian anti-discrimination law: See generally, Rees et al, above n 27 [4.1.3]-[4.1.5].

¹⁶⁷ The formula is contained in *FW Act* s 342(1) item 1(d). See Owens et al, above n 28, 464.

¹⁶⁸ It is unclear how the adverse action discrimination prohibition operates in situations where the employer has only one or two employees: Andrades, above n 138, 7; Rice & Roles, above n 140, 23.

¹⁶⁹ *Barclay* [2011] FCAFC 14 (9 February 2011) [35]-[36] (Gray and Bromberg JJ). That understanding has been echoed in *Ramos* [64]-[66]; *Stephens* [83]-[84].

¹⁷⁰ Andrades, above n 138, 7-8.

account Australia's international labour obligations' is an objective of the *FW Act*.¹⁷¹ The Discrimination (Employment and Occupation) Convention 1958 (No 111) of the International Labour Organisation ('ILO') has been, and remains, directly relevant in understanding the meaning of the unlawful termination provisions in the former *WR Act* and the current *FW Act*.¹⁷² ILO Convention 111 defines discrimination broadly to include 'any distinction, exclusion or preference made on the basis of' a number of grounds, and 'such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation'.¹⁷³ Some commentators draw on ILO Convention 111 (as well as other material) to support an argument that the adverse action discrimination provisions may cover the broad idea of indirect discrimination as it is known in anti-discrimination law.¹⁷⁴

In addition, the ILO Workers with Family Responsibilities Convention 1981 (No 156) is potentially relevant to understanding the meaning of discrimination and equality in relation to a modern day Schou. This Convention acknowledges the desirability of taking into account the special needs of workers with family responsibilities in terms and conditions of employment.¹⁷⁵ ILO Convention No 156 speaks of 'creating effective equality of opportunity' for workers with family responsibilities.¹⁷⁶ Each member state under this Convention, including Australia, has undertaken to 'make it an aim of national policy to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities.'¹⁷⁷ Recourse to such broad understandings of discrimination and the need to provide accommodation to workers with family responsibilities will take effect to strengthen the claim of a modern day Schou under the *FW Act*.

The lack of a legislative definition of discrimination in the *FW Act* opens up the possibility for the development of a more nuanced understanding of that concept in the context of adverse action. The Explanatory Memorandum may acknowledge this prospect, by recognizing that the adverse action provisions are not merely a consolidation of previous understandings of freedom of association and unlawful

¹⁷¹ *FW Act* s 3(a). Note that extrinsic material can be used to aid interpretation: *Acts Interpretation Act 1901* (Cth) s 15AB.

¹⁷² *WR Act* s 659(2); *FW Act* s 772(1)(f). These provisions rely on the external affairs head of power in the Australian Constitution. A person is not entitled to lodge a claim under the unlawful termination provisions where they are entitled to challenge the dismissal as adverse action: *FW Act* s 723.

¹⁷³ Art 1(a), (b). It has been determined that this form of words (which appeared in the *Human Rights and Equal Opportunity Commission Act 1986* (Cth)) includes anti-discrimination law meanings of both direct discrimination and indirect discrimination: *Commonwealth v Human Rights and Equal Opportunity Commission* [2000] FCA 1854 (15 December 2000) at [53].

¹⁷⁴ Rice & Roles, above n 140, 24-7.

¹⁷⁵ ILO Convention 156 arts 3.2, art 4.

¹⁷⁶ ILO Convention 156 art 3.1. See also preamble.

¹⁷⁷ ILO Convention 156 art 3.1. In Convention 156 'discrimination' is defined to have the same meaning as in ILO Convention 111: ILO Convention 156 art 3.2.

termination, and that they do expand the scope of unlawful conduct by employers.¹⁷⁸ In choosing not to define or specify a meaning of discrimination, Parliament deliberately left this field open, leaving the task of assigning meaning to claimants and employers, their representatives, FWA, and ultimately the courts. Principles of statutory interpretation indicate that the new rules ought to be interpreted in a way that promotes the objects of the legislation, and the Full Federal Court has reminded us of the importance of this approach in the context of interpreting Part 3-1 of the *FW Act*.¹⁷⁹ The objects of the Act include advancing the ‘social inclusion of all Australians’, to assist employees ‘to balance their work and family responsibilities by providing for flexible working arrangements’, and to prevent discrimination. In addition, the objects of Part 3-1 refer to providing protection from workplace discrimination, and providing ‘effective relief’ from discriminatory harms.¹⁸⁰

The factual context of Schou illustrates the potential impact of different interpretations of the phrase ‘discriminates between the employee and other employees of the employer’. If that formula countenances the ILO Convention 100 meaning of discrimination, then Schou may be able to successfully argue that she experienced ‘exclusion’ by reason of her forced resignation, which had the ‘effect of nullifying or impairing equality of opportunity ... in [her] employment or occupation’. ILO Convention 156 supports such an interpretation. Schou might also be successful if the adverse action provisions are interpreted to encompass a broad understanding of indirect discrimination, as some commentators argue it might. She may be able to establish that the policy of her employer – that all employees must work on site all sitting days – substantially disadvantages parents and carers and does so unreasonably.

Alternatively, if the *FW Act* formula countenances only direct discrimination in the form of less favourable treatment, as others predict, then Schou was not treated differently to, or less favourably than, her co-workers. Indeed, that Schou was treated the same as her colleagues in the sense that the Department required all sub-editors to work on site all sitting days, was noted by both the Supreme Court and the Court of Appeal.¹⁸¹ None of the employees in the Department were provided with flexibility as they were all expected to conform to the normative work arrangement of working on site. This may also be the outcome if the ordinary meaning of discrimination is adopted.¹⁸² Such a narrow interpretation of the legislative phrase ‘discriminates between the employee and other employees’ provides very little potential to challenge status quo work arrangements and understandings that detrimentally impact on non-normative workers such as mothers, and more broadly workers with family or carer’s responsibilities.

¹⁷⁸ EM Fair Work Bill, above n 50 [1336].

¹⁷⁹ *Acts Interpretation Act 1901* (Cth) s 15AA; *Barclay* [18].

¹⁸⁰ *FW Act* s 3; s 336(c), (d).

¹⁸¹ *Victoria v Schou* [2001] VSC 321 (31 August 2001) [12], [24]; *Victoria v Schou* [2004] VSCA 71 (30 April 2004) [39] (Phillips JA).

¹⁸² Some articulations of the ordinary meaning of discriminate emphasise differentiating *between* employees, or treating a person differently: see n 165. See further Rice & Roles, above n 140, 22.

D Exceptions

A number of exceptions apply in relation to the adverse action protections. These exceptions appear to be potentially applicable in relation to all four forms of adverse action, and not merely adverse action in the form of discrimination, although that context might be their more obvious application.¹⁸³ One exception covers action that is taken because of the 'inherent requirements of the particular position'.¹⁸⁴ This exception applied in the past in relation to the unlawful termination provisions, and in that context was interpreted to refer to the essential requirements of the position in question, rather than an aspect of the position that is non-essential or peripheral.¹⁸⁵ A similar exception exists in anti-discrimination law, although in that context it is frequently paired with a requirement on the employer to make reasonable adjustments to assist the employee to fulfill the inherent requirements of the job.¹⁸⁶ No such obligation on the employer appears in the *FW Act* 'inherent requirements' exception. Drawing on the findings of VCAT it seems that this exception would not be applicable in relation to the case of a modern day Schou. Working on site all sitting days was not an essential requirement of the position, and Schou clearly could continue to perform the essential requirements of the position whilst working at home.¹⁸⁷

Another exception applies in relation to action that is 'not unlawful under any anti-discrimination law in force in the place where the action is taken'.¹⁸⁸ The concept of 'anti-discrimination law' in this last exception is defined for this purpose, and includes predictably Commonwealth statutes such as the *SDA*, and relevant state and territory anti-discrimination statutes such as the *EOA* (Vic).¹⁸⁹ Much uncertainty attaches to the scope of this exception.¹⁹⁰ Two alternative interpretations of this *FW Act* exception are possible.¹⁹¹ The *FW Act* formula might mean that conduct that is

¹⁸³ *FW Act* s 351(2).

¹⁸⁴ *FW Act* s 351(2)(b).

¹⁸⁵ *Qantas Airways Ltd v Christie* (1998) 193 CLR 280 at 295 (Gaudron J), at 305 (McHugh J), at 318-9 (Gummow J), at 340-1 (Kirby J). See also *X v Commonwealth* (1999) 200 CLR 177, on the similar inherent requirements exemption in the *DDA*.

¹⁸⁶ See eg, *DDA* s 21A(1)(b); *EOA* (Vic) s 20, s 23.

¹⁸⁷ There is also an exception in relation to religious institutions, which again also applied in relation to the previous unlawful termination provisions: *FW Act* s 351(2)(c). Like the inherent requirements exception, this religious institutions exception has no relevance to Schou's employment.

¹⁸⁸ *FW Act* s 351(2)(a). Note also the separate exception that an employer's conduct will not constitute 'adverse action' where it 'is authorized by or under' the *FW Act*, a Commonwealth law, or a prescribed state or territory law: *FW Act* s 342(3).

¹⁸⁹ *FW Act* s 351(3). Although s 351(3) refers to the repealed *EOA 1995* (Vic), s 10A of the *Acts Interpretation Act 1901* (Cth) provides in effect that the reference to the 1995 Act should be taken to include a reference to the *EOA* (Vic).

¹⁹⁰ Owens et al, above n 28, p 463; Creighton & Stewart, above n 28, [17.38]; Rice & Roles, above n 140, 27-9; Smith, above n 28, 215-6. Commentators have noted that the need to inquire into and determine the applicability of the 'not unlawful' exception is likely to produce significant implications in terms of legal cost and delay: Rice & Roles, above n 140, 29.

¹⁹¹ Notably both interpretations concede that the protection offered by adverse action varies from state to state and territory, as each jurisdiction's anti-discrimination legislation varies in important respects.

covered by a specific exemption or exception in a relevant anti-discrimination statute (such as a positive measure or temporary measures exemption)¹⁹² will not constitute 'adverse action' under the *FW Act* provisions.¹⁹³ Alternatively, it might exempt from the adverse action provisions additional broader conduct, such as that which falls outside the scope of anti-discrimination law (perhaps because discrimination on that ground and in those circumstances is not rendered unlawful,¹⁹⁴ or that the evidence does not establish that the ground was 'a substantial reason' for the conduct¹⁹⁵).

Unfortunately the passage of this provision through Parliament does not shine much light on the correct interpretation. As introduced into Parliament the Bill worded the exemption as action that is 'authorised by, or under, a State or Territory anti-discrimination law'.¹⁹⁶ As enacted the provision exempts action that is 'not unlawful under any anti-discrimination law in force in the place where the action is taken'. The Supplementary Explanatory Memorandum explained the change in wording as follows:

This exception is intended to ensure that where action is not unlawful under a relevant anti-discrimination law (e.g., because of the application of a relevant statutory exemption) then it is not adverse action under subclause 351(1). The word 'authorised' may not capture all action that is not unlawful under anti-discrimination legislation, especially if the legislation does not specifically authorize the conduct but has the effect that the conduct is not unlawful. These amendments ensure the exception operates as intended.¹⁹⁷

This passage is ambiguous. On the one hand the deletion of the word 'authorised', suggests a conscious decision to broaden the exemption to cover conduct that, for whatever reason, is not rendered unlawful under anti-discrimination law.¹⁹⁸ On the other hand, the first sentence in the passage seems to reinforce the narrower interpretation of this *FW Act* exception. That is, that conduct that is not unlawful under anti-discrimination law because it falls within a relevant statutory exemption cannot be challenged under the *FW Act* as adverse action. On balance it seems that

That outcome sits uneasily with Parliament's intention that the *FW Act* provide a national approach: Owens et al, above n 28, p 463.

