

Work/Family, Australian Labour Law, and the Normative Worker

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I ANALYSING THE AUSTRALIAN WORK/FAMILY PROBLEM

Work/family issues have become a major topic of interest and discussion in Australia. Rarely does a week go by without a news service carrying a story exploring the reasons why professional women are deferring decisions to have a baby, or considering the implications of long working hours and absent fathers and the lack of affordable child-care places. The Sex Discrimination Commissioner, the trade union movement, and all major political parties have now developed policies and programmes of reform to address the problems that are seen to arise at the intersection of paid market work and caring and domestic responsibilities.

Academics, too, have been keen to explore the work/family phenomenon. The Australian literature is grounded in a range of disciplines, adopting different approaches and levels of explanation. Broader developments in the Australian labour market are important in most accounts, particularly the substantial increase over the past thirty years in the number of women, especially mothers, in paid work.¹ Also seen as important are shifts in labour market regulatory thinking and structure, away from centralized standard-setting through industrial awards in favour of decentralized enterprise bargaining against a safety net of minimum standards. Many scholars interpret these developments as accountable for worsening work and family outcomes, as hours of work, shift allocations, leave arrangements, wages, and type of engagement become, increasingly, matters for negotiation rather than prescriptive standard-setting.²

* This chapter draws on my doctoral studies in the Centre for Socio-Legal Research at Griffith University. I thank Rosemary Owens, Joanne Conaghan, and Kerry Rittich for their encouragement and thoughtful comments on a draft of this chapter, and the participants of INTELL7 for welcoming my original paper. Any errors remain mine.

¹ In June 2000, 61% of married women with dependent children were participating in the paid labour force: Australian Bureau of Statistics (ABS), *Labour Force Status and Other Characteristic of Families*, Cat 6224.0 (Canberra: ABS, June 2000).

² See e.g. Strachan, G. and Burgess, J., 'The Incompatibility of Decentralised Bargaining and Equal Employment Opportunity in Australia', *BJIR*, 38 (2000), 361.

What typifies much of the Australian literature, and especially scholarship that situates its analyses primarily in the paid labour market, is an understanding both that the work and family problem is a relatively new phenomenon, and that it is properly understood as an inevitable conflict between the competing demands of two separate spheres of life. Labour law, with its ambit lying in the public world of the market, has also tended to constitute work and family problems as being the product of relatively recent social change, bringing family responsibilities into conflict with the demands of the market. In this framework, and with Australia's relatively recent emphasis on enterprise bargaining, industrial law becomes about responding to these developments by facilitating employers, employees, and trade unions in reaching their own agreements regarding these matters above a set of minimum standards.

This chapter attempts to take a different approach to analysing the current Australian work/family phenomenon. Rather than starting from an understanding that this is a relatively new problem of conflict between two separate spheres, the analysis seeks to reveal how labour law is itself constitutive of current problems. To do this the existing situation must be placed in a context of (at least) the twentieth-century breadwinner and family wage tradition of Australian industrial relations. Do the gendered assumptions of the breadwinner/homemaker model and family wage of the twentieth century continue to shape labour law today? What does labour law assume about its subject worker, and his/her relationship to family and domestic work?³ How have these understandings developed over time, and across different areas of Australian labour law, such as award-making, enterprise bargaining and anti-discrimination law?

This chapter begins the work of addressing these questions by drawing on various moments in Australian labour law that reveal something of the law's subject. In particular, the analysis exposes some main ways in which the assumptions of the breadwinner model of work and family, formally adopted in the Australian system of industrial relations in 1907, continue to exert a profound influence over the shape of legal regulation today. For example, a breadwinner/homemaker framework appears to underlie the fragmentation of the labour market, and labour standards, into a (standard) full-time/(non-standard) part-time dualism that marginalizes female part-time and casual employees, whose form of

³ This approach comes from an understanding that all doctrinal categories or areas of law, including labour law, construct their own understanding of the legal person—the subject—who is deemed to act in certain ways, to wield certain rights and to assume certain responsibilities: Naffine, N. and Owens, R. J., 'Sexing Law', in N. Naffine and R. J. Owens (eds.), *Sexing the Subject of Law* (North Ryde, NSW: LBC Information Services, 1997), 3, 7. See also Naffine, N., 'Sexing the Subject (of Law)', in M. Thornton (ed.), *Public and Private: Feminist Legal Debates* (Melbourne: OUP, 1990), 18.

engagement in paid labour marks them as mothers first, and workers second. Whilst it is true that in Australia, as elsewhere, the limitations of the breadwinner model and its legacy have become more visible as greater numbers of women have entered the paid labour market, and as other pressures such as labour market restructuring and neo-liberal thinking challenge the rationale of the labour law tradition, it is a mistake to see work and family as a new phenomenon, or problem.

Many scholars, in Australia and elsewhere, have explored a paradigmatic worker of labour law, workplace cultures, and industrial relations practice that is inimical to the interests of women workers. The ideal worker of labour law is invariably identified as a full-time employee working under a contract of employment on a continuous and permanent basis, from young adult years until retirement. What characterizes these accounts is a strong sense that the legal regulation of (paid) labour markets is built on an understanding of work and the worker that is gendered male. More recent scholarship has focused attention on a particular aspect of this gendering process—the normative assumptions about the interconnections between the market worker and the worker's family. For example, in *Women Going Backwards*, published in 2002, Sandra Berns writes about how Australian labour markets and law assume a worker who is 'unencumbered' by family or domestic responsibilities.⁴ Similar normative concepts have been identified in many other industrialized countries.⁵ This chapter seeks to build on this body of scholarship through focusing on ways in which Australian labour law constitutes the relationships of the ideal worker and his/her family and domestic work.

