ACKNOWLEDGMENT

I, Kristen Louise Murray, acknowledge that this thesis is my work alone, except where due acknowledgment is made in the text, and does not include material for which any other university degree or diploma has been awarded.
SEX WORK AS WORK: LABOUR

REGULATION IN THE LEGAL SEX

INDUSTRY IN VICTORIA

Submitted by Kristen Murray for Master of Laws by Thesis
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INTRODUCTION

Prostitution occupies a significant place in academic research. It has been analysed from a range of disciplines including sociology and anthropology, women's studies, criminology and law, and medicine and health services. Much of the recent scholarship in Australia concerning prostitution has focussed on the relationship between sex work and sexually transmissible diseases,¹ and on the decriminalisation of prostitution.²

Despite the considerable number of studies into prostitution, there has been only limited consideration in Australia of prostitution as a form of waged labour.³ Some feminist theorists, writing from an historical perspective, have examined the concepts of sex and work and the way in which these are reproduced within the practice of prostitution.⁴

Judith Allan and Hilary Golder analysed the development of prostitution in New South

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Wales in the late nineteenth and early twentieth century from four perspectives: the
movement from trade to industry; recruitment; wages and conditions; and changing
occupational hazards. They concluded that prostitution is “obviously analogous to the
work of the wife but it is also linked to the work of the waitress, barmaid, domestic
servant, social worker, nurse, office and process worker”.\(^5\) Allan and Golder suggested
that prostitution could serve as a paradigm for most of the narrow range of jobs available
to Australian women. Writing four years later, Allan conceded that there were difficulties
in conceptualising prostitution as ‘women’s work’ but nevertheless believed it served as
a powerful case study in the context of sex specific labour.\(^6\) Jan Aitkin, writing in 1978,
identified a number of problems associated with the ‘prostitute as worker’, including
hours of work, pay rates, leave, taxation and superannuation, working environment and
work hazards.\(^7\) Aitkin concluded that “prostitutes are one of the most exploited groups of
workers” but, in doing so, conceded that much of the material she drew upon was based
on informal sources and media reports as opposed to rigorous empirical data.\(^8\)

This study seeks to address the lack of Australian literature on prostitution as waged
labour. It examines the industrial regulation of women workers in the legal sex industry
in Victoria. The study attempts to analyse the consequences of theorising sex work as
primarily an industrial activity rather than as a manifestation of male sexual violence or
as an affront to public morality. In doing so, it draws on empirical research conducted by
the author to identify working conditions for women in the legal sex industry in Victoria.
It furthers our understanding of the conditions under which sex work is practiced and

\(^5\) Golder and Allen, above n 3, 17.
\(^6\) Allen, above n 3, 197.
\(^7\) Aitkin, above n 3, 10.
\(^8\) Ibid.
what industrial issues are important to women working in the industry. The study attempts to explain why the legal sex industry remains largely unaffected by measures such as awards and enterprise agreements. The study also identifies impediments to workers accessing legal protections available through the common law, and through industrial, occupational health and safety and anti-discrimination statutes. A focus on the sex industry provides the opportunity to analyse the extent to which these protective labour mechanisms are applicable to industries where the nature of work practices differ substantially from the labourist construction of 'work'.

In Victoria, the legal sex industry encompasses a wide range of activities, including prostitution, tabletop dancing, stripping, and peep show performances. People engaged in prostitution must comply with the Prostitution Control Act 1994 (Vic) in order to operate lawfully. Legal prostitution service providers comprise licensed brothel and escort agency operators and sex workers who are working for themselves or for one other person. The provision of prostitution services by an unlicensed provider is illegal, as is soliciting for prostitution in a public place. There is no specific regulatory scheme that governs other forms of sex work in Victoria, although such activities are subject to planning controls, public decency legislation and liquor licensing laws.

As this study examines only the legal sex industry in Victoria, the conditions of workers in unlicensed brothels and escort agencies and in street sex work do not form part of this study. This is not to suggest that the workplace conditions experienced by workers

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9 Prostitution Control Act 1994 (Vic) ss 22–3.
10 ibid ss 12–13.
11 See for example the Planning and Environment Act 1987 (Vic), the Liquor Control Reform Act 1998 (Vic) and the Summary Offences Act 1966 (Vic).
engaged in illegal sex work do not require consideration and reform.\textsuperscript{12} Equally, the exclusion of illegal workers does not suggest that they are not engaged in productive work simply because of their illegal status. The reasons for this exclusion are twofold. First, one of the purposes of this study is to provide a basis upon which future comparisons between women engaged in sex work and women workers in other (legal) service industries may be made. This comparison is only meaningful if the focus is upon women working in the legal sex industry. The mere fact of the illegality of some forms of sex work tends to have its own specific impact upon working conditions that would distort comparisons with other service industries. Second, as a practical matter, it is difficult to contact workers in the illegal industry and these workers are likely to be (understandably) reluctant to participate in a taped interview in which their confidentiality can not be unequivocally assured.