¹⁹² See eg, *SDA* s 7D, s 44; *EOA* (Vic) s 12, s 89.

¹⁹³ It has been aptly written that '[i]n cross-referencing to exemptions and exceptions the *FW Act* has unwittingly stumbled into the most incoherent corner of Australia's anti-discrimination laws': Rice & Roles, above n 140, 28. As these authors note, there is little consistency across Australian anti-discrimination statutes regarding exemptions and exceptions.

¹⁹⁴ For example, discrimination on the ground of sexuality or gender identity that takes place within the Commonwealth public sector and Commonwealth statutory agencies is not rendered unlawful under either Commonwealth or state anti-discrimination law: *Commonwealth of Australia v Anti-Discrimination Tribunal (Tasmania)* (2008) 248 ALR 494.

¹⁹⁵ See eg, *EOA* (Vic) s 8(2)(b). Under the *SDA* the prohibited reason need be only one of the operative reasons: *SDA* s 8.

¹⁹⁶ Fair Work Bill 2008 (Cth) (as presented and read a first time) cl 351(2)(a).

¹⁹⁷ EM Fair Work Bill, above n 50 [220].

¹⁹⁸ Interestingly, the word 'authorised' was unaltered in the Bill in the context of the exception that applies to action that is 'authorised by or under' the *FW Act* or other law of the Commonwealth (*FW Act* s 342(3)(a)). The EM provides an illustration of this exception as being where an employer is authorised to stand down an employee under s 524(1): EM Fair Work Bill, above n 50, [1388]. This provides support for the view that the broader interpretation should be given to the exception in s 351(2)(a).

the broader interpretation is more likely to be correct.¹⁹⁹ That outcome seems to best represent the thinking behind the decision to remove the word 'authorised' from the Bill's provision. Notably, the wide wording of the legislative provision itself suggests such a broader interpretation.²⁰⁰

This provision that exempts conduct that is 'not unlawful under any anti-discrimination law' will clearly be of relevance to a claim by Schou of adverse action on the ground of 'family or carer's responsibilities', as it is likely to be under any claim on a ground covered by anti-discrimination law. Schou's situation does not fall within any of the specific exceptions in the *EOA* (Vic) or the *SDA*, and so on the narrower interpretation the *FW Act* exception will not apply. If the broader interpretation of the *FW Act* exception is adopted, it must be noted that the Department's conduct was determined to be 'not unlawful' under the direct and indirect discrimination provisions in the *EOA 1995* (Vic), as they stood at that time. Notably though a relatively strong argument can be made that the Department's conduct would be unlawful under the current provisions regarding discrimination in the form of an unreasonable failure to accommodate the responsibilities of a parent or carer. This argument has been explored above, and if it is correct, the Department's conduct cannot be described as 'not unlawful' under anti-discrimination law, with the result that the *FW Act* exception will not apply.²⁰¹

E Concluding Thoughts on Adverse Action

A person in Schou's position today faces much uncertainty in pursuing a remedy under the adverse action provisions in the *FW Act*. Even if it is established that she did experience 'adverse action' within the meaning of the legislation, was that 'adverse action' 'because' she had a 'workplace right', or 'because of' her 'family or carer's responsibilities', or was it unrelated to those matters? Would the Department be able to discharge the reverse onus of proof in this regard by showing that its change of mind on the modern proposal was solely prompted by business concerns, with Schou's 'workplace right' or 'family or carer's responsibilities' playing no operative role at all?

Clearly much about these new provisions remains to be mapped through future cases. The examination above illustrates the many questions and uncertainties a potential litigant and their legal advisor faces in the adverse action framework.²⁰² Nonetheless,

¹⁹⁹ For a support of this view, see Rice & Roles, above n 140, 27-9. Contra Smith, above n 28, 215-6.

²⁰⁰ If the more expansive interpretation is correct, it means that the *FW Act* provisions add nothing substantively new to the overall legal framework, albeit that the Act establishes a new forum for existing discrimination grievances: Owens et al, above n 28, 463-4.

²⁰¹ Notably, were Schou located in a state or territory where the anti-discrimination statute does not impose an obligation on employers to accommodate the care responsibilities of an employee, such as Queensland, Tasmania, Western Australia, and perhaps New South Wales, the employer's conduct would most likely be 'not unlawful' under anti-discrimination law, with the result that the *FW Act* exception would apply and the employer would not be liable under the adverse action provisions.

²⁰² Smith explores how the institutional structures of Australian industrial relations, and the tradition of separation of industrial claims from discrimination claims will shape how the adverse action

the advantages for claimants of the *FW Act* framework of adverse action over the *EOA* (Vic) mechanism of discrimination in the form of a failure to accommodate are pronounced and attractive. These include the reversed onus of proof, a need for the prohibited ground to be only a reason for the adverse action, whether or not the dominant or a substantial reason, and the potentially pro-active enforcement role of Inspectors of the Fair Work Ombudsman. Whether these attractions outweigh the considerable uncertainty attaching to key concepts in the jurisdiction remain to be assessed on an individual basis.

CONCLUSION

This article has shed light on three new legal mechanisms designed to assist workers with care responsibilities. The well known case of Deborah Schou, with her relatively modest request to work from home two days a week, was used as a vehicle to explore the legal frameworks. Being located in Victoria and so now covered by the accommodation provisions in the *EOA* (Vic), the situation of a modern day Schou represents the best case scenario in favour of accommodation. As a Victorian public sector employee a contemporary Schou has recourse to both the request provisions and the adverse action protections in the *FW Act*, whereas employees of other state public sectors most likely do not.²⁰³ Given these matters it is surprising and of concern that the legal rights of a modern day Schou are not both more straightforward, and clearly in her favour.

Ultimately the investigation conducted in the article reveals that it is uncertain whether a person with care responsibilities such as Schou could successfully use these legal rights in order to claim accommodation in the form of different treatment to those without care responsibilities. The ability to request a change in working arrangements under the *FW Act* provides a limited enforcement mechanism, and is silent on the situation where, as here, an employer initially agrees to a request and then later changes its mind. Potential sources of legal uncertainty were uncovered in both the Victorian discrimination jurisdiction and in the federal adverse action framework. The Victorian discrimination provisions on reasonable accommodation raise questions regarding the degree of formality required in relation to the employee's request for accommodation. The legal standard of reasonableness in the Victorian provisions also generates methodological questions regarding how different factors should be weighed. It has been shown that vague rules in anti-discrimination law tend to strengthen the hand of those employers who resist the policy objectives of the rules.²⁰⁴ This does not bode well for the fuzzy reasonableness standard of the accommodation provisions in the *EOA* (Vic). The adverse action jurisdiction under the *FW Act* also contains several grey areas. A notable instance is the use of the concept of discrimination in the *FW Act* framework, without definition or explication.

provisions are interpreted: Belinda Smith, 'What Kind of Equality Can We Expect from the Fair Work Act?' (2011) 35 *Melbourne University Law Review* (forthcoming).

²⁰³ See n 57.

²⁰⁴ Gaze, above n 6, 90.

The exception for conduct that is 'not unlawful under any anti-discrimination law' also gives rise to many questions.

This article reveals the complexity of the issues and choices confronting both employees and their legal advisors, flagging and exploring main issues of contestation under the *EOA* (Vic) framework and the *FW Act*. One clear message emerges from the examination conducted in this article. It is that there is not an obviously preferable course of action for a modern day Schou. All three avenues present different challenges and risks for an employee.

Requests for Flexible Work under the Fair Work Act

Anna Chapman*

Over the past five years Australia has seen much law reform activity around the intersections of labour market engagement and care responsibilities. One of the more contested questions of law reform is the extent to which employers ought to be under a legal obligation to actively accommodate the responsibilities that their employees have as carers. Accommodation may take the form of adjusting hours and times of work, and location of work, so that an employee can better manage conflicts between their work obligations and their responsibilities to care for others, such as children or elderly parents. A number of inquiries and investigations attest to strong opposition from many employers to the imposition of a legal obligation of this description. Employers draw on the concept of managerial prerogative and speak of the need to manage their enterprises in the ways they see as most appropriate, whilst advocates in favour of imposing a positive duty of accommodation emphasise the objective of equality and the need for law to provide the tools to truly challenge the ideal worker norm of Australian labour markets.¹

Only Victoria and the Northern Territory have been prepared to squarely legislate a requirement on employers to accommodate, to the extent that is reasonable, the care responsibilities of their employees.² The Commonwealth Parliament has not been prepared to legislate in this manner,³ although it has been prepared to impose a reasonable adjustments obligation on employers in relation to the ground of

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¹ See eg, Human Rights and Equal Opportunity Commission, 'It's About Time: Women, Men, Work and Family' (Final Paper, 2007) 58-65; Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *The Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008) [4.33]-[4.41]. See also Marian Baird, 'The State, Work and Family in Australia' (2011) 22 *International Journal of Human Resource Management* 3742.

² *Anti-Discrimination Act* (NT) s 24 (which applies in relation to all attributes covered in the Act); *Equal Opportunity Act 2010* (Vic) ('EOA 2010 (Vic)') s 17, s 19, s 22, s 32. The Victorian provisions were originally inserted into the *Equal Opportunity Act 1995* (Vic) by the *Equal Opportunity Amendment (Family Responsibilities) Act 2008* (Vic). The EOA 2010 (Vic) also imposes an obligation on employers to make reasonable adjustments in relation to disability: EOA 2010 (Vic) s 20. A positive obligation on employers may be imposed by the *Anti-Discrimination Act 1977* (NSW) s 49V(4) and s 49U, although this has not been tested in case decisions. In addition, in the context of indirect discrimination claims and the reasonableness component, the New South Wales tribunal has required employers to at least consider and sometimes to make reasonable efforts to accommodate an employee's request to alter her working arrangements: *Tleyji v The TravelSpirit Group Pty Ltd* [2005] NSWADT 294 (15 December 2005) [105]; *Reddy v International Cargo Express* [2004] NSWADT 218 (30 September 2004) [84].

³ For recommendations in favour of such a Commonwealth legislative right, see HREOC, above n 1, recommendation 6; Senate Standing Committee on Legal and Constitutional Affairs, above n 1, recommendation 14.

disability.⁴ As for care responsibilities, the Commonwealth has enacted a new statutory mechanism for carers in the *Fair Work Act 2009* (Cth) (*FW Act*). Under this framework eligible parents and carers may request a change in their working arrangements in order to accommodate care responsibilities to young children and children with a disability.⁵ Although the legislation provides that an employer is only entitled to refuse such an employee request on ‘reasonable business grounds’, at best the *FW Act* provides a partial enforcement scheme only against employers. Whilst some aspects of this *FW Act* mechanism are enforceable as civil remedy provisions, the central requirement that an employer is only permitted to reject a request on ‘reasonable business grounds’ is not directly enforceable. This feature of the new legislation attests to the highly contested character of the issue of accommodation for care responsibilities, and the deep ambivalence by the Commonwealth Parliament regarding the appropriate role of the state in shaping interactions between work and care.