This chapter commences its legal story of the paradigmatic worker of Australian labour law in the origins of the system of compulsory arbitration established in the early twentieth century. Following this, the analysis turns to examine Berns' account of the unencumbered worker of contemporary Australian labour markets and legal regulation. This work provides the conceptual underpinning for the chapter. From here the chapter focuses on some contemporary aspects of the Australian labour

⁴ Berns, S., *Women Going Backwards: Law and Change in a Family Unfriendly Society* (Aldershot: Ashgate Publishing, 2002). Berns uses this term throughout her text. It first appears in the preface (at vi) in relation to her concept of the unencumbered citizen.

⁵ See e.g. Conaghan, J., 'Women, Work and Family: A British Revolution?', in J. Conaghan, R. M. Fischl, and K. Klare (eds.), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (New York: OUP, 2002), 53; Rittich, K., 'Feminization and Contingency: Regulating the Stakes of Work for Women', in *ibid.*, 117; Williams, J., *Unbending Gender: Why Family and Work Conflict and What To Do About It* (New York: OUP, 2000); Appelbaum, E., Bailey, T., Berg, P., and Kalleberg, A. L., 'Shared Work/Valued Care: New Norms for Organising Market Work and Unpaid Care Work', in H. Mosley, J. O'Reilly, and K. Schomann (eds.), *Labour Markets, Gender and Institutional Change* (Cheltenham: Edward Elgar, 2000).

market and legal regulation, as revelatory of a subject worker who is not encumbered in the labour market by family and caring work.

II THE AUSTRALIAN BREADWINNER OF THE TWENTIETH CENTURY

Commentators identify the Australian system of compulsory arbitration of industrial disputes, established at the federal level through a 1904 statute, as a key aspect of the social settlement brokered in the first decade of the twentieth century. Along with restrictions on (non-European) immigration, arbitration ensured relatively high minimum wage rates and security of employment for workers in Australia. In return, a third aspect of the settlement—high tariffs—protected domestic markets, and profit levels, for the Australian manufacturing industry. In this framework, arbitration was a central arm of social protection, with social security providing residual relief for those who, for reasons seen as socially acceptable at that time, did not themselves engage in the labour market, or were not able to be dependent on a labour market wage.⁶

The normative model of the family at the time—a marriage relationship between a full-time male breadwinner and a female homemaker and mother—provided a central ideological theme underpinning this social settlement. A breadwinner/homemaker structure of work and family was institutionalized in the federal arbitration system through a 1907 case known as the *Harvester* judgment.⁷ The specific issue before the court related to the interplay between tariffs and wages. Commonwealth excise legislation provided tariff protection to manufacturers on condition that the wage rates they paid to unskilled labourers were 'fair and reasonable'. Higgins J., the President of the Arbitration Court, determined that in order to satisfy this test, a wage must be sufficient to support the 'labourer's home of about five persons' in conditions of 'frugal comfort'.⁸ The court assumed that the worker was the sole wage earner for himself, his wife, and two or three children. This needs-based family wage approach to setting minimum male wages came to form the basis for Australia's wage fixation system for most of the twentieth century.⁹

Harvester legally institutionalized gender inequality in basic wages. What had been market practice at the time became legal practice in the

⁶ See generally Hancock, L., Howe, B., and O'Donnell, A. (eds.), *Reshaping Australian Social Policy: Changes in Work, Welfare and Families*, Growth 48 (Melbourne: Committee for Economic Development of Australia, Nov. 2000); Castles, F., 'The Institutional Design of the Australian Welfare State', *International Social Security Review*, 50 (1997), 25.

⁷ *Ex parte H. V. McKay* (1907) 2 CAR 1 ('*Harvester*').

⁸ *Ibid.*, 6.

⁹ Hunter, R., 'Women Workers and Federal Industrial Law: From *Harvester* to Comparable Worth', *AJLL*, 1 (1988), 147.

arbitration system.¹⁰ A direct consequence of the *Harvester* family wage was that minimum wages for women were set on the assumption that when women did engage in market work, they were supporting themselves alone. In the *Federated Clothing Trades Case* of 1919 Higgins J. determined that the minimum rate for adult women ought to be 'the sum per week necessary to satisfy the normal needs of an average female employee, who has to support herself from her own exertions'.¹¹ After an investigation of what that might be, the court set a female basic wage at just over half the male rate. Some thirty years later the female minimum was increased to seventy-five per cent of the male rate.¹² Gender differentials between wage rates were sustained over the decades through a highly gender segregated labour market. From the early days where women worked alongside men they were granted the same pay, lest their lower rate lead to a loss of breadwinner jobs to them.¹³ The legacy of the family wage, and the undervaluation of the type of market work that women have predominantly engaged in, continues to be felt today, both in the ongoing struggle for equal pay and in Australia's high rates of gendered occupational segregation.

The breadwinner/homemaker model of work and family shaped the legal regulation of the labour market in the early twentieth century beyond wages policy. *Harvester* reinforced the association of men with the public world of market work and women with financial dependence and the responsibilities of family and home. This gender division in household work remains resistant to change today with women continuing to shoulder a substantially larger share of family and caring work.¹⁴ A good example of the normative force of the homemaker ideal in the first half of the twentieth century lies in the rules that existed until 1966 in the Commonwealth public service that imposed bars on the employment of married women. Indeed, the rules provided that women employees were deemed to have 'retired' upon marriage.¹⁵ The breadwinner/homemaker

¹⁰ Ryan, E. and Conlon, A., *Gentle Invaders: Australian Women at Work*, 2nd edn. (Melbourne: Penguin Books Australia, 1989), 84; Bennett, L., 'Legal Intervention and the Female Workforce: The Australian Conciliation and Arbitration Court 1907-1921', *International Journal of the Sociology of Law*, 12 (1984), 23.

¹¹ *Federated Clothing Trades v. J. A. Archer* (1919) 13 CAR 647, at 691.

¹² *Basic Wage Inquiry 1949-50* (1950) 68 CAR 698.