This study does not consider the industrial conditions of men working in the legal sex industry. Although prostitution involves sex between men, the vast majority of prostitutes are women with male clients.\textsuperscript{13} Other forms of live sexually explicit entertainment, such as tabletop dancing, similarly involve a female performer providing sexualised entertainment for male patrons. Gender and sexuality have therefore played important roles in the historical and cultural construction of sex work.\textsuperscript{14} Within the regulated sex work industry in Victoria, gender is not only an important determinant in


\textsuperscript{13} Noah Zats, 'Sex Work/Sex Act: Law, Labor and Desire in Constructions of Prostitution' (1997) 22 Signs 277, 279.

\textsuperscript{14} Ibid.
the way the service is provided but also to some extent shapes the conditions under which it is provided. In the same way that a large majority of sex workers are women, most venue owners/managers are men. Male managers, by and large, represent their preconceived and idealised vision of what constitutes female sexuality through the imposition of formal and informal industrial controls over workers.

Concentrating on women in sex work also renders the liberal construction of ‘public and ‘private’ – the realm of the market economy, populated by men, and the realm of the family, populated by women – more readily transparent. The public/private dichotomy has a two-fold effect upon women workers: it legitimates the supremacy of contract as the primary regulatory instrument between women sex workers and employers, and naturalises the provision of sexual services by women through its association with unpaid labour or services provided in the home.\(^{15}\) Sex workers, however, do not conform to patriarchal notions of how women should behave in both spheres, including their participation in paid work.\(^{16}\) A focus on women sex workers therefore illustrates commonalities between the industrial conditions of sex workers and all women engaged in paid work as well as exposing how ‘public’ processes can serve to isolate and disadvantage women who do not conform with gendered patterns of engagement with the public sphere.

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EMPIRICAL RESEARCH

Empirical research has been identified as a research methodology which provides a 'voice' to excluded populations, including women engaged in sex work. Unfortunately, there is a lack of recent empirical data regarding the industrial conditions of women working in the legal sex industry in Victoria. Most of the empirical research was conducted in the late 1980s and early 1990s. Consequently, more recent developments in labour relations such as decentralisation of the labour market and the increasing role of enterprise bargaining are not considered in this earlier research.

This study is based on empirical data obtained through a series of qualitative research interviews conducted by the author with sex workers, sex worker advocates and a brothel manager. Nine interviews were conducted with women who were currently working in the sex industry or who had worked in the sex industry in the past. Some participants had worked in different parts of the sex industry and therefore had a range of experience. Seven participants had experience working in brothels and escort agencies and three participants had experience as private workers. One participant had worked in tabletop dancing venues and in brothels. Interviews were also conducted with

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19 Approval was obtained from the University of Melbourne Human Research Ethics Committee to conduct the interviews and the interviews were conducted in accordance with this approval. This meant that participants were informed that the interviewer, subject to any legal requirements, would protect their confidentiality, and that any identifying information would be deleted from the transcript of interview. Participants were informed that the Interviewer is also an employee of Consumer and Business Affairs Victoria, which has responsibility for administering the Prostitution Control Act 1994 (Vic). Interview subjects were free to refuse to answer any question, terminate the interview at any time and withdraw any unprocessed data upon request, and were advised that all questions were voluntary. Subjects were also asked to provide written consent to participating in the interview, including having the
a sex worker advocate employed by the Prostitutes Collective of Victoria and with a union organiser employed by the Liquor, Hospitality and Miscellaneous Workers Union (LHMWU). These participants were recruited through referrals from a worker at the Prostitutes Collective of Victoria and a sex work industry researcher and consultant.