Unsurprisingly, the lack of enforcement attaching to the request mechanism attracted strong criticism in submissions to the Senate Inquiry into the Fair Work Bill.⁶ For example, the Australian Human Rights Commission expressed the view that without a direct grievance procedure of enforcement, ‘this ... [request mechanism] will be nothing more than a guideline’.⁷ For the ACTU, the request mechanism ‘is rendered nugatory by the fact that the employer may deny the request on “reasonable business grounds” and the refusal cannot be reviewed in any forum.’⁸ In the opinion of the community legal centre JobWatch, ‘an employer need not genuinely consider such a request or can make a decision based on subjective reasons. This will render the right to request flexible working arrangements ... effectively meaningless.’⁹ Debate in Parliament similarly drew attention to the lack of enforcement of the new right.¹⁰

Scholarship has continued to highlight this issue of limited enforcement, with many texts in the field leaving the reader with the impression that there is little, if anything, of substance in the *FW Act* request mechanism that can be directly enforced against an unwilling employer.¹¹ Some literature has stepped outside a focus on formal

⁴ *Disability Discrimination Act 1992* (Cth) (*DDA*) s 5(2) (as a type of direct discrimination), s 6(2) (as part of indirect discrimination).

⁵ *FW Act* Part 2-3 Div 4. These provisions commenced on 1 January 2010.

⁶ The Senate, Standing Committee on Education, Employment and Workplace Relations, Parliament of Australia, *Fair Work Bill 2008 [Provisions]* (2009) [2.30]. For an analysis of submissions and debate in Parliament, see Jennifer Waterhouse and Linda Colley, ‘The Work-Life Provisions of the Fair Work Act: A Compromise of Stakeholder Preference’ (2010) 36 *Australian Bulletin of Labour* 154.

⁷ Australian Human Rights Commission (‘AHRC’), *Australian Human Rights Commission Submission to the Senate Education, Employment and Workplace Relations Committee* (2009) [14].

⁸ ACTU, *Submission of the Australian Council of Trade Unions to the Senate Education, Employment and Workplace Relations Committee Inquiry into the Fair Work Bill* (2009) [79].

⁹ Job Watch Inc, *Submission to the Senate Standing Committee on Education, Employment and Workplace Relations Inquiry into the Fair Work Bill 2008* (2009) [4.3.1].

¹⁰ Commonwealth, *Parliamentary Debates*, Senate, 10 March 2009, 1002 (R Siewert); 1069 (R Brown); 1082 (N Xenophon).

¹¹ Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work* (Oxford University Press, 2nd edn, 2011), [12.4.6], [7.3.4.2]; Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th edn, 2010) [10.17], [13.96]-[13.97]; Andrew Stewart, *Stewart’s Guide to Employment Law*

enforcement structures, to provide a broader view of the potential of the new *FW Act* provisions to generate cultural change around work and care.¹² This scholarship construes the legislative provisions as presenting a normative statement about the desirability of employers reasonably accommodating employees with responsibilities to children. The thinking is that the mere enactment of the new provisions may encourage employees to make requests for accommodation of care responsibilities, at the same time as it regularizes the handling of such requests by employers as simply another aspect of managerial responsibilities. Over time cultural change within organisations, and more broadly the labour market and society, may be generated. Indeed, the process of normalising employee requests for accommodation and adjustment, and having them considered and granted by employers, is already well underway. It is clear that many employers were already providing flexible work arrangements when the *FW Act* scheme was enacted. For example, in the 6 months prior to the commencement of the *FW Act* mechanism, research revealed that just over 20% of employees had requested flexible arrangements, with their requests granted in almost 70% of cases, partially rejected in around 14% of cases, and fully rejected in almost 10% of cases.¹³ In this way the *FW Act* scheme builds on these emerging labour market developments, and offers potential to provide further impetus to them.¹⁴

This article takes a deeper look at the legal dimensions of the request mechanism in the *FW Act*. It examines closely the legal obligations on employers that are directly enforceable. Although as noted the central obligation on employers to grant requests unless there are 'reasonable business grounds' is not directly enforceable as a contravention of the request provisions, other rules in the request mechanism are directly enforceable. This article explores these other rules and their potential interpretation. It is arguable that these provisions do impose important substantive – and enforceable - obligations on employers. In this way the article addresses the view that the request mechanism in the *FW Act* contains little of value for workers in terms of legal enforcement. On the contrary, it appears that the new statutory scheme may offer important, and to date largely unacknowledged, scope by way of direct

(Federation Press, 3rd edn, 2011) [11.5]; Marilyn J Pittard and Richard B Naughton, *Australian Labour Law: Text, Cases & Commentary* (LexisNexis, 5th edn, 2010) [10.35]; Anthony Forsyth et al, *Navigating the Fair Work Laws* (Lawbook Co, 2010) 45. Some texts recognize that many employers were already granting flexibility prior to the enactment of the statutory request mechanism. This phenomenon is discussed below.

¹² Sara Charlesworth and Iain Campbell, 'Right to Request Regulation: Two New Australian Models' (2008) 21 *Australian Journal of Labour Law* 116; Jill Murray, 'Work and Care: New Legal Mechanisms for Adaptation' (2005) 15 *Labour & Industry* 67. These authors draw on the experience of earlier similar developments in the United Kingdom granting a right to request which are said to have led to a cultural change in employer attitudes.

¹³ Barbara Pocock, Natalie Skinner and Reina Ichii, *Work, Life and Workplace Flexibility: The Australian Work and Life Index 2009*, Centre for Work + Life, University of South Australia, 2009, p 54, p 59. See also Natalie Skinner and Barbara Pocock, 'Flexibility and Work-Life Interference in Australia' (2011) 53 *Journal of Industrial Relations* 65; Linda Colley, 'Central Policies, Local Discretion: A Review of Employee Access to Work-Life Balance Arrangements in a Public Sector Agency' (2010) 36 *Australian Bulletin on Labour* 214; CCH, 'Results of Flexible Work in 2010 – A Pulse Survey' (June 2010) 184 *Equal Opportunity Alert* 1, 3.

¹⁴ Creighton and Stewart, above n 11, [13.96]; Stewart, above n 11, [11.5].

enforcement. This is important in itself. In addition, it provides further impetus and leverage for the continuing development of workplace structures, processes and cultures of accommodation of care responsibilities.

The article first profiles the request mechanism in the *FW Act*, and its partial enforcement regime. From there the article turns to address questions of interpretation, focusing first on the process by which an employer reaches a decision. This is followed by an examination of the range of factors that an employer may be required to take into account in its consideration of the request. The last section of the article examines the request regime enacted in the United Kingdom in 2002. How that scheme has been interpreted may prove useful in understanding the Australian legislative framework.

The Statutory Framework

The request mechanism is part of the National Employment Standards, and is contained in Part 2-2 Division 4 of the *FW Act*. The Division enables an employee, who falls within certain closely defined categories, to request a change in 'working arrangements' in order to accommodate a limited range of care responsibilities.¹⁵ The responsibilities that are recognized are those that relate to a child under school age,¹⁶ or a child with a disability under the age of 18.¹⁷ The legislation specifies that the employee's request must be in writing and 'set out details of the change sought and of the reasons for that change'.¹⁸ The employer is required to give the employee a written response within 21 days, stating whether the request is granted or refused.¹⁹ If the employer refuses the request the employer's written response 'must include

¹⁵ The concept of 'working arrangements' is undefined, although a legislative note gives the examples of 'hours of work', 'patterns of work', and 'location of work': *FW Act* s 65(1) note.

¹⁶ *FW Act* s 65(1)(a), (b). On the meaning of 'school age' see *FW Act* s 12. In Victoria the 'school age' is 6 years of age: *Education and Training Reform Act 2006* (Vic) s 2.1.1.

¹⁷ The *FW Act* does not define or explain the meaning of 'disability', and the Explanatory Memorandum, Fair Work Bill 2009 (Cth) ('EM') is silent on the question of how that concept should be interpreted. This lack of statutory definition or explanation may indicate that the concept should be given its ordinary meaning (*Acts Interpretation Act 1901* (Cth) s 15AB) rather than reference made to technical definitions found in anti-discrimination legislation such as the *DDA*. In two recent decisions the word 'disability' in the General Protection provisions (Part 3-1 of the *FW Act*) has been given its ordinary meaning, and not the extended meaning in the *DDA*: *Hodkinson v Commonwealth* [2011] FMCA 171 (31 March 2011) [145]-[146]; *Stephens v Australian Postal Corporation* [2011] FMCA 448 (8 July 2011) [86]-[87]. Requests for accommodation under the NES mechanism can only be made by a 'parent' of a 'child', or a 'national system employee' who 'has responsibility for the care' of a 'child': *FW Act* s 65(1). The concept of 'parent' is not defined in the Act, but 'child' of a person is defined to include a person who is a child of the person within the meaning of the *Family Law Act 1975* (Cth), and an adopted child or step-child of the person: *FW Act* s 17, s 12 definitions of 'step-child'. These all provide relatively broad definitions. Note that the Productivity Commission has recently recommended that the *FW Act* request mechanism be expanded to cover parents of significantly disabled children over the age of 18: Productivity Commission, *Disability Care and Support*, Inquiry Report, Volume Two, No 54, 31 July 2011, p 728-729 (recommendation 15.5).

¹⁸ *FW Act* s 65(3). The Fair Work Ombudsman has formulated a template letter of request for use by employees: www.fairwork.gov.au/info/workandfamily.

¹⁹ *FW Act* s 65(4). Note that the legislation does not explicitly identify the time from which the 21 days runs. Presumably time starts to run from when the employer receives the request.

details of the reasons for the refusal'.²⁰ The employer 'may refuse the request only on reasonable business grounds'.²¹

Not only is the request mechanism narrowly drawn in respect to the type of care responsibilities that it relates to, it is restrictive in terms of the workers who can use it. It applies only in relation to 'national system employees',²² and only to those who have completed 12 months 'continuous service' with their employer prior to making the request, or are a 'long term casual employee' with 'a reasonable expectation of continuing employment by the employer on a regular and systematic basis'.²³

A partial enforcement framework operates in relation to the request mechanism. The rule that the only basis for an employer to refuse a request is 'reasonable business grounds' is not enforceable as a contravention of Part 2-2 Division 4.²⁴ It cannot be litigated directly, as no cause of action arises where an employer refuses a request on unreasonable grounds.

Indirect enforcement though of this obligation may arguably arise through other mechanisms. Importantly, the merits of an employer's refusal of a request for accommodation are reviewable where the employer has consented, under an agreement or an employment contract, to dispute resolution over a refusal of an employee's request.²⁵ In addition, where an enterprise agreement contains a term that provides a similar request mechanism, a contravention of that term is able to be pursued as a breach of the enterprise agreement.²⁶ And finally, an unreasonable refusal of a request by an employer may be able to be pursued as discrimination under

²⁰ *FW Act* s 65(6).