¹³ *Rural Workers' Union v. Mildura Branch of the Australian Dried Fruits Association* (1912) 6 CAR 62.

¹⁴ Regardless of whether women engage in paid market work, they continue to do considerably more domestic and family work than men. See generally Craig, L., *The Time Cost of Parenthood: An Analysis of Daily Workload*, Discussion Paper 117 (Sydney: Social Policy Research Centre, University of NSW, 2002); Bittman, M., *Juggling Time: How Australian Families Use Time*, 2nd edn. (Canberra: Australian Government Publishing Service, 1992).

¹⁵ Section 49 of the Commonwealth Public Service Act 1922 (Cth), repealed by s. 4 of the Public Service Act 1966 (No. 2) (Cth).

model is also illustrated in two award test cases brought in the 1920s seeking reductions in working time. The underlying assumption of the parties, and the court, in these cases was that when workers were not at work, they were engaged in leisure. Paid work and leisure were assumed to constitute the worker's day, and household and caring work were assumed out of existence. Higgins J. postulated: 'The feeling [of workers] is that all the energies of a man's waking hours should not be given to the making of a living; that he should have some energy left for other and higher things—art, education, science, literature, even hobbies and amusements, as he selects'.¹⁶

The *Harvester* family wage concept was always deeply flawed as a model for ensuring social protection. It institutionalized sex discrimination and a hetero-normative model of the family in the industrial relations system. It severely undercompensated female-headed households, as it overcompensated the apparently forty-five per cent of male workers at the time who were not married.¹⁷ From the early 1970s, the indefensibility of the *Harvester* approach became more visible, especially as greater numbers of women entered the paid labour market and second-wave feminism became an effective voice in the political sphere. Changes in the social security system and family law presented further challenges to the breadwinner/homemaker form. In 1973, income support was extended to all female sole parents, including mothers who had never been married. Previously, income support was limited through a widows' pension to selective categories of women who were seen as socially deserving, such as widows and 'deserted' wives.¹⁸ Two years later, no-fault divorce became available.¹⁹ These developments went towards recognizing women-headed households as sustainable family units.²⁰

The family wage concept was finally formally abandoned by the Industrial Relations Commission in a series of equal pay cases culminating in the 1974 *National Wage Case*.²¹ In this decision the Commission

¹⁶ *Australian Timber Workers' Union v. John Sharp and Sons Limited* (1920) 14 CAR 811, at 847. See also *Amalgamated Engineering Union v. J. Alderdice and Company Pty Ltd* (1927) 24 CAR 755; *Standard Hours Inquiry* (1947) 59 CAR 581.

¹⁷ Whelan, D., 'Women and the Arbitration System', *Journal of Australian Political Economy*, 4 (1979), 59, 65.

¹⁸ Social Services Act (No. 3) 1973 (Cth). Widows' pensions were provided through the Widows' Pensions Act 1942 (Cth).

¹⁹ Family Law Act 1975 (Cth). This Act provided for divorce based on one year's separation.

²⁰ The developments did not however unambiguously break with the breadwinner/homemaker tradition. For example, and as Berns points out, the 1973 supporting mothers benefit contained no requirement that the recipient seek work in the labour market, thereby reinforcing the idea of mothers as homemakers, and not as labour market participants. See Berns, above, n. 4, ch. 6.

²¹ *National Wage Case 1974* (1974) 157 CAR 293. This case followed equal pay test cases in 1969 and 1972: (1969) 127 CAR 1142; (1972) 147 CAR 172. See generally Hunter, above, n. 9.

made clear its break from the social protection role of arbitration established by *Harvester* in stating that '[t]he Commission has pointed out in the past that it is an industrial arbitration tribunal, not a social welfare agency. We believe that the care of family needs is principally a task for governments and not the Commission'.²² From this point, minimum wage rates were not differentiated by sex. Formal equality had been achieved, and workers were to be paid as individuals on the basis of work value, rather than on the basis of the supposed needs of male breadwinners and single women.²³

III THE UNENCUMBERED WORKER OF CONTEMPORARY AUSTRALIAN LABOUR MARKETS

As Sandra Berns points out in *Women Going Backwards*, two central assumptions underlay the Australian twentieth-century breadwinner/homemaker model. The first, reinforced through the family wage concept of the *Harvester* case, was that the breadwinner was financially responsible as the sole wage earner for his family. By paying the market worker a family wage *Harvester* explicitly supported the financial dependence of the private sphere of the family on the public waged labour market. The second assumption was implicit in *Harvester*, and was not clearly articulated or critiqued in labour law until feminist scholars began to look at these issues relatively recently. This assumption was that the breadwinner had no responsibility to actually do the caring and domestic work of the family because this was taken care of by the full-time homemaker wife. Through the breadwinner/homemaker bargain then, market work and the family existed in a complex interdependent relationship, marked by the financial dependence of the homemaker on the worker and the dependency of the market worker on the domestic and family work of the homemaker.²⁴

The late 1960s and early 1970s equal pay cases are seen by Berns as central in displacing the first assumption of the breadwinner model that the worker of the labour market was financially responsible as the sole wage earner for a family.²⁵ Market workers were no longer to be assumed to be supporting a family. The second assumption underlying the breadwinner/homemaker model was however untouched by these equal pay cases.²⁶ For Berns, this second assumption continues to hold sway to this day.

²² *National Wage Case 1974* (1974) 157 CAR 293 at 299.

²³ The relationship between formal equality and the abandonment of the family wage concept in 1974 is discussed further below. ²⁴ Berns, above, n. 4, 4–5, ch. 6.

²⁵ *Ibid.*, 27.

²⁶ e.g. working hours were not revised downwards in recognition of the abandonment of the model that assumed that market workers had the support of a full-time homemaker.