Obtaining the interview data was complicated by three factors. Firstly, considerable difficulty was experienced in obtaining access to women working for escort agencies and in tabletop dancing venues, peep shows and strip venues. Women working for escort agencies tend to be more isolated than brothel workers and do not generally have the same opportunities to interact with other workers. Many women working as strippers and tabletop dancers do not consider their work to be ‘sex work’\textsuperscript{20} and may therefore be reluctant to participate in a study with a specific focus on sex workers. Accordingly, only one interview participant had experience in working in the tabletop dancing industry and two had worked for escort agencies. Secondly, no workers with experience in the ‘straight’ stripping industry (strippers working in venues other than tabletop dancing venues and peep shows) were available to participate in this study. The working conditions of women who work in the ‘straight’ stripping industry are therefore not considered as part of this study. The third factor limiting the data obtained was that licensees and managers of venues that provide prostitution services and live sexually explicit entertainment, did not respond to written requests to be interviewed. Thirty-five letters were sent to venues but only one brothel manager agreed to participate in an interview.

\textsuperscript{20} Interview tape-recorded.

OUTLINE OF CHAPTERS

This study examines the legal sex industry in Victoria. Chapter one introduces the range of activities that comprises this industry. It distinguishes between legal and illegal commercial sexual activity and discusses the difference between escort and brothel work, private sex work, tabletop dancing and peep shows. Chapter two is concerned with establishing a fundamental premise of this study – that the provision of a sexual service in return for payment is work, both in a broader industrial sense and for the purpose of this study. Selected literature is used to consider competing perspectives on sex work in relation to three key issues: the ability of sex workers to exercise choice/consent, what is being exchanged in sex work, and whether sex work involves skill. Chapter three discusses the common law status of women engaged in sex work and considers whether their work conditions indicate an employment relationship or some other form of work relationship, such as independent contracting. The conclusion reached is that the relationship between venue proprietors and sex workers, in general, is an employment relationship.

Chapters four and five identify a range of legal mechanisms that, at least in theory, provide protection to Australian workers, including workers in the legal sex industry in Victoria. These mechanisms are the common law contract of employment; awards, enterprise agreements and minimum wage orders under the Workplace Relations Act 1996 (Cwth); other employee rights provided under the Workplace Relations Act 1996 (Cwth) such as unfair dismissal and unfair contract provisions; occupational health and safety law; and anti-discrimination and equal opportunity statutes. Chapter four is concerned with the contract of employment; awards, agreements and minimum wage
orders; and other rights under the Workplace Relations Act 1996 (Cwth). Chapter five discusses occupational health and safety law and equal opportunity statutes. Each of these mechanisms is described and their potential and actual application to the legal sex work industry is assessed. The discussion is focussed on protective legal mechanisms available to sex workers who are engaged in an employment relationship with venue proprietors or managers. However, as it is not possible to categorically state that women working in the legal sex industry in Victoria are employees, chapter five also contains some discussion of the availability of protective legal mechanisms to independent contractors. Chapters four and five conclude that, with some limited exceptions in the area of unfair dismissal, these mechanisms have largely been irrelevant in the working lives of women in the legal sex work industry.

The discussion in chapters four and five is predicated upon a 'protective' view of labour law, in which the role of the state is to enact and enforce a system of laws designed to relieve some of the effects on workers of their relative lack of power.\textsuperscript{21} The effectiveness of labour regulation in encouraging private decision making between workers and venue managers, or with facilitating a more 'flexible' and efficient labour market in the legal sex industry, is not considered.

Chapter six develops four key themes in explaining the limitations with the law in action in this area. These are: the distinction between the public and private spheres and how it impacts upon sex workers' access to and use of protective labour mechanisms; stigmatisation of sex work and women engaged in sex work; confusion regarding the employment status of women engaged in sex work; and the effect of a masculinist

\textsuperscript{21} Creighton and Stewart, Labour Law: An Introduction (3\textsuperscript{rd} ed, 2000) 5.
industrial culture. Chapter seven then provides some concluding comments to this study. It states that sex work is a legitimate form of paid labour engaged in by women and, as such, women working in the legal sex industry are entitled to the protections afforded by labour regulation. The fact that these protections have been largely absent from the working lives of women in the sex industry is symptomatic of the lack of legitimacy accorded to sex work in the arena of labour regulation and in the broader community.
CHAPTER ONE