²¹ *FW Act* s 65(5).

²² *FW Act* s 60. Generally speaking, only employees in the common law sense of being engaged under contracts of service are included within the concept of 'national system employees': *FW Act* s 13.

²³ *FW Act* s 65(2). The concept of 'continuous service' is defined in s 22. The concept of 'long term casual employee' is defined in s 12 to be a casual employee who has been employed by that employer 'on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months'. The criteria of 12 months continuous service and 'long term casual employee' disproportionately exclude employment arrangements that are dominated by women of child-bearing age. See eg, Charlesworth and Campbell, above n 12, 122, who write that '[i]n 2006 ..., 21% of working women of child bearing age (25-44 years) had less than 12 months service with their current employer', citing Australian Bureau of Statistics, *Labour Mobility Australia*, 2006, Cat No 6209.0. See also Australian Bureau of Statistics, *Australian Labour Market Statistics*, July 2009, Cat No 6105, ABS, Canberra, 2009; AHRC, above n 7, [8]. In addition, the person requesting a change in working arrangements must actually be in employment. In other words, the request mechanism cannot be used by job applicants to seek accommodation in relation to a potential position: Beth Gaze, 'Quality Part-time Work: Can Law Provide a Framework?' (2005) 15 *Labour & Industry* 89 at 106.

²⁴ *FW Act* s 65(5), s 44(2). See also s 739(2), s 740(2). It is of course important to acknowledge that relevant employers are legally bound to comply with all aspects of the *FW Act* request mechanism, whether a particular provision is able to be directly enforced as a civil remedy provision or not: *FW Act* s 44.

²⁵ *FW Act* s 739(2), s 740(2).

²⁶ *FW Act* s 50. See further Forsyth et al, above n 11, 45. See eg, Workplace Express, 'FWA to Decide on Part-time Work Request', 3 June 2011. The arguments explored in this article may be relevant to the interpretation of such a term in an enterprise agreement, depending on the wording of the clause.

anti-discrimination law, and perhaps most obviously for Victorian employees under the *Equal Opportunity Act 2010* (Vic).²⁷

In contrast to the rule that the employer may only refuse a request on 'reasonable business grounds', the rules in the *FW Act* scheme requiring the employer to give the employee a written response within 21 days stating whether the request is granted, and where refused including 'details of the reasons for the refusal', are directly enforceable as contraventions of Part 2-2 Division 4. These are civil remedy provisions.²⁸ A claim can be brought in relation to such failures by an employee affected by the contravention, an employee organisation that is entitled to represent the interests of such an employee, or an Inspector of the Fair Work Ombudsman. The maximum penalty for a contravention of these civil remedy provisions is \$6,600 for an individual and \$33,000 for a body corporate employer.²⁹ The legislation provides that this potentially substantial penalty, or part of it, may be ordered to be paid to a particular employee, or organisation.³⁰

A Reasonable Investigation by the Employer?

The requirements on an employer to provide a written response to a request within 21 days, and where the request is refused to include 'details of the reasons for the refusal' begs the question of the degree of particularisation that will be required to be provided by an employer to the employee in order to satisfy this test. Must the employer exhaustively explain the reasons for its refusal? Would an outline and summary of reasons be sufficient? The Explanatory Memorandum to the Fair Work Bill states that '[t]he intention is that an employee is able to clearly understand why their request is being rejected.'³¹ The wording of the legislation itself makes it clear that the requirement is not merely that the employer provide the reasons for its refusal. Rather, it is that the employer supply 'details' of those reasons. The word 'details' suggests that specifics of the reasons will be required from an employer, so that the employee is, in the words of the Explanatory Memorandum, 'able to clearly understand why their request is being rejected'.

Faced with this obligation, employers must turn their mind to the level of investigation and consideration of a request that will need to be undertaken by them

²⁷ *EOA 2010* (Vic) s 17, s 19, s 22, s 32. The *FW Act* request mechanism does not exclude the operation of State law that provides more beneficial entitlements for employees to flexible work arrangements. Indeed, the *FW Act* contains an explicit direction in that regard: *FW Act* s 66. The requirement on the employer to provide reasons for its rejection may assist an employee in an evidentiary sense in an action such as under the *EOA 2010* (Vic). And note that if an employee is treated adversely because they have made a request under the federal request mechanism, this provides a basis to pursue a General Protections claim under Part 3-1 of the *FW Act*: *FW Act* s 340(1)(a)(i), s 341(1)(b), s 341(2)(i).

²⁸ *FW Act* s 65(4), (6), s 44(1), s 539.

²⁹ *FW Act* s 539(2), s 546. The hearing will take place in the Federal Court, the Federal Magistrates Court or in an eligible State or Territory court. A penalty unit is currently \$110. See also *FW Act* s 540. The limitation period for bring a claim is 6 years: s 544.

³⁰ *FW Act* s 546(3).

³¹ EM, above n 17, [265].

in the 21 days allocated so that in the event they decide to reject the request, they are in a position to provide 'details of the reasons' for the rejection. Importantly, the only 'reasons for the refusal' that are legitimate under the request mechanism are 'reasonable business grounds'. The link between these aspects of the request mechanism is clear. In short, the 'details' to be provided to the employee must be details of the 'reasonable business grounds'.

Looking outside Part 2-2 Division 4 may provide assistance in understanding the appropriate approach to be taken to the obligation on the employer to provide the employee with 'details' of its 'reasonable business grounds'. Interpretations given to the Small Business Fair Dismissal Code ('Code') by Fair Work Australia ('FWA') may be helpful in this regard. The Code provides a defence to a small business employer in relation to a claim of unfair dismissal under the *FW Act*.³² The relevant Code provision states that a dismissal will not be unfair 'when the employer believes on reasonable grounds' that the employee has been guilty of conduct that justifies summary dismissal.³³ FWA has taken the approach that in order to possess 'reasonable grounds' for its belief, an employer at least needs to have taken reasonable steps to gather relevant information.³⁴ That may require that the employer discuss the allegation of misconduct with the employee, and this is especially so where the facts are in doubt or are capable of an innocent interpretation.³⁵ In one recent decision FWA expressed it more strongly that 'it would usually be necessary for the employer to establish what inquiries or investigations were made to support' the argument that it had reasonable grounds for its belief, and that it would 'ordinarily be expected' that the employer's belief of serious misconduct would be put to the employee.³⁶

These interpretations under the Small Business Fair Dismissal Code may be useful in understanding the possible import of the request mechanism obligation on employers. The two sets of provisions share similarities in the use of the concept of reasonableness, and in the fact that it is for the employer to assess, at least initially, whether it has reasonable grounds. A potential point of distinction though exists. The Code refers to the employer forming a view about whether it has reasonable grounds to believe that the employee has been guilty of serious misconduct, and in that sense

³² *FW Act* s 385(c), s 388. The Code applies in relation to employers who employed fewer than 15 employees at the time of the dismissal: *FW Act* s 23. See further, Anna Chapman, 'Protections in Relation to Dismissal: From the Workplace Relations Act to the Fair Work Act' (2009) 32 *University of New South Wales Law Journal* 746 at 762-4.

³³ The relevant Code provision states '[i]t is fair for an employer to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal'.

³⁴ *Khammaneechan v Nanakhon Pty Ltd* [2010] FWA 7891 (14 October 2010) [60]; *Kneebone v Stuart Wines Company Pty Ltd* [2011] FWA 2350 (15 April 2011) [9], [18]. See also inferentially, *Nielson v Cadle Park Pty Ltd* [2009] FWA 1737 (17 December 2009) [30]; *N v The Bakery* [2010] FWA 3096 (20 April 2010) [55]-[67]; *Knecht v Renaissance Parquet* [2011] FWA 1079 (21 February 2011) [20]-[40].

³⁵ *Said v Jokar Holdings Pty Ltd* [2011] FWA 977 (15 February 2011) [43]-[45], upheld on appeal: *Jokar Holdings Pty Ltd v Said* [2011] FWA 2628 (6 May 2011).

³⁶ *Harley v Rosecrest Asset Pty Ltd* [2011] FWA 3922 (21 June 2011) [9].

the employee's conduct will be the dominant focus of the employer's deliberations. In contrast, the employee's situation plays a smaller, although still important, role in the employer forming a view on whether it has 'reasonable business grounds' to reject a request for accommodation. The employee's situation and the specifics of her or his request are important as providing the starting point for the employer's deliberations regarding its 'business grounds', but the employee's situation plays a more confined role in the employer's deliberations under the request decision-making process than under the Code process.

Nonetheless, the analogy with interpretations given to the Small Business Fair Dismissal Code appears plausible, and potentially instructive. Interpretations of the Code by FWA suggest that in order to make a decision to reject a request for accommodation on 'reasonable business grounds', an employer needs to have taken reasonable steps to investigate the viability of the accommodation that the employee has requested. In addition to conducting an appropriate internal assessment of the feasibility of the request, an employer may be required to meet with the employee to discuss the specifics of her or his request. The less detailed the employee's letter of request, the greater the likely need for the employer to meet with the employee in person in order to gain a full sense of what is being requested, and why.³⁷ In short, it may be that the employer will need to inform itself sufficiently of the relevant information in relation to the request in order for it to both possess, and be in a position to satisfy its legal obligation to provide the employee with, 'details of' its 'reasonable business grounds'.³⁸

Relevant Factors in the Employer's Deliberation?

The matters discussed above go to the processes by which an employer gains a clear understanding of the employee's request for accommodation, and reaches a decision in relation to it. A second and interrelated dimension of the employer's legal obligations under the *FW Act* relates to the methodology and breadth of lens that the employer should adopt in assessing 'reasonable business grounds'. A plethora of questions arise. For instance, after gaining a full sense of the employee's request, and the reasons for it, should an employer's assessment of 'reasonable business grounds' relate solely to its own perceived imperatives and interests, or does the requirement of 'reasonable business grounds' invoke a methodology by which the employer must consider and give weight to the employee's interests and needs? Should other employees' interests (present and future) be taken into account as well by the employer? If an employer's investigation of its business grounds related solely to

³⁷ Notably the employee's request is required to 'set out details of the change sought and of the reasons for that change': *FW Act* s 65(3). The employee ought to be in a position to fully take part in that meeting or those meetings, and this might mean that the employee is given notice of the meeting, and have an opportunity to have a support person with them.