It is this second assumption, and labour law's separation of production from reproduction, that is the subject of contemporary feminist interest and analysis. Berns' thesis regarding the labour market is that the breadwinner of the twentieth century has largely 'metamorphosed' into the unencumbered worker of today—a normative worker who has neither financial responsibility to provide for a family nor actual responsibility for family and domestic work.²⁷ For Berns, today's ideal worker continues to behave in the market as if he (or she) has a homemaker wife.²⁸

Berns situates the downfall of the family wage and the emergence of the unencumbered worker within the broader political tradition of liberalism and classical and neo-classical economic theory, and specifically in the simplified model of the abstract liberal citizen and rational economic actor—the formally equal individual of the public sphere. In particular, she positions the fall of the family wage in a context of the growing acceptance during the 1960s of the value of formal equality in the public sphere.²⁹ Berns explores how the liberal tradition constitutes its formally equal citizen (and worker) of the public world as devoid of gender, racial, class, or family context. The main identity of the liberal citizen (and worker) lies in absence rather than presence—an apparent lack of markers signifying particularity. For liberalism, differences in gender, race, class, and family context belong in the world of the social, family, and the home, and not the market.³⁰ 'All the ties and obligations constitutive of the social, the indicia of difference, must be left behind if people are to meet as equals in the public sphere'.³¹ Berns draws on the work of John Rawls in *Political Liberalism* to illustrate liberalism's public citizen. She writes that Rawls' understanding of the liberal citizen 'as a free and equal moral person capable of being self supporting over a complete life' represents both that engagement in the paid labour market is normative, and, secondly, that the citizen faces no impediments to such participation, such as the particularities of caring or domestic work.³²

In her text, Berns discusses a linguistic and social process that she identifies as differential gendering.³³ This practice identifies difference in a way that naturalizes and universalizes the point from which difference is measured. For example, when we identify and study particular groups of workers, such as women workers, their gender (and often family circumstances) assumes primacy both linguistically and socially, leaving the normative figure of the worker ungendered. In this way men

²⁷ Berns uses the word 'metamorphosed' on p. 167 of her text: Berns, above, n. 4.

²⁸ Berns makes this point in relation to the unencumbered citizen: *ibid.*, 43.

²⁹ *Ibid.*, 166.

³⁰ On Berns' unencumbered citizen, see generally *ibid.*, 16–20, ch. 2.

³¹ *Ibid.*, 36.

³² Rawls, J., *Political Liberalism* (New York: Columbia University Press, 1993), discussed in Berns, above, n. 4, 18.

³³ Berns, above, n. 4, 4–6.

and male workers disappear from view and analysis, to be replaced by the universal figure of the worker. Thus, differential gendering explains the dichotomies of workers/women workers, and more recently in Australia, workers/workers with family responsibilities. The category of 'worker' assumes primacy as the universal figure of the labour market, and the categories of 'women workers' and 'workers with family responsibilities' are constituted in their difference as outsiders to the labour market (and labour law). Berns writes that through differential gendering, 'masculinity is simultaneously affirmed (as universal) and rendered invisible (and thus located beyond analysis)'.³⁴

Berns examines the fields of industrial relations law and policy, anti-discrimination law, family law, and the tax/transfer system to reveal how they interconnect in complex, and sometimes contradictory, ways to produce the unencumbered citizen of the liberal nation state. The text positions itself as an exploration at the theoretical and conceptual level, rather than as an empirical examination of legal rules. For example, the text finds strong evidence of an unencumbered subject of industrial relations policy in the construction of (federal) government-funded child-care as being part of family policy under the family services portfolio, rather than as being included in the industrial (or workplace) relations portfolio.³⁵

Berns finds further support for her theory of the unencumbered worker in various other observations. One matter is the fragmentation of the labour market into a core of unencumbered workers and a periphery of secondary workers, such as part-time employees and casuals, who are often visibly encumbered by the particularity of family work.³⁶ In addition, the text highlights that enterprise bargaining has continued to marginalize the sex equality agenda in the labour market, and that the flexibility that has been delivered is largely employer-driven. The relative lack of provisions such as paid maternity and parental leave in enterprise bargaining agreements further bolsters Berns' thesis of the unencumbered worker.³⁷ Berns makes the argument that with the spread of working hours into evenings and weekends, employers often seem to assume in enterprise bargaining that workers are available to work at any time, and on short notice, reflecting a view of the worker as an individual with few commitments outside market work.³⁸ Finally, an unencumbered

³⁴ *Ibid.*, 6. ³⁵ *Ibid.*, 165. ³⁶ *Ibid.*, 155–6.

³⁷ *Ibid.*, 4–5, 162–3. For example, one study has found that only 13.5% of registered collective agreements contained at least one measure that the researcher identified as genuinely useful for parents and other carers, whilst only 11.6% of registered individual agreements included one or more such clauses: Whitehouse, G., 'Industrial Agreements and Work/Family Provisions: Trends and Prospects under "Enterprise Bargaining"', *Labour & Industry*, 12 (2001), 109, 113–15.

³⁸ Berns, above, n. 4, 14–16.

norm of workplace cultures appears evidenced in men's reluctance to take up measures, where they exist, such as parental leave and family leave.³⁹

The remainder of this chapter builds on Berns' work by expanding on some of these observations. The gendered fragmentation of the labour market into a core of full-time employees and a periphery of part-time and casual workers is explored first. This is followed by an examination of how anti-discrimination values have been marginalized in the enterprise bargaining framework of Australian industrial relations, and what this reveals about the normative worker of enterprise bargaining. Finally, the Sex Discrimination Act 1984 (Cth) is examined to uncover a paradigmatic figure of work relations that is constituted as being without family responsibilities.