DELINEATING THE LEGAL SEX INDUSTRY IN VICTORIA

INTRODUCTION

The objective of this chapter is to distinguish the legal sex work industry in Victoria from illegal sex work. The chapter does this by first examining how prostitution is regulated in Victoria. This involves an examination of how the *Prostitution Control Act 1994* (Vic) (PCA), the *Prostitution Control Regulations 1995* (Vic) made under the PCA, and the *Health (Brothel) Regulations 1990* (Vic) made under the *Health Act 1958* (Vic) apply to brothels, escort agencies and street sex work. Next, the chapter considers live sexually explicit entertainment and explores how this form of sex work is regulated. Finally, the chapter discusses recent amendments to the PCA which appear to mean that some forms of live sexually explicit entertainment fall within the definition of "sexual services" and therefore constitute prostitution. Venues that provide such live sexually explicit entertainment would need to comply with the PCA and relevant regulations. Failure to do so means that these venues are operating as illegal brothels or escort agencies. These recent amendments to the PCA therefore have the potential to expand the ambit of the illegal sex industry in Victoria.
THE LEGAL FRAMEWORK FOR REGULATING PROSTITUTION IN VICTORIA

Prostitution Control Act 1994 (Vic)

The primary mechanism for regulating prostitution in Victoria is the PCA, which came into effect on 13 June 1995. It replaced the Prostitution Regulation Act 1986 (Vic), which represented one of the first comprehensive attempts by any jurisdiction, nationally or internationally, to regulate prostitution.¹ Under the PCA, the definition of "prostitution" is largely dependent upon the definitions of "sexual services" and "payment or reward" for its meaning. Prostitution is defined as "the provision by one person to or for another person (whether or not of a different sex) of sexual services in return for payment or reward." Until 1 September 1999, when a revised definition of "sexual services" came into operation, "sexual services" was defined as including:

- taking part with another person in an act of sexual penetration within the meaning of Division 1 of Part 1 of the Crimes Act 1958 (Vic); and

- masturbating another person.

There has been limited judicial consideration of this former definition of "sexual services" under the PCA. In the context of a planning dispute over a proposed adult entertainment venue, the Administrative Appeals Tribunal (AAT) found that "sexual

services” was a wide concept not limited to sexual penetration and masturbation. It stated that the definition of prostitution was drafted in such a way that no logical, consistent and satisfactory interpretation of it could be devised. Nevertheless, the AAT went on to find that the definition of prostitution under the PCA was intended to include sexual services by one person to another for payment or reward “where sexual gratification and climax is contemplated and invited”. As noted, the definition of “sexual services” was amended in 1999 and now appears to include a broader range of services than masturbation of one person by another and sexual penetration. The ambit of this revised definition is discussed in the final part of this chapter.

One of the primary ways that the PCA attempts to control prostitution in Victoria is through the creation of a licensing system for people providing prostitution services (defined as “prostitution service providers”) and people managing brothels when the licensed prostitution service provider is not on the premises (“approved managers”). The PCA provides that “prostitution service providers” may lawfully operate one or more escort agency, or a brothel, or thirdly a brothel and one or more escort agency. In other words, prostitution service providers are prohibited from having an interest (and therefore operating) more than one brothel at any one time. Sex workers who work for themselves or with one other person as prostitution service providers are exempt from the licensing provisions of the PCA. In general, “prostitution service providers” are

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3 Ibid 64.
4 Prostitution Control (Amendment) Act 1999 (Vic) s 4.
5 Ibid ss 3, 22.
6 Ibid ss 3, 9.
7 Ibid s 75.
8 Ibid s 23.
licensed operators of brothels or escort agencies rather than sex workers themselves.

Since 1 July 1998, the licensing of prostitution service providers and approved managers has been carried out by the Business Licensing Authority (BLA). The BLA has responsibility for administering the licensing and registration provisions of a number of Acts, including the PCA.\(^9\) The BLA determines licence and approved manager applications\(^10\) and is also empowered to refer matters to the Victorian WorkCover Authority, the Department of Immigration and Ethnic Affairs, the Australian Taxation Office or any other body.\(^11\) In assessing the suitability of an applicant to carry on business as a prostitution service provider, the BLA considers a range of factors. These include whether the applicant is of good repute, whether the applicant’s associates are of good repute, the adequacy of the applicant’s financial resources, and whether the applicant will have in place arrangements to ensure the safety of people working in the business.\(^12\)

In addition to establishing a licensing system for prostitution service providers and approved managers, the PCA creates a number of criminal offences related to prostitution. These include forcing a person to enter or remain in prostitution,\(^13\) consuming liquor in a brothel,\(^14\) and for a prostitute to knowingly work while he or she is infected with a sexually transmissible disease (STD).\(^15\) The last offence places the onus on sex workers to establish that they have been undergoing monthly swab testing for

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\(^9\) Business Licensing Authority Act 1998 (Vic) s 6(a).
\(^10\) Prostitution Control Act 1994 (Vic) ss 25(a)–(b).
\(^11\) Ibid s 25(d).
\(^12\) See generally factors contained in s 38 of the Prostitution Control Act 1994 (Vic).
\(^13\) Ibid s 8.
\(^14\) Ibid s 21.
\(^15\) Ibid s 20.
STDs and three monthly blood testing for HIV. The PCA also makes street prostitution illegal.