³⁸ Leaving aside the question of legal obligation, such a meeting (or meetings) of course accords with good management practice. The Best Practice Guide released by the Fair Work Ombudsman expresses the view that the legislation implicitly requires that the employer must seriously or reasonably consider the request: Fair Work Ombudsman, *Best Practice Guide – Work & Family, The Right to Request Flexible Working Arrangements, No 01a*, p 1.

perceived negatives to it of granting flexibility such as cost, and detrimental impact on customer service, would that lead to non-compliance with the legislation? In other words, what weight should an employer give to business case arguments in favour of granting flexibility, in terms of for example, staff retention and higher levels of motivation and commitment by staff?³⁹ And finally, how should these questions be addressed in the context of statutory objectives which speak to ‘promot[ing] social inclusion’ and ‘assisting employees to balance their work and family responsibilities by providing for flexible working arrangements’ through ‘a balanced framework for cooperative and productive’ and ‘fair’ workplace relations?⁴⁰

Notably, the phrase ‘reasonable business grounds’ is not defined or further articulated in the *FW Act*.⁴¹ Nor does the Act specify a list of factors to take into account. On its face it is unclear whether the test calls for a narrower investigation of the employer’s perceived business reasons alone and whether those reasons were reasonable in the sense of not trivial, or whether it justifies and indeed requires a broader assessment of reasonableness in all the circumstances, balancing the employer’s interests with the employee’s situation, as well as the impact on other employees.

It should be noted that as the section is worded, the concept of reasonableness attaches to the employer’s ‘business grounds’; the wording of the phrase does not necessarily indicate that a broader consideration of reasonableness per se is warranted.⁴² Nonetheless, the ordinary meaning of the word ‘reasonable’ may suggest a broader approach.⁴³ The Macquarie Dictionary defines ‘reasonable’ as ‘endowed with reason’, ‘agreeable to reason or sound judgement: a reasonable choice’.⁴⁴ In order for a decision to be ‘endowed with reason’ or a ‘sound judgement’, it might be said that it must be preceded by a process of considering and weighing up various factors. The Federal Court has used the Macquarie Dictionary meaning of the word ‘unreasonable’ to interpret a test of ‘unreasonable burdens’ under the Corporations

³⁹ On business case arguments in favour of flexible work arrangements, see Human Rights and Equal Opportunity Commission, ‘Striking the Balance: Women, Men, Work and Family Discussion Paper 2005’ (Discussion Paper 2005) 98-99; National Centre for Social Research, ‘The Second Work-Life Balance Study: Results from the Employers’ Survey – Executive Summary’ (Employment Relations Research Series No 22, Department of Trade and Industry, UK, 2003); Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* (Oxford University Press, 2000) 88-94.

⁴⁰ *FW Act* s 3 objectives.

⁴¹ Note also that the *FW Act* provides that employees may request an extension of unpaid parental leave for a further 12 months after the initial 12 month period, such request an employer is only entitled to refuse on ‘reasonable business grounds’: s 76. Like the request mechanism, these parental leave extension rules do not specify or further articulate the meaning of ‘reasonable business grounds’. Unfortunately their meaning has not been explored through decisions.

⁴² The Explanatory Memorandum provides that the test ‘is to be assessed in the circumstances that apply when the request is made’: EM, above n 17, [267]. This statement provides a sense of the appropriate timing for applying the test. It unfortunately does not clarify the scope of ‘the circumstances’ that it refers to.

⁴³ Where words are undefined in legislation, they are to be given their ordinary meaning: *Acts Interpretation Act 1901* (Cth) s 15AB. This approach is apparent in interpreting various aspects of the *FW Act*. See eg, the interpretation of ‘disability’ discussed in n 18.

⁴⁴ *Macquarie Dictionary*, 5th edn, 2009, Sydney.

Law. In that case Heerey J cited with approval the comments at first instance of the Administrative Appeals Tribunal to the effect that '[w]hether a burden may fairly be described as "unreasonable" is essentially one of fact requiring an evaluation of the evidence, having regard to the nature of the requirements to be performed, keeping in mind the policy objective of the legislation'.⁴⁵ The ordinary meaning of the word reasonable in the *FW Act* request mechanism may suggest then that although the word reasonable is located solely with the employer's 'business grounds', it might call for a broader process of consideration. This may be especially so in light of the objectives of the *FW Act* to assist employees with care responsibilities, and to do so within a framework of 'balanced', 'fair' and 'cooperative' workplace relations. Those objectives suggest a process by an employer of considering the employee's interests, in a balanced and fair manner.

The immediate origins of the *FW Act* request mechanism lie in a 2005 award test case,⁴⁶ and this history suggests that a narrower investigation of the employer's reasons alone may have been all that was intended by Parliament in enacting the provisions in the *FW Act*. In this 2005 test case the Full Bench of the Australian Industrial Relations Commission ('AIRC') granted a standard award clause that permitted employees to request a return to work from parental leave on a part-time basis until their child reached school age.⁴⁷ Employers were to 'consider the request having regard to the employee's circumstances' and were entitled to refuse such requests, but only on 'reasonable grounds'.⁴⁸ The standard clause awarded provided that:

The employer shall consider the request having regard to the employee's circumstances and, provided the request is genuinely based on the employee's parental responsibilities, may only refuse the request on reasonable grounds related to the effect on the workplace or the employer's business. Such grounds might include cost, lack of adequate replacement staff, loss of efficiency and the impact on customer service.⁴⁹

Notably the employee's interests are only articulated as relevant to the requirement that the employer 'consider the request having regard to the employee's circumstances'. Moreover this aspect of the clause appears to be directed to an employer's assessment that the employee's requested change 'is genuinely based on' parental responsibilities. The detriment experienced by the employee herself or

⁴⁵ Ibid.

⁴⁶ *Parental Leave Test Case 2005* (2005) 143 IR 245. The new rights granted in this test case were effectively curtailed by the Work Choices amendments of 2006: Sue Williamson and Marian Baird, 'Family Provisions and WorkChoices: Testing Times' (2007) 20 *Australian Journal of Labour Law* 53. The Work Choices legislation is the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth). It amended the *Workplace Relations Act 1996* (Cth).

⁴⁷ *Parental Leave Test Case 2005* (2005) 143 IR 245. In addition, the AIRC also granted rights to request extensions of unpaid parental leave, and the period that parents can simultaneously take immediately following birth or placement of a child. Notably, and in contrast to the latter *FW Act* provisions, the merits of an employer's refusal of all three types of request could be subject to review through award dispute resolution procedures. On the potential impact of the 2005 test case, see Jill Murray, 'The AIRC's Test Case on Work and Family Provisions: The End of Dynamic Regulatory Change at the Federal Level?' (2005) 18 *Australian Journal of Labour Law* 325.

⁴⁸ *Parental Leave Test Case 2005* (2005) 143 IR 245 [395]-[396].

⁴⁹ Ibid, [396].

himself in not being accommodated, and the interests of other employees, were not articulated to be relevant factors in the consideration of 'reasonable grounds'. Indeed the clause may suggest the contrary interpretation as it is clearly worded that the employer 'may only refuse the request on reasonable grounds related to the effect on the workplace or the employer's business'. Notably all the factors given in the clause as examples of reasonable grounds to reject a request identify negative outcomes for the employer in granting the request.

It has been argued that the silence attending the employee's interests in the articulation of 'reasonable grounds' is explainable by the way the clause is constructed grammatically. Specifically, the formulation of 'must only refuse' logically refers only to the employer's interests, as it is directed to the employer. For this reason, the argument proceeds, the clause should not be taken to mean that the employee's interests are not relevant in a consideration of reasonable grounds.⁵⁰ The same could be said in relation to the *FW Act* request mechanism which provides that an employer 'may refuse the request only on reasonable business grounds'.⁵¹ Again this is a statement directed to the employer, and that may explain the silence attending the employee's interests and broader interests in granting flexibility.

The Explanatory Memorandum accompanying the Fair Work Bill continued the explicit focus on employer concerns, and on a narrow construction of those interests at that. Broader business case arguments in favour of granting flexibility are absent, as are the direct interests of the employee and other employees. The Explanatory Memorandum states that 'reasonable business grounds' may include 'the effect on the workplace and the employer's business of approving the request', including financial impact, and the impact on 'efficiency', 'productivity' and 'customer service', 'the inability to organise work among existing staff', and 'the inability to recruit a replacement employee'.⁵² The silence surrounding the impact on the employee of the request not being granted is arguably more pronounced in the *FW Act* scheme than the 2005 test case as the Act does not contain the explicit test case directive to the employer to 'consider the request having regard to the employee's circumstances'.

Despite these strong and highly relevant indications of the appropriateness of a narrower approach to interpreting 'reasonable business grounds', it should be noted that there is much in the *FW Act* and its history to support a broader approach that takes into account the employee's interests, and other employees' interests, in granting flexible work arrangements. Notably, the legislative formula of 'reasonable business grounds' was chosen by Parliament in preference to other possible phrases, such as 'genuine operational reasons'. The concept of 'genuine operational reasons' has been part of industrial law for some time and has been interpreted in a manner that focuses attention solely on the employer's situation and imperatives. It has not

⁵⁰ Murray, above n 48, 336.

⁵¹ *FW Act* s 65(5).

⁵² EM, above n 17, [267]. The Senate Report on the Fair Work Bill also continued this exclusive focus on employer concerns: The Senate, above n 6, [2.26]. Equivalent statements of relevant factors are contained in a Best Practice Guide released by the Fair Work Ombudsman: Fair Work Ombudsman, above n 38, p 2.

been interpreted to invoke a broader consideration of fairness to the employee, or a broader balancing of interests approach.⁵³ Parliament's choice then in enacting the 'reasonable business grounds' test for the *FW Act* request mechanism over a 'genuine operational reasons' formula may indicate an intention against adopting a too narrow approach to interpretation.

The tradition and rationale of industrial law is of course replete with illustrations of an enduring concern for the worker and their situation. There are many instances where this concern has been expressed through a requirement of reasonableness. In a range of industrial contexts the concept of reasonableness has been seen as requiring a methodology of weighing and balancing various factors, including the employee's interests and concerns.⁵⁴ For example, this is the methodology used in the working hours rule in the *FW Act* that provides that an employer must not require an employee to work additional hours (above 38 hours per week for a full time employee) unless those extra hours are 'reasonable'.⁵⁵ The legislation provides a list of factors that must be taken into account in assessing reasonableness. This list includes (in the following order) health and safety concerns, 'the employee's personal circumstances, including family responsibilities', the needs of the workplace or enterprise in which the employee is employed, and patterns of work in the industry.⁵⁶ Cases discussing reasonable overtime take an approach of balancing employee interests against employer concerns, in all the relevant circumstances.⁵⁷

Another context in which reasonableness invokes a methodology of weighing up employee interests with employer concerns lies in the *FW Act* provision that employees are entitled to be absent from work on a public holiday, but that 'an

⁵³ 'Genuine operational reasons' has a history in the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), the *Industrial Relations Act 1993* (Cth) and earlier in the *Termination, Change and Redundancy Case* (1984) 8 IR 34 & the *Termination, Change and Redundancy Case - Supplementary Decision* (1984) 9 IR 115. See Anna Chapman, 'The Decline and Restoration of Unfair Dismissal Rights' in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009) 207; Anthony Forsyth, 'Australian Regulation of Economic Dismissals: Before, During and After "Work Choices"' (2008) 30 *Sydney Law Review* 506.