IV THE BIFURCATION OF THE AUSTRALIAN LABOUR MARKET AND LABOUR LAW

The traditional breadwinner/homemaker household, with a male partner as the sole wage earner and a female partner as a full-time homemaker, is still a strong model of labour force participation for families in Australia. In 2000, it accounted for just over thirty-four per cent of working families with dependent children. A second main path followed by families has been called a 'one plus' model, where one partner (invariably the male) works in the market full-time (defined as thirty-five hours or more per week), whilst the female partner engages in paid work on a part-time basis (defined as less than thirty-five hours per week). This model accounts for almost thirty-one per cent of working families. A third model, where both adults are in full-time waged work, comprised approximately twenty-three per cent of all working families. One-parent families, with the parent in paid work, accounted for just over twelve per cent of such working families.⁴⁰

Both the continuing strength of the traditional breadwinner family, and the emergence of the 'one plus' model, reinforce women's primary attachment as being to the home and family, and men's to the public world of the labour market. Women are family carers first, and waged workers second, if at all.

³⁹ Berns, above, n. 4, 5-6.

⁴⁰ Buchanan, J. and Thornthwaite, L., *Paid Work and Parenting: Charting a New Course for Australian Families*, A Report Prepared for the Chifley Research Foundation (Sydney: University of Sydney, Aug. 2001), 19-20, esp. Table 4 (p. 20). It is unclear how the data used in this study categorized same-sex families.

The growth of the 'one plus' model is symbiotically related to employer demands for greater labour supply flexibility from the mid-1980s. Indeed, some Australian commentators discuss how employers were able to mobilize successfully the rhetoric of the family-friendly workplace to bolster their claims for flexibility and choice.⁴¹ The demands of business for labour flexibility have aligned easily with government policy promoting part-time employment for mothers as a suitable and desirable way of addressing work/family conflict.⁴² This policy underlies the approach to part-time and casual employment taken in the 1996 Workplace Relations Act. The Act removed existing provisions in industrial awards that limited the number of part-time and casual employees that an employer could engage. In addition, the Act ensures that awards contain provisions providing for regular part-time employment, where deemed appropriate by the Industrial Commission.⁴³

Berns understands the development of part-time work for women as a fragmentation of the labour force into a core of normative (male) unencumbered full-time workers, and a periphery of (female) secondary or contingent workers, who are often visibly marked by family and domestic responsibilities.⁴⁴ There is much support for the view that the labour market continues today to require that full-time workers behave as if they have a homemaker wife taking care of family and domestic work. Indeed, in many ways this supposition has become stronger in relation to full-time workers, with working hours increasing substantially in Australia over the past twenty years,⁴⁵ and work intensification and pressure characterizing workplaces.⁴⁶ In this environment, part-time work for mothers becomes the obvious policy response of a conservative government seeking to disrupt existing power relations in the market, and the family, as little as possible. Even though the working lives of

⁴¹ Berns, above, n. 4, 2; Hunter, R., 'The Mirage of Justice: Women and the Shrinking State', *Australian Feminist Law Journal*, 16 (2002), 53, 57; Junor, A., 'Permanent Part-time Work: Rewriting the Family Wage Settlement?', *Journal of Interdisciplinary Gender Studies*, 5 (2000), 94, 105.

⁴² Reith, P., 'Delivering on Work and Family: The Workplace Relations Act 1996', *Australian Bulletin of Labour*, 25 (1999), 221. The author of this article was, at the time, the federal Minister for Employment, Workplace Relations and Small Business.

⁴³ WR Act, ss. 89A(4)(a), 143(1C)(b). Prior to the 1990s the trade union movement and the Industrial Commission were both antipathetic to part-time employment, seeing it as undermining the male breadwinner full-time norm: Owens, R., 'Women, "Atypical" Work Relationships and the Law', *Melbourne University Law Review*, 19 (1993), 399, 407-8.

⁴⁴ Berns above, n. 4, 155.

⁴⁵ Working hours have become a major industrial issue in Australia, with full-time employees working an extra 3.1 hours per week more than they were in 1982. Most of this is unpaid. Campbell, I., 'Extended Working Hours in Australia', *Labour & Industry*, 13 (2000), 91, 93-4.

⁴⁶ Watson, I., Buchanan, J., Campbell, I., and Briggs, C., *Fragmented Futures: New Challenges in Working Life* (Annandale, NSW: Federation Press, 2003), 95.

full-timers may be difficult, and indeed becoming more consuming, full-time standard employment remains at the centre of labour law's gaze, especially its protective vision. Workers engaged on a full-time basis under contracts of employment of indefinite duration attract the strongest and broadest range of legal entitlements and protections, which often increase with length of continuous service. These include, for example, award rights to paid annual, sick, bereavement, family, and long-service leave, rights on redundancy, and protection from unfair and discriminatory dismissal. These workers are the ones around whom labour law has been built.

Contingent and precarious workers are frequently referred to in Australia as atypical or non-standard workers, words that emphasize (and may further entrench) the typicality of the full-time worker.⁴⁷ Such workers remain at the periphery of labour law's protective function. Contingent work, such as part-time and casual employment, is often characterized by insecurity over continuing engagement and hours and shifts worked. This work is often poorly remunerated with little possibility of career progression. Relatively low unionization levels also characterize these groups, undermining their effectiveness in collective bargaining.⁴⁸ Although part-time employees generally have access to award leave entitlements on a pro rata basis, casuals usually do not.⁴⁹ Part-time employees are often able to seek redress in relation to unfair and discriminatory dismissal, whilst casuals employed for less than twelve months cannot bring an application in relation to unfair dismissal.⁵⁰

Even where initiatives have been introduced into labour law to assist employees to manage their family commitments around their working lives, these schemes are sometimes marked by the normative strength of the full-time ideal in ways that undermine their effectiveness. An example of this lies in the entitlement to unpaid parental leave following the birth of a child. This legislative right, enacted at the federal level through a 1993 statute, provides a right to unpaid maternity and paternity leave of fifty-two weeks (in total) for full-time and part-time employees who have completed twelve months' continuous service with their employer.⁵¹

⁴⁷ Owens, R., 'Decent Work for the Contingent Workforce in the New Economy', *AJLL*, 15 (2002), 209, 212-14.