**Prostitution Control Regulations 1995 (Vic) and Health (Brothel) Regulations 1990 (Vic)**

The regulation of the legal sex work industry under the PCA is complemented by an extensive set of regulations contained in the *Prostitution Control Regulations 1995 (Vic)*, made under the PCA, and the *Health (Brothel) Regulations 1990 (Vic)*, made under the *Health Act 1958 (Vic)*.

The *Prostitution Control Regulations 1995 (Vic)* contain procedural matters relating to fees, the operation of the BLA and advertising controls. In addition, regulation 19 contains provisions designed to protect the occupational health and safety of sex workers. These include:

- preventing a licensee or approved manager from disputing a prostitute’s decision or taking punitive action against a prostitute if he or she fails to provide a sexual service because of concerns about safety or violence;
- preventing a licensee or approved manager from misrepresenting the qualities of a prostitute or negotiating on behalf of a prostitute;

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16 Ibid s 20(2)(a).
18 *Prostitution Control Regulations 1995 (Vic)* r 19(1).
19 Ibid r 19(2).
• requiring a licensee to ensure that all rooms used for prostitution contain a sealed alarm and a light sufficient to check for the presence of sexually transmissible diseases;\textsuperscript{20} and

• requiring a licensee of an escort agency to provide each prostitute with a two-way electronic communication device.\textsuperscript{21}

One of the objectives of the \textit{Health (Brothel) Regulations 1990 (Vic)} is to "encourage proprietors of brothels to provide and maintain an environment in brothels for prostitutes and clients which is safe from the spread of infectious diseases."\textsuperscript{22} To this end, the Regulations require proprietors of brothels to maintain a free supply of condoms and lubricant.\textsuperscript{23} In addition, the Regulations create offences relating to the refusal to use a condom and the refusal of service.\textsuperscript{24} Further, information about sexually transmitted infectious diseases must be provided to prostitutes in brothels;\textsuperscript{25} linen, baths and spas must be kept clean;\textsuperscript{26} and inspections by authorised officers of the Department of Human Services are required to be conducted.\textsuperscript{27}

Under the PCA, the BLA can take disciplinary action against a prostitution service provider or an approved manager if they have been convicted or found guilty of an offence against the PCA, the \textit{Prostitution Control Regulations 1995 (Vic)} or the \textit{Health

\textsuperscript{20} ibid r 19(3)(a)–(b).
\textsuperscript{21} ibid r 19(6).
\textsuperscript{22} \textit{Health (Brothel) Regulations 1990 (Vic)} r 2(a).
\textsuperscript{23} ibid r 5(1).
\textsuperscript{24} ibid rr 6–7.
\textsuperscript{25} \textit{Health (Brothel) Regulations 1990 (Vic)} Part 4.
\textsuperscript{26} ibid.
\textsuperscript{27} ibid Part 6.
(Brothel) Regulations 1990 (Vic). Disciplinary powers include suspension or cancellation of the licence or approval, imposition of a maximum penalty of $10,000, and requiring the prostitution service provider or approved manager to enter into an undertaking.

**WHAT FORMS OF PROSTITUTION CAN BE LEGALLY PROVIDED IN VICTORIA?**

**Brothels**

A brothel is defined as "any premises made available for the purpose of prostitution by a person carrying on the business of providing prostitution services at the business’s premises." Brothels are a large and visible component of the sex industry. It is estimated that brothels employ 16,000 people Australia-wide, service 12.5 million client visits per annum and nationally turn over $1.25 billion annually. The BLA estimated that there were 84 legal brothels operating in Victoria in July 2000.