⁵⁴ This is also the well established methodology for addressing reasonableness in the context of indirect discrimination under anti-discrimination law: *Secretary, Department of Foreign Affairs v Styles* (1989) 23 FCR 251 at 263 per Bowen CJ and Gummow J. See further, Neil Rees et al, *Australian Anti-Discrimination Law: Text, Cases and Materials* (Federation Press, 2008) [4.3.28]-[4.3.36]; Rosemary Hunter, *Indirect Discrimination in the Workplace* (Federation Press, 1992) 226-238. Anti-discrimination legislation includes lists of factors to be weighed up in considering reasonableness, and notably the provisions in the *EOA 2010* (Vic) on discrimination in the form of an unreasonable failure to accommodate parent and carer responsibilities directs attention first to the employee's situation, and then secondly to the employer's interests: *EOA 2010* (Vic) s 17(2), s 19(2), s 22(2), s 32(2).

⁵⁵ *FW Act* s 62(1).

⁵⁶ *FW Act* s 62(3).

⁵⁷ See eg, *MacPherson v Coal & Allied Mining Services Pty Ltd (No 2)* [2009] FMCA 881 (9 September 2009) [61] (not challenged on appeal in *Coal & Allied Mining Services Pty Ltd v MacPherson* [2010] FCAFC 83 (12 July 2010); *The Australian Workers' Union v Australian Trainers' Association* [2009] FWA 418 (9 October 2009) [9]; *Williams v Macmahon Mining Services Pty Ltd (No. 2)* [2009] FMCA 763 (14 August 2009) [28]-[29]. See also *Working Hours Test Case* (2002) 114 IR 390 [247].

employer may request an employee to work on a public holiday if the request is reasonable'.⁵⁸ Again a list of factors is prescribed on the meaning of reasonableness, and this includes (in this order) 'the nature of the employer's workplace or enterprise (including its operational requirements)', 'the nature of the work performed by the employee', and 'the employee's personal circumstances, including family responsibilities'.⁵⁹ In assessing reasonableness in this context, FWA adopts a methodology of balancing various factors.⁶⁰ The Explanatory Memorandum to the FW Bill confirms that in relation to both the additional hours rule and the public holiday provision, the appropriate methodology for assessing reasonableness is 'a balancing exercise between factors'.⁶¹

A number of modern awards under the *FW Act* contain a mechanism that permits a casual employee engaged on a regular and systematic basis to convert their employment status to part-time or full-time after completing a specified length of service. An employer 'must not unreasonably' refuse such a request.⁶² In contrast to the standard award clause which does not further explain the meaning of reasonableness in this context, the Hospitality Industry (General) Award 2010 provides that in determining reasonableness, the employer may have regard to the following factors:

- 'the size and needs of the workplace or enterprise;
- the nature of the work the employee has been doing;
- the qualifications, skills, and training of the employee;
- the trading patterns of the workplace or enterprise (including cyclical and seasonal trading demand factors);
- the employee's personal circumstances, including any family responsibilities; and
- any other relevant matter.'⁶³

In discussing the provision that an employer 'must not unreasonably' refuse a casual's request to convert their employment status, Fair Work Australia has interpreted the criterion of reasonableness as invoking a methodology of weighing different factors, including the employer's objectives and concerns, in addition to the legitimate expectations and wishes of the casuals themselves to have the option to

⁵⁸ *FW Act* s 114(2).

⁵⁹ *FW Act* s 114(3).

⁶⁰ *Pietraszek v Transpacific Industries Pty Ltd* [2011] FWA 3698 (28 June 2011) [70]-[90].

⁶¹ EM, above n 17, [250], [452].

⁶² See eg, Graphic Arts, Printing and Publishing Award 2010 cl 12.5; Manufacturing and Associated Industries and Occupations Award 2010 cl 14.4; Road Transport and Distribution Award 2010 cl 12.6; Textile, Clothing, Footwear and Associated Industries Award 2010 cl 14.10; Plumbing and Fire Sprinklers Award 2010 cl 14.3. The standard award clause provides that where an employer refuses to permit the conversion, the employer must discuss its reasons for the refusal with the employee and a 'genuine attempt' must be made to reach agreement. On the history and context of casual conversion clauses, see Rosemary Owens, 'Decent Work for the Contingent Workforce in the New Economy' (2002) 15 *Australian Journal of Labour Law* 1 at 15-21. See also *Award Modernisation* (2008) 177 IR 364 [51].

⁶³ Hospitality Industry (General) Award 2010 cl 13.4(f).

convert, as well as the impact on other employees of the employer.⁶⁴ In an earlier decision the South Australian Industrial Relations Commission was clear that the standard conversion clause required the employer to investigate and consider the individual circumstances of each employee that seeks to convert their employment status. It was not sufficient for an employer to decide in principle to reject requests.⁶⁵ This understanding of reasonableness in the casual conversion context confirms a general trend in industrial law that construes reasonableness as necessitating a weighing of various factors that go to the employee's interests as well as the employer's objectives.

Not only has the concept of reasonableness in industrial law been interpreted to build in a concern for the worker and their interests, reasonableness has itself been read into other industrial tests in a way that brought into consideration the worker's interests. For example, from 1994 to 1997 the unfair dismissal provisions in the *Industrial Relations Act 1988* (Cth) provided that '[a]n employer must not terminate an employee's employment unless there was a valid reason, or valid reasons, connected with the employee's capacity or conduct or based on the operational requirements' of the employer's undertaking.⁶⁶ Another provision in the Act to the effect that a reason would not be a 'valid reason' where the termination was 'harsh, unjust or unreasonable', was struck down by the High Court as being invalid.⁶⁷ Interestingly, cases interpreting the 'valid reason' criterion built in broader considerations of reasonableness and fairness to the employee. For example, in *Nettlefold v Kym Smoker Pty Ltd*, Lee J of the Industrial Relations Court of Australia considered that it was 'arguable' that the phrase 'valid reason' invited a broader consideration of whether the termination of employment was in all the circumstances unjust or unfair.⁶⁸ Justice Lee said that the legislation sought to establish a balance between the right of an employer to manage its enterprise and the right of each employee not to be harmed by poor management practices.⁶⁹ His honour emphasized that the question was whether the employer had objectively established that it had a 'proper' ground for the termination;⁷⁰ the subjective view of the employer would not satisfy its onus

⁶⁴ *Australian Manufacturing Workers' Union v Christie Tea Pty Ltd* [2010] FWA 10121 (3 December 2010) [14]-[18].

⁶⁵ *Clerks (South Australia) Award* [2004] SAIRComm 4 (28 January 2004) [127]-[130].

⁶⁶ *Industrial Relations Act 1988* (Cth) s 170DE(1). This provision was effectively replaced with the *Workplace Relations Act 1996* (Cth) Part VIA Div 3.

⁶⁷ *Industrial Relations Act 1988* (Cth) s 170DE(2) struck down in *Victoria v Commonwealth* (1996) 138 ALR 129. The High Court determined that s 170DE(2) went beyond the Termination of Employment Convention (ILO, No 158), and was thus not a valid enactment under the external affairs head of power in the Australian Constitution. The High Court decision left 'valid reason' intact as the sole criterion for determining whether a termination was unlawful.

⁶⁸ *Nettlefold v Kym Smoker Pty Ltd* [1996] IRCA 495 (4 October 1996) 4.

⁶⁹ *Ibid*, 5-6. Lee J noted that the legislation sought to give effect to the ILO Convention 158.

⁷⁰ *Ibid*, 7, 8. In *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 Northrop J held that 'valid reason' in s 170DE(1) meant a 'sound, defensible or well founded' reason (at 373). It has been suggested that the appellations of 'proper' and 'defensible' appear to invite a consideration of broader ideas of fairness: Anna Chapman et al, *Valid Reasons for Termination of Employment: A Research Report Prepared for the Judges of the Industrial Relations Court of Australia*, Working Paper No 12, January 1997, Centre for Employment and Labour Relations Law, University of Melbourne, 16.

of proof in this regard.⁷¹ In this case the court looked beyond the employer's asserted reason for the dismissal to a number of broader matters that went to fairness. The good work record of the employee and her expectation of continuing employment were identified as relevant considerations, as was the fact that she was a young person in her first job and might have difficulty finding re-employment.⁷²

These various instances of the *FW Act* use of reasonableness, and the 'valid reason' example, illustrate both an enduring concern of industrial law to bring the interests of the worker into the employer's decision-making processes, and that this has been done under the banner of reasonableness. This is the context in which judicial decisions on whether an employer has provided adequate 'details' of its 'reasonable business grounds' to reject a request under the *FW Act* scheme will be decided. The decision of Lee J in *Nettlefold v Kym Smoker Pty Ltd* reflects the extent to which courts have been prepared to extend criterion which on their face appear as solely employer focused, such as 'valid reason', to include broader considerations of reasonableness and fairness to the employee. Granted this decision was heard in the specific context of the unfair dismissal scheme at that time, it nonetheless illustrates the broader point regarding industrial law's long-standing preparedness to read the worker's interests into account.

The United Kingdom Scheme

The United Kingdom enacted a right to request flexible working arrangements in 2002. Those developments have clearly been influential in Australian debates, and notably were explicitly referred to by the Full Bench of the AIRC in handing down its standard award clause in the *Parental Leave Test Case 2005*.⁷³

The UK framework provides that eligible employees may apply for a change in work arrangements, including in terms of hours, times and location of work. The employer 'shall only refuse the application because he [sic] considers that one or more of the following grounds applies—

- (i) the burden of additional costs,
- (ii) detrimental effect on ability to meet customer demand,
- (iii) inability to re-organise work among existing staff,

⁷¹ Chapman et al, above n 71, 6. The need for an objective analysis, rather than a subject belief, was confirmed in *Kerr v Jaroma Pty Ld* [1996] IRCA 539 (28 October 1996) 10, 13.

⁷² In the result the court determined that there was not, in all the circumstances, a 'valid reason' for the termination of employment. A similarly broad contextual approach to assessing whether there was objectively a 'valid reason' was adopted in a number of subsequent decisions. In these decisions matters such as an employer's failure to adopt a fair selection process in redundancy and failure to offer alternate employment were examined, as was the degree of an employee's misconduct and whether the employee had been warned about the consequences of a failure by her to carry out a direction: See eg, *Kerr v Jaroma Pty Ld* [1996] IRCA 539 (28 October 1996); *Reid v World Travel Headquarters Pty Ltd* [1996] IRCA 497 (4 October 1996); *Lupoi v Phillips Fox* [1996] IRCA 489 (3 October 1996).

⁷³ *Parental Leave Test Case 2005* (2005) 143 IR 245 [395]. On the broader significance in Australia of the UK developments, see Charlesworth and Campbell, above n 12, 117; Murray, above n 12.