⁴⁸ See generally Junor, A., 'Permanent Part Time Work: New Family/Friendly Standard or High Intensity Cheap Skills?', *Labour & Industry*, 8 (1998), 77; Owens, above, n. 43, 407-11.

⁴⁹ As against this, awards usually require a wage loading to be paid to casuals.

⁵⁰ WR Act, ss. 170CB, 170CBA, 170CE(5), (5A), (5B). See also s. 492 for the position in Victoria.

⁵¹ The current provisions are WR Act, Part VIA, Division 5, Sch. 14. These provisions further reflect the *Harvester* model by limiting entitlements explicitly to the child's mother and her spouse. Notably, the concept of spouse is not defined in the WR Act. Although it is likely to include a heterosexual de facto spouse, it is unlikely to cover a same-sex spouse, as same-sex marriages are not recognized in the Commonwealth legal system. Some states do, however, recognize, for a range of purposes, same-sex de facto relationships.

Prior to 2001, casuals were excluded from this right.⁵² Given gendered labour force participation characteristics, it is likely that more fathers than mothers will be eligible for this right to unpaid parental leave, especially prior to 2001, as women are more likely to be casuals than men, and also less likely to accumulate twelve months' service than men, due to time out of the workforce for family-related reasons.⁵³ The irony of this is twofold. Not only are men least likely to feel able to take unpaid leave, as in most couples they remain the highest income earner, in Australia, as elsewhere in the world, the bulk of the work of caring for young babies invariably falls to mothers. A second example relates to family leave. Following an award test case initiated by the trade union movement in 1994, the federal Industrial Commission drafted standard award clauses that permit employees to use their aggregated entitlements to paid sick leave and bereavement leave (to a maximum of the equivalent of five days per year) to care for a sick family member.⁵⁴ Permanent part-time employees have a pro rata entitlement to family leave, whilst casuals have no entitlement. As most casuals are women, men are again more likely to be entitled to this work and family measure than are women. Not only do these examples reveal the pervasiveness of the standard/contingent framework of labour law, they highlight the limitations of reforms built on this gendered structure.

Several Australian scholars, in addition to Berns, have explored the relationship between part-time work (including casual work) and a normative subject of Australian labour law and labour markets who works on a full-time basis without constraint due to family or domestic work. Rosemary Owens, in important early Australian investigations of women, atypical work, and labour law, examined the ways in which the labour market and labour law continued to privilege typical full-time employees over atypical workers.⁵⁵ In one article Owens argued that the promotion of atypical work as a step forward for women is deeply problematic because it continues to structure women's lives through understandings about women's proper (natural) roles in the family and

⁵² In 2001, the right to unpaid parental leave was extended through the federal award system to casuals with more than 12 months' continuous service: *Re Vehicle Industry Repair, Services and Retail—Award 1983* (2001) 107 IR 71.

⁵³ Owens makes a similar argument regarding the preconditions that attached to the 1979 award entitlement to unpaid maternity leave: Owens, above, n. 43, 415-16.

⁵⁴ *Family Leave Test Case—November 1994* (1994) 57 IR 121; *Family Leave Test Case, Supplementary Decision* (1995) AIRL 3-060; *Personal/Carer's Leave Test Case—Stage 2—November 1995* (1995) 62 IR 48. Notably, family leave extends to cover caring for a member of the employee's 'household'. This concept was adopted by the Industrial Commission for the purpose of covering non-normative caring relationships, such as those arising in same-sex families.

⁵⁵ Owens, R., 'The Peripheral Worker: Women and the Legal Regulation of Outwork', in Thornton, above, n. 3, 40; Owens, above, n. 43.

the home.⁵⁶ Beth Gaze reveals the normative strength of the full-time paradigm of Australian labour markets in the lack of a labour market model, understanding, and legitimacy for part-time work. She illustrates her argument by drawing on the university as a workplace, where part-time faculty must negotiate anew their responsibilities in relation to research, teaching, and administration, as there is no default labour market framework for part-time work to fall back on.⁵⁷ Anne Junor explores the potential offered by permanent part-time employment to alleviate work and family conflict in Australia, whilst moving towards the longer-term goal of gender equity. She notes the highly gendered character of part-time employment and investigates whether permanent part-time employment for mothers is a residue of a male breadwinner/female homemaker model, and whether it might provide the basis for a new and more equitable gender settlement. Junor concludes that the dualism of (male) full-time/(female) part-time does not itself transcend the breadwinner/homemaker model, and as such can only be one part of a broader strategy for a new gender settlement in Australia.⁵⁸

V THE ANTI-DISCRIMINATION AGENDA IN THE ENTERPRISE BARGAINING FRAMEWORK

An unencumbered worker norm can be seen in the way in which anti-discrimination principles have been marginalized in the industrial relations framework. From the enactment of the first anti-discrimination statutes in Australia in the mid-1970s, industrial law and anti-discrimination values were widely viewed as operating in separate spheres, and indeed institutionally involved different state agencies and enforcement regimes. This division began to break down in the early 1990s with anti-discrimination values being imported into the industrial system.⁵⁹ Some tentative steps were taken in 1992, and a year later, a broader set of rules was enacted by the federal Labor government.⁶⁰ The current industrial relations legislation—the Conservative government's Workplace Relations Act 1996 (Cth)—does little to build on the 1993 amendments. Indeed, in

⁵⁶ Owens uses the concept of the sexual contract, drawing on the work of Carol Pateman in *The Sexual Contract* (Cambridge: Polity Press, 1988), ch. 5: Owens, above, n. 43, 422.

⁵⁷ Gaze, B., 'Working Part Time: Reflections on "Practicing" the Work-Family Juggling Act', *Queensland University of Technology Law & Justice Journal*, 1 (2001), 199.