A person operating a brothel must be licensed to do so by the BLA. Brothel operators must also obtain a valid planning permit and otherwise comply with the planning controls contained in the Planning and Environment Act 1987 (Vic) and in Part 4 of the PCA. Planning controls include limiting the number of rooms used for prostitution to

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28 Prostitution Control Act 1994 (Vic) ss 48(b)–(c), 54(3)(a)–(b). It is also worth noting that the Business Licensing Authority has a broad discretion to take disciplinary action against a licensee or approved manager on the basis that “the licensed business has been managed in such a way that it is desirable that disciplinary action should be taken against the licensee.” See Prostitution Control Act 1994 (Vic) ss 48(3)(d), 54(c)(3).
29 Ibid ss 48A, 54.
30 Ibid s 3.
33 Register information, Business Licensing Authority, 12 July 2000.
six,\textsuperscript{35} prohibiting the establishment of brothels in areas zoned as being primarily for residential use,\textsuperscript{36} and ensuring that brothels are not established within 200 metres of a place of worship, kindergarten, school, children’s service centre or any place regularly frequented by children.\textsuperscript{37} A prostitution service provider who is licensed to operate a brothel is prohibited from selling, supplying or consuming liquor in a brothel and from permitting liquor to be sold, supplied or consumed.\textsuperscript{38}

**Escort Agencies**

An escort agency is defined in the PCA as “a business of providing, or facilitating the provision of, prostitution services to persons at premises not made available by the agency”.\textsuperscript{39} Snow describes escort agencies as offering a visiting service that usually operates from an office and in some instances from the proprietor’s home.\textsuperscript{40} Unlike brothels, clients do not visit the premises but telephone the agency and request that a sex worker visits them.\textsuperscript{41} In February 2001 there were 55 prostitution service providers licensed to operate an escort agency (or agencies) only and 69 licensed to operate a brothel and escort agency (or agencies).\textsuperscript{42}

\textsuperscript{34} Prostitution Control Act 1994 (Vic) s 72.
\textsuperscript{35} Ibid s 74(1)(d). However, it should be noted that brothels operating prior to the commencement of the Prostitution Control Act 1994 on 14 June 1995 were able to continue operating as deemed licensees if they lodged an application within three months of the date of commencement (see Prostitution Control Act 1994 (Vic) s 69(3)). The operators of these brothels were deemed licensees. Deemed licensees operating a brothel with a planning permit that authorised more than six rooms to be used for prostitution were able to continue to operate. Accordingly, there are eight brothels using more than six rooms, the largest of which is operating 18 rooms.
\textsuperscript{36} Prostitution Control Act 1994 (Vic) s 74(1)(d).
\textsuperscript{37} Ibid s 74(1)(c).
\textsuperscript{38} Ibid s 21(1).
\textsuperscript{39} Ibid s 3.
\textsuperscript{40} Snow, above n 31, 21.
\textsuperscript{41} Ibid.
\textsuperscript{42} Register information, Business Licensing Authority, 1 February 2001 (copy on file with author).
Exempt Workers

Section 23(1) of the PCA exempts sex workers who are working alone or with one other person from the requirement to obtain a licence to provide prostitution services. These workers are known as ‘exempt workers’, ‘private workers’ or, in the parlance of the PCA, “small owner operated businesses”. 43 Although not required to become licensed as prostitution service providers, exempt workers are required to register “prescribed particulars” with the BLA prior to commencing their business. These details are entered onto a confidential register. 44 A number of restrictions apply to private workers, including being prevented from being referred clients or referring clients to another prostitute who does not work in the business. 45 In February 2001 there were 1357 exempt workers registered with the BLA. 46

The PCA does not make provision for exempt workers to work legally from their own homes. 47 Exempt workers who wish to operate a business where they see clients on premises provided by them, rather than visiting the client at a private house or hotel, must obtain planning permission to operate a brothel. As with brothels run by licensed prostitution service providers, brothels run by exempt workers must comply with planning controls in the PCA and the Planning and Environment Act 1987 (Vic). The most significant planning restriction for exempt workers is the prohibition on establishing a brothel in a residential area. 48 These planning restrictions, and the difficulty that

43 Headnote to Prostitution Control Act 1994 (Vic) s 23.
44 Ibid ss 24(1)-(3) and Prostitution Control Regulations 1995 (Vic) r 11.
45 Prostitution Control Act 1994 (Vic) s 23(2).
46 Register information, Business Licensing Authority, 1 February 2001 (copy on file with author).
47 The ability of women to work privately from their own homes was one of the major recommendations to emerge from the Victorian Government’s Inquiry into Prostitution (1985).
48 Prostitution Control Act 1994 (Vic) s 74(1)(a).
exempt workers may encounter in engaging security and other support staff, means that very few two person brothels have been established in Victoria.\textsuperscript{49} The overwhelming majority of