- (iv) inability to recruit additional staff,
- (v) detrimental impact on quality,
- (vi) detrimental impact on performance,
- (vii) insufficiency of work during the periods the employee proposes to work,
- (viii) planned structural changes, and
- (ix) such other grounds as the Secretary of State may specify by regulations.⁷⁴

Like the Australian system the UK legislation provides a limited enforcement mechanism. In the UK, employees have a right to apply to the Employment Tribunal on the ground that the employer has failed to follow the correct procedure, or that the decision to reject the application ‘was based on incorrect facts.’⁷⁵ This provides greater, albeit still limited, scope for tribunal scrutiny compared to Australia. What is interesting about the UK jurisdiction is that although the list of acceptable reasons to reject a request all go to perceived potential detriments to the employer in agreeing to the employee’s application, tribunal decisions have interpreted the UK scheme more broadly than that. In the leading case of *Commotion Ltd v Ruddy* the Employment Appeal Tribunal (‘EAT’) stated that:

the employee is entitled to present a complaint to an employment tribunal on the basis that the decision to reject his application for flexible working was based on incorrect facts: see section 80H(1)(b). It must follow that the tribunal is entitled to investigate the evidence to see whether the decision was based on incorrect facts. There is, we would suggest, a sliding scale of the considerations which a tribunal may be permitted to enter into in looking at such a refusal. The one end is the possibility that all that the employer has to do is to state his ground and there can be no investigation of the correctness or accuracy or truthfulness of that ground. At the other end is perhaps a full inquiry looking to see whether the employer has acted fairly, reasonably, and sensibly in putting forward that ground. Neither extreme is the position, in our judgment, which applies in the relevant statutory situation. We accept ... [the] submission that the tribunal is not entitled to look and see whether it regards the employer as acting fairly or reasonably when he puts forward his reason for rejection of the flexible working request. However, we reject ... [the] submission that the tribunal is not entitled to examine the facts objectively at all; for if it was not so entitled, the jurisdiction set out or the right to make an application set out by section 80H(1)(b) would be of no use. The true position, in our judgment, is that the tribunal is entitled to look at the assertion made by

⁷⁴ *Employment Rights Act 1996* (UK) s 80G(1)(b), inserted by the *Employment Act 2002* (UK). See also *Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002* (SI 2002 No. 3236) and the *Flexible Working (Procedural Requirements) Regulations 2002* (SI 2002 No. 3207). The provisions were subsequently extended by the *Work and Families Act 2006* (UK) and *Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2006* (SI 2006 No. 3314).

⁷⁵ *Employment Rights Act 1996* (UK) s 80H(1)(b). The UK mechanism specifies procedures and time frames for the making of an application by an employee, an employer’s consideration of the application, and the employee’s right to appeal an unfavourable decision by their employer.

the employer, ie the ground which he asserts is the reason why he has not granted the application, and to see whether it is factually correct. In this case, it does not arise; but, in another case, it may be for instance that the bona fides of the assertion might have to be looked into.⁷⁶

In the opinion of the original tribunal, in order to fulfill this jurisdiction it is required to examine the evidence 'as to the circumstances surrounding the situation to which the application gave rise.'⁷⁷ In doing so, it was confirmed on appeal the tribunal is entitled to inquire into what would have been the effect of acceding to the employee's request. Relevant questions include 'could [the request] ... have been coped with without disruption; what did other staff feel about it; could they make up the time; and matters of that type.'⁷⁸ In this case it was determined that the employer had not carried out a proper investigation into whether the employee's request for part-time work in her role as a warehouse assistant was feasible, and that no evidence had been brought to support the employer's view that the employee's request could not be accommodated.⁷⁹ The approach of the tribunal, affirmed on appeal, reflects a relatively high level of preparedness to consider a broad range of circumstances, including the tribunal's own experience that generally part-time work in warehouse contexts is feasible, to assess whether the facts objectively supported the employer's view.

Clearly the Australian situation is not directly analogous, not the least because any judicial scrutiny in the Australian context will relate to the legal obligation for an employer to provide 'details of' its 'reasonable business grounds', whereas the UK jurisdiction relates to whether the decision to reject the application 'was based on incorrect facts.' Nonetheless, this UK jurisprudence may suggest that a broader judicial consideration of relevant circumstances may be appropriate, including questions such as 'could [the request] ... have been coped with without disruption; what did other staff feel about it; could they make up the time'. This seems even more likely in the Australian context given the presence of the concept of reasonableness within 'reasonable business grounds'.

Conclusion

This article has explored a recent law reform initiative regarding work and care - the right in the *FW Act* for eligible employees to request a change in working arrangements in order to accommodate responsibilities to children. Employers are only entitled to reject such requests on 'reasonable business grounds'. Although the merits of an employer's refusal of a request cannot be directly challenged before a court or other authority under the *FW Act*, that limitation may not be the end of the story so far as legal enforcement goes. This is because an employer must provide 'details of' the reasons for a refusal, within 21 days, and those reasons must be 'reasonable business grounds'. It is arguable that this civil remedy provision may

⁷⁶ *Commotion Ltd v Rutty* [2006] ICR 290 [37].

⁷⁷ *Ibid*, [38].

⁷⁸ *Ibid*.

⁷⁹ *Ibid*, [39].

impose on an employer a number of legal obligations not previously realized or understood. Employers may be under an obligation to conduct a reasonable investigation and consideration into the feasibility of accommodating the employee's request. As part of this, employers might be required to consider not only their immediate business interests, but also the employee's situation, the potential positive impact on other employees of granting accommodation, and the potential business case benefits in flexibility. The exploration conducted in this paper addresses the widely expressed view of commentators that there is little of substance in the *FW Act* request mechanism that can be directly enforced against an unwilling employer.

Chapman, A. (2011) The New National Scheme of Parental Leave Payment (Legislative Note)
Australian Journal of Labour Law, v. 24 (1), pp. 60-70.

NOTE:

This publication is included on pages 285-295 in the print copy
of the thesis held in the University of Adelaide Library.

CHAPTER 6:

CONCLUSION

6.1 Introduction

From the early 1970s there has been a large expansion in Australia in industrial law and anti-discrimination law initiatives designed to assist workers to manage their work commitments with their care responsibilities. New forms of leave for the purpose of care have been developed, and new rules regarding working time, discrimination, adverse action and reasonable accommodation have been instituted. In important respects these mechanisms are productive of a move away from the *Harvester* model of (male) waged work as sealed off from (female) concerns of care, home and family, instituted in the industrial system in the early part of the 20th Century.¹ This movement away from *Harvester* provides a shift towards recognizing diverse work and care arrangements, most notably in the form of supporting mothers as workers of the labour market, male workers as carers, and recognizing same sex couples as relationships through which care occurs. As the papers comprising this thesis have demonstrated, significant inadequacies remain in recognizing more complex and dynamic dimensions of diversity in work and care practices. The thesis has argued that these shortcomings of the industrial law and anti-discrimination law mechanisms relate to three matters: the continuing separation of work from care; substantive restrictions in the legal rules themselves relating to, for example, eligibility and exceptions and exemptions; and, the definitions and concepts of care used in the various sets of legal provisions.

These deficiencies in the schemes present challenges for policy makers and others in thinking about how legal regulation might more authentically account for diverse work and care arrangements. The continuing separation of work and care presents a

¹ *Harvester* refers to *Ex parte H. V. McKay* (1907) 2 CAR 1.

complex challenge, as this matter marks the foundations of industrial law and anti-discrimination law, and indeed legal liberalism itself, and for this reason remains a conundrum. It is discussed further in the final part of this conclusion.

Leaving the issue of separation of work and care to one side for the moment, the thesis now offers a proposal which may address key shortcomings in the substantive dimensions of the industrial and anti-discrimination mechanisms examined, in addition to the question of how best to elaborate the definition or concept of care protected. It is a relatively modest proposal, staying largely within the confines of the legal rights and obligations as they currently exist, but reshaping them from within. The proposal would bring a more standard approach to these complex legal initiatives bestowing rights and obligations, with the benefits of certainty, consistency and clarity for workers, employers and others. The thesis does not express a view on whether its proposal is politically viable, or the practical realities of implementing it, especially across different statutory schemes and jurisdictions. This would no doubt be challenging. Rather, the proposal is put forward as a broad concept, for further practical development, rather than as a detailed political plan or drafting agenda. Nonetheless, the broad concept appears feasible.

6.2 The Proposal

The proposal contains two main dimensions. The first addresses how best to articulate the care responsibilities recognized, and the second concerns the development of a test of justification to replace both the existing use of the concept of reasonableness in the different industrial and anti-discrimination mechanisms, and the range of existing exceptions and exemptions in those legal rules.

6.2.1 Care Responsibilities

As shown in chapters 3-5, to date the approach taken to drafting the care relationships and arrangements recognized in each new law reform measure designed to assist

workers with care responsibilities has led to complexity, inconsistency and incoherence, where some care relationships are offered protection, whilst others are not. As this thesis illustrates, any attempt at drawing categories and distinctions around the care relationships and situations that should be recognized in legal regulation will inevitably be under-inclusive. Furthermore, and as the findings of the thesis suggest, it is likely to fail to adequately account for diversity. It is time to move on from the two adult couple, ‘immediate family’ and the other various categories and tests that have been developed over the years in attempts to recognize care responsibilities in industrial law and anti-discrimination law. Workers, employers and others ought to be able to easily ascertain and understand their legal rights and obligations regarding the accommodation of care. In addition, care responsibilities ought to be valued equally, regardless of the context in which they occur, as this is inherent in the goals of social inclusion, equality and non-discrimination.

In order to address this situation, the thesis proposes that the current ad hoc definitions of care responsibilities articulated in the various industrial law and anti-discrimination law mechanisms be replaced with a single concept of ‘care responsibilities’ or ‘responsibilities to care’. That concept should not be defined in the relevant legal rule. Rather, those words should be left to their ordinary meanings, which are appropriately broad. The Macquarie Dictionary defines ‘care’ as ‘to look after; make provision for’ and ‘responsibility’ as ‘the state or fact of being responsible’.² The advantage of adopting the ordinary meaning of these words is that it is likely to lead to an interpretation that accords with current community understandings, and for this reason is expected to result in a fuller recognition of diverse work and care arrangements than currently exists.

Qualifications on care responsibilities may nonetheless be necessary in relation to some legal mechanisms. Unpaid parental leave under the *Fair Work Act 2009* (Cth) (‘*FW Act*’) and the parental leave payment scheme under the *Paid Parental Leave Act*

² Susan Butler (ed), *Macquarie Dictionary* (Macquarie Dictionary Publishers, 5th ed, 2009) 264, 1409.

2010 (Cth) are the main candidates for such qualifications.³ These entitlements might appropriately be limited in a temporal sense to care responsibilities in the first 12 or 24 months of a baby's life, or within 12 or 24 months after a child has been placed for adoption. The current primary caregiver model of the unpaid parental leave provisions, and the parental leave payment scheme, would also require consideration as to whether care responsibilities should be limited to those of a primary carer. The interests of diversity, social inclusion and non-discrimination would suggest that the entitlements should not be limited in this manner; although any broadening of eligibility would necessitate some reworking of the way in which the entitlements of different carers interact.

6.2.2 Justification

The second aspect of the proposed model addresses the concept of reasonableness that is used to delineate a number of the legal initiatives examined in chapters 3-5. Reasonableness provides the key test in the right to request mechanism under the *FW Act*, the reasonable accommodation provisions in the *Equal Opportunity Act 2010* (Vic), the anti-discrimination rules relating to indirect discrimination, and the working time rules under the *FW Act*.⁴ The publications of the thesis show that the concept of reasonableness itself, and the ways in which it has been articulated in the statutes and interpreted, raise doubts as to whether a test of reasonableness has the capacity to give proper weight to the values of diversity, social inclusion, equality and non-discrimination.