⁵⁸ Junor, above, n. 41.

⁵⁹ Nevertheless, the separation of industrial law and anti-discrimination law remains. For example, the Sex Discrimination Act 1984 (Cth) (SDA) still retains an exemption in s. 40 in relation to sexually discriminatory practices of an employer done in direct compliance with an award or registered collective agreement.

⁶⁰ Industrial Relations Reform Act 1993 (Cth).

some important respects, the existing provisions are weaker than the framework introduced in 1993. Notably, even though it is now generally believed that work and family outcomes are deteriorating in Australia, there have been no amendments over the past seven years to the Workplace Relations Act designed to address a situation that is seen by some as approaching a crisis.

The current rules in the Workplace Relations Act charge the Industrial Commission with the task of ensuring that the content of registered collective agreements does not discriminate on a prohibited ground.⁶¹ Grounds include sex, sexual preference, family responsibilities, and pregnancy. The way that the Commission approaches this task in relation to collective agreements gives rise to some concerns. It generally accepts the agreement, and the parties' submissions in relation to it, at face value with little further investigation into potential issues of discrimination. Importantly, there is generally no examination of how the agreement might operate in the particular workplace in question.⁶² The statutory rules pertaining to a new type of agreement introduced with the 1996 scheme—a registered individual agreement called an Australian Workplace Agreement or AWA—contain even weaker anti-discrimination provisions. There is no legislative requirement that AWAs be scrutinized prior to approval to ensure that they are non-discriminatory towards women or workers with family responsibilities. Rather, AWAs must merely contain a prescribed anti-discrimination clause.⁶³ Not only is this standard clause worded very generally, but the existence of this clause does not necessarily mean or guarantee that the rest of the agreement is non-discriminatory.⁶⁴

There are some provisions in the Workplace Relations Act relating to consultation in enterprise bargaining processes that warrant examination. The current provisions have their origins in the 1993 amendments of the Labor government. They require employers to take reasonable steps to ensure that a proposed collective agreement is explained to employees before they agree to it.⁶⁵ The legislation requires that the explanation must

⁶¹ WR Act, s. 170LU(5). An exemption exists in relation to the 'inherent requirements' of that employment, or on the basis of religious teachings or beliefs in relation to the employment of a member of staff in a religious institution: WR Act, s. 170LU(6)(b), (c).

⁶² This is my conclusion from a brief survey of 20 recent case decisions. It is consistent with the conclusions of earlier research: Charlesworth, S., 'Enterprise Bargaining and Women Workers: The Seven Perils of Flexibility', *Labour & Industry*, 8 (1997), 108; Charlesworth, S., *Stretching Flexibility: Enterprise Bargaining, Women Workers and Changes to Working Hours* (Sydney: Human Rights and Equal Opportunity Commission, 1996), 10.

⁶³ Where the agreement does not explicitly include this clause, it is implied into it. WR Act, s. 170VG(1), Workplace Relations Regulations, reg. 30ZI(1), Sch. 8.

⁶⁴ Importantly, AWAs attract certain requirements of confidentiality and secrecy regarding their content, making it difficult to assess their impact and effect: WR Act, ss. 83BS, 170WHB. But see also s. 170VG(2).

⁶⁵ WR Act, ss. 170LJ(3), 170LK(7).

be appropriate for the employees, having regard to their particular circumstances and needs, especially those employees who are women, young people, and people from non-English speaking backgrounds.⁶⁶ The point has been made that this type of legislative provision means little in the absence of broader mechanisms to ensure genuine participation and representation in bargaining processes by all employees.⁶⁷ Notably, the Workplace Relations Act does not ensure such broader processes. Another limitation with these statutory provisions lies in the way the Commission monitors compliance with them. The Commission's approach is almost perfunctory, invariably accepting, without further inquiry, the employer's usually very brief explanation of how the particular needs of employees in these three groups were taken into account in the consultation process.⁶⁸ In some cases, employers have indicated that these employees received the same explanation and information as the workforce as a whole, suggesting that the particular needs of women workers, young people, and people who have English as a second language may not in fact have been taken into account at all.

This consultation requirement provides an excellent example of the process of differential gendering explained by Berns.⁶⁹ Each of the three groups—women employees, young workers, and employees from non-English speaking backgrounds—are defined by their difference from an assumed universal figure of the worker who is genderless, and without the particularities of age or language. Indeed, the specificity of workers in these three categories is made explicit in the legislation, which refers to their 'particular circumstances and needs'.⁷⁰ The identification of the three groups in the legislation, through a process of differential gendering, simultaneously affirms the universal worker as genderless and without age and language, and at the same time sends a clear message that the workers in the three groups are non-normative.

The statutory rules in the Workplace Relations Act that impose anti-discrimination principles onto the content of collective agreements and AWAs, in addition to the requirements about consultation, fall far short of an attempt to recognize, or facilitate recognition, that work and family are not separate spheres, but are interconnected in complex and dynamic ways. The legal rules themselves are weak, and the enforcement

⁶⁶ WR Act, s. 170LT(7)(a). There are no equivalent consultation requirements in relation to AWAs. But see s. 83BB(2).

⁶⁷ Owens, R., 'Law and Feminism in the New Industrial Relations', in I. Hunt and C. Provis (eds.), *The New Industrial Relations in Australia* (Annandale, NSW: Federation Press, 1995), 36 (writing about the 1993 Industrial Relations Reform Act provisions).

⁶⁸ This is my conclusion from a brief survey of 20 recent case decisions. It is consistent with the conclusions of the earlier research conducted by Charlesworth, above, n. 62.

⁶⁹ Berns' understanding of differential gendering is explained above. See Berns, above, n. 4, 4-6.