The proposal of this thesis is to replace the use of a test based on reasonableness in these different contexts with one based on justification.⁵ The proposal is to place the

³ The same would apply in relation to the 'dad and partner pay' entitlement proposed by the Paid Parental Leave and Other Legislation Amendment (Dad and Partner Pay and Other Measures) Bill 2012 (Cth).

⁴ In addition, employers may only refuse a request for an extension of unpaid parental leave beyond 12 months on 'reasonable business grounds' (*FW Act* s 76(4)) and a reasonableness test applies where an employer requests an employee to work on a public holiday (*FW Act* s 114(2)).

⁵ The approach of 'justification' developed in this chapter has similarities to a proposal put forward in Discrimination Law Experts' Group, *Consolidation of Commonwealth Anti-Discrimination Laws*

onus on the employer (or other respondent) to establish that its conduct was justifiable in all the circumstances. In relation to the right to request mechanism and Victorian reasonable accommodation rules, the onus would be placed on the employer to establish that it was justified in not providing the accommodation sought by the worker. This approach starts from a presumption that responsibilities to care for others ought to be accommodated by employers, unless the circumstances are such that they justify the employer not providing the adjustment or accommodation sought.

In terms of laws prohibiting indirect discrimination, an employer would bear the onus of establishing that it was justified, in all the circumstances, in imposing the requirement challenged by the worker, rather than the worker bearing the onus of establishing that the requirement was not reasonable. In relation to the working time rules, the proposal would require the employer or other hirer of labour to establish that it was justified in requesting or requiring the employee to work additional hours. This starts from a presumption that employees should not work hours additional to 38 per week, or their lesser ordinary hours of work, unless the employer can establish that the circumstances are such that its request or requirement of additional hours was justifiable.

The use of a presumption in the test of justification provides for an appropriate valuing of care in the work context. Moreover, as the reasons why (for example) the employer rejected or failed to grant a request, or required the employee to work additional hours, lie solely within the employer's knowledge, it is appropriate to place the onus on the employer to establish that it was justified in coming to the decision

Submission (13 December 2011) 8-9. The thesis author is a member of the Discrimination Law Experts' Group. Notably, British anti-discrimination law has contained several different formulations over the years relating to justification, to the effect that an employer will not be liable for indirect discrimination if it can establish that the practice or criterion was objectively justifiable. The current *Equality Act 2010* (UK) provides that indirect discrimination is justifiable where the respondent is able to show that the impugned measure was 'a proportionate means of achieving a legitimate aim' (s 19(2)(d)): Sandra Fredman, *Discrimination Law* (Oxford University Press, 2nd ed, 2011) 191-6; Nicholas Bamforth, Maleiha Malik and Colm O'Cinneide, *Discrimination Law: Theory and Context* (Sweet & Maxwell, 2008) 321-330.

that it did. This would operate as a reverse onus of proof.⁶ Such a reverse onus generates the additional benefit of leverage, encouraging employer best practice in establishing processes and policies to consider properly employee requests for accommodation and to deal with long working hours. Ultimately those pressures on employer liability are likely to encourage and shape changes in workplace practices and cultures regarding work and care interaction.

The concept of justification should be explained by a non-exhaustive list of factors to take into account. That list ought to be standard across the different schemes, and should emphasize the public interest in furthering the objects of the particular legislative scheme, which might appropriately include the current objectives of promoting social inclusion, fairness, and non-discrimination, and assisting employees to manage work and care. Achieving substantive equality between all people would be usefully added as an objective, for the purpose of drawing attention to the understanding that equality includes the active accommodation of care responsibilities. Given the almost complete silence at present within industrial law and anti-discrimination law regarding Indigenous kinship networks of care, it might be useful to draw attention to the object of substantive equality in relation to Indigenous people specifically.

Other factors should also appear in the list of relevant factors in assessing justification. The legislation ought to make it clear that the disadvantage to the employee in not being accommodated is an important matter to be considered in whether the employer's decision was justified. The employer's operational arrangements and financial position would also be relevant factors to consider.

⁶ The employee would be required to establish as a factual matter that she or he had 'care responsibilities' (within the ordinary meaning of those words). Notably, a reverse onus of proof is in keeping with the adverse action protections in Part 3-1 (*FW Act* s 361) and the unlawful termination provisions in Part 6-4 Div 2 (*FW Act* s 783). The Explanatory Memorandum to the Fair Work Bill acknowledges that in the absence of a reverse onus in relation to the adverse action, 'it would often be extremely difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason' under Part 3-1: Explanatory Memorandum, Fair Work Bill 2008 (Cth) [1461].

This proposed test of justification envisages a process of weighing different factors, in the context of a reverse onus of proof. The methodology of considering a range of indicia is similar to the existing reasonableness tests in some of the current work and care mechanisms, namely the Victorian reasonable accommodation provisions, laws prohibiting indirect discrimination, and the working time rules. The proposal of this thesis, however, differs from those existing reasonableness tests, in that it envisages development in the factors to be considered, in addition to starting from a presumption that care responsibilities ought to be accommodated. It will have a reverse onus of proof. Importantly, a test of justification potentially provides a break from the conservative interpretation of reasonableness that the thesis reveals has developed, particularly in anti-discrimination law. The test of justification proposed in this chapter is likely to be more onerous for an employer to establish, than is an employer's position under the current reasonableness tests. That shift is appropriate, in furthering the objectives of social inclusion, equality and non-discrimination.

In addition to replacing reasonableness in work and care legal mechanisms, a test of justification, accompanied by the same list of factors, should also be used in place of a range of exceptions and exemptions in the adverse action protections in the *FW Act*, and in the anti-discrimination law protections that relate to work and care. This latter would include indirect discrimination provisions, in addition to direct discrimination rules. For example, the adverse action provisions should be recast so that employees are protected from the various forms of adverse action on account of their care responsibilities, unless the employer is able to establish through the reverse onus that its conduct was justified. This continues the existing reverse onus of the jurisdiction, and replaces the uncertain exceptions in the adverse action provisions – including the religious institutions exception – with the single concept of justification. Likewise, anti-discrimination law should be reshaped so that workers are protected from direct and indirect discrimination on the attribute of care responsibilities, unless the employer is able to satisfy through a reverse onus that it was justified in taking the action that it did.

Together the use of care responsibilities and justification (with a reverse onus of proof) would greatly improve the potential of the industrial and anti-discrimination law initiatives to recognize and provide protection to diverse work and care practices.

6.3 Law's Separation of Work from Care

As documented in this thesis one of the main deficiencies of the industrial law and anti-discrimination law mechanisms designed to address collision between work and care relates to the ways in which these laws continue to separate work from care. This matter presents a very difficult challenge in thinking about better forms of legal regulation on the topic of work and care, as it implicates the very foundations of industrial law and anti-discrimination law, and indeed legal liberalism itself. This reflection that work and care conflict activates the very basis and continuing legitimacy of law's disciplinary categories is not a new one.⁷ The contribution of the thesis to that insight is that it shows how thoroughly this is so in Australia.

The current dynamic of work and care conflict is itself a creature of industrial law. The production of work as separate from the rest of life, including care, arose through the processes of industrialization and the establishment of industrial law as a legal discipline. The earlier emergence of the nuclear family from the broader concept and arrangement of the household assisted this process. That separation of work from the rest of life then became entrenched in the Australian system of arbitration through the *Harvester* judgment. Anti-discrimination law, a relative newcomer to the field of work legal rights and obligations, has done little to usurp the *Harvester* separation of work from care, and indeed as this thesis shows, contains that separation within its own structure. All of this is to say that industrial law, as with anti-discrimination law, reflects a classic liberal public/private dualism. These disciplines constitute their field

⁷ See eg, Joanne Conaghan, 'Work, Family and the Discipline of Labour Law' in Joanne Conaghan and Kerry Rittich (eds), *Labour Law, Work, and Family: Critical and Comparative Perspectives* (Oxford University Press, 2005) 19; Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press, 2011).

of concern – paid work engagement – through a process of separating it off from the rest of life (including care).

For this reason the disciplinary categories of industrial law and anti-discrimination law are limited in their capacity to break down the separation of work and care. Their very foundations, and indeed their continuing legitimacy as disciplines, depend on the processes of regulation of market work away from care. Indeed, the very act of industrial law and anti-discrimination law ‘recognising’ care and making certain care arrangement cognisable to law is itself a powerful act of separation and hierarchy.

Audre Lorde was a political activist and scholar whose work opened up discussions about differences between women in terms of race, sexuality and class in feminist and civil rights movements in the USA during the 1960s-1980s. One of her best known contributions is a speech she delivered at a feminist conference held in New York in 1979, in which she drew attention to the lack of Black, lesbian and Third World women’s perspectives at the conference.⁸ Her speech rhetorically asked, ‘[w]hat does it mean when the tools of a racist patriarchy are used to examine the fruits of that same patriarchy? It means that only the most narrow perimeters of change are possible and allowable.’⁹ Later in her presentation she famously said:

[f]or the master’s tools will never dismantle the master’s house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change. And this fact is only threatening to those women who still define the master’s house as their only source of support.¹⁰

Although Lorde was using a broader concept of patriarchy and was not specifically speaking about the legal system and law as such, her powerful words resonate in thinking about the investigation conducted in this thesis, its proposal for a new model, and the broader problem of separation between work and care. The thesis has shown that Australian industrial law and anti-discrimination law, in Lorde’s parlance,

⁸ Audre Lorde, ‘The Master’s Tools Will Never Dismantle the Master’s House’ in Audre Lorde, *Sister Outsider: Essays and Speeches* (Crossing Press, 1984) 110.

⁹ Ibid 110-111.

¹⁰ Ibid 112.

the tools of the master, are not capable of dismantling the foundations on which these disciplines are both constructed and constantly legitimized, namely the public / private divide of work and care, in addition to hierarchies related to gender, race and sexuality, to name a few. The proposed model outlined in this conclusion is a modest one, and this reflects the lack of a truly transformative potential within industrial law and anti-discrimination law. Nonetheless, as this thesis shows, change within the confines of 'the master's house' is possible, although we should be wary to place too great reliance or dependence on that. Legal change within industrial law and anti-discrimination law will never dismantle the gendered, racialised and heterosexed foundations on which law rests.

APPENDIX

The Appendix to the thesis contains one paper that provides a closer examination of the reasonable accommodation provisions enacted into Victorian anti-discrimination legislation by the *Equal Opportunity Amendment (Family Responsibilities) Act 2008* (Vic). Those amendments have been substantively reenacted in identical terms in the *Equal Opportunity Act 2010* (Vic) and are examined in a broader perspective in ‘Reasonable Accommodation, Adverse Action and the Case of Deborah Schou’, thesis chapter 5.

The paper contained in the Appendix is:

- ‘Care Responsibilities and Discrimination in Victoria: The Equal Opportunity Amendment (Family Responsibilities) Act 2008 (Vic)’ (2008) 21 *Australian Journal of Labour Law* 200-207.

Chapman, A. (2008) Care Responsibilities and Discrimination in Victoria: The Equal Opportunity Amendment (Family Responsibilities) Act 2008 (Vic) (Legislative Developments)
Australian Journal of Labour Law, v. 21 (2), pp. 200-207.

NOTE:

This publication is included on pages 308-315 in the print copy
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