⁷⁰ WR Act, s. 170LT(7).

procedures adopted by the Commission in relation to them exacerbate their limitations. They are not capable of generating a displacement of the breadwinner tradition of market work. They make no real attempt to do so. Indeed, the consultation requirements explicitly work to further entrench a male (adult and Anglo) norm as the universal subject of enterprise bargaining.

VI THE SEX DISCRIMINATION ACT 1984 (CTH)

In 1990, Margaret Thornton wrote about a 'benchmark' figure of Australian anti-discrimination law, who she described as 'likely to be a white, Anglo-Celtic, heterosexual male who falls within acceptable parameters of physical and intellectual normalcy'.⁷¹ Evidence of Thornton's benchmark person emerges most clearly in the concept of direct discrimination articulated in the various anti-discrimination statutes. Direct discrimination generally arises when the discriminator treats the complainant less favourably than, in circumstances that are the same or are not materially different, the discriminator treats, or would treat, a comparator person.⁷² In a complaint of sex discrimination brought by a woman, the comparator employee will be a similarly situated male employee. In a complaint of discrimination on the ground of race brought by an Indigenous employee, the comparator will be a non-Indigenous employee. Through this process of comparison, across the different grounds, Thornton's benchmark class is constituted as normative in the labour market. Their workplace experiences provide the benchmark against which differential treatment is measured, and discrimination is defined.⁷³

The Sex Discrimination Act 1984 (Cth) prohibits direct discrimination on a range of grounds, including family responsibilities. These provisions were introduced in 1992. In a complaint of discrimination on the ground of family responsibilities the comparator is a similarly situated employee without family responsibilities. This comparator is Berns' unencumbered worker, established as normative in the labour market through the Sex Discrimination Act. Had Thornton been writing today about the benchmark figure of anti-discrimination law, no doubt she would have also identified the characteristic of being without family responsibilities. The provisions in the Sex Discrimination Act relating to family responsibilities

⁷¹ Thornton, M., *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Melbourne: OUP, 1990), 1.

⁷² See e.g. the SDA, ss. 5(1), 6(1), 7(1), 7A.

⁷³ This point originates from MacKinnon, C., *Towards a Feminist Theory of the State* (Cambridge, MA: Harvard University Press, 1989); MacKinnon, C., *Feminism Unmodified: Discourses on Life and Law* (Cambridge, MA: Harvard University Press, 1987).

reveal an unencumbered norm of Australian labour markets in another way. The legislation provides a very narrow legal entitlement regarding family responsibilities. The ground covers only direct discrimination, and only in relation to dismissal from employment.⁷⁴ In this way, the Sex Discrimination Act protects only a very limited space for family context in the workplace. It aims merely to ensure that encumbered workers are not dismissed when a worker without family responsibilities would not be. In constituting a contained and relatively small area of legitimacy for the family encumbrances of workers, the legislative scheme confirms that the appearance of family context elsewhere in the employment relation is inappropriate.

A final way in which the Sex Discrimination Act is built upon, and reinscribes a separation of market and home, lies in the exclusion from the Act of unpaid work within the family.⁷⁵ In this way, the fiction of the home and the family as being beyond regulation by law is maintained. In addition to excluding unpaid work within families, the Sex Discrimination Act continues to exclude some work performed in a commercial context in the home.⁷⁶ These exclusions reflect both the malleability of liberalism's public/private divide, and the strength of the ideology surrounding the home and domestic sphere, as being untouched by law.

VII CONCLUSIONS

This chapter poses some (ambitious) questions about the normative person of Australian labour law and, in particular, that subject's relationship to family and domestic work. The analysis commences in the breadwinner/homemaker tradition of Australian industrial law and, in particular, the family wage of the 1907 *Harvester* case. It attempts to shed some light on the contemporary subject of labour market legal regulation by focusing on three present day phenomena, namely, the fragmentation of the labour force and labour standards into a dualism of standard/non-standard work, the marginalization of anti-discrimination values in

⁷⁴ Other aspects of paid work, such as recruitment, hiring, promotion, and training are not covered (unless the employer's actions can be shown to constitute constructive dismissal): SDA, s. 14(3A). The concept of family responsibilities is defined in s. 4A (and see the definition of de facto spouse in s. 4(1)). These provisions are explicitly limited to heterosexual family forms.

⁷⁵ The Act covers employment, commission agents, contract workers, and partnerships. All these presuppose a legally enforceable common law contract: SDA, s. 4(1).

⁷⁶ Section 14(3) of the SDA excludes sex discrimination in employment that relates to performing domestic duties in the residence of the respondent. Section 35 provides an exemption in relation to sex discrimination in paid work, where the duties of the position involve the care of a child or children in the place where the child or children resides or reside.

enterprise bargaining, and the test of direct discrimination in the Sex Discrimination Act 1984 (Cth). Each of these matters reveals a normative worker who largely acts in the labour market as if he (or she) has a homemaker wife at home.

Much work remains to be done to fully bring into vision the subject of Australian labour law. This chapter is a small step along that path. In particular, several research questions follow from the ones investigated here: have the paradigmatic assumptions regarding the worker and the worker's family responsibilities developed evenly across different areas of labour law, such as industrial law and anti-discrimination law? What factors and processes account for uneven developments? A sub-set of questions arises in relation to labour law's vision of the normative family and caring relationships of its worker. The subject worker and his family of *Harvester* were constituted culturally as heterosexual, and Anglo-Celtic. Does labour law continue to assume a heterosexed normative family, in an Anglo-Celtic form? Arguably, current analyses are only beginning to skim the surface of these difficult and perplexing questions.



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Work/Family, Australian labour law, and the normative worker

Date:

2005

Citation:

CHAPMAN, A. M. (2005). Work/Family, Australian labour law, and the normative worker.
RITTICH, K (Ed.). CONAGHAN, J (Ed.). Labour law, work, and family, (1), pp.79-97. Oxford
University Press.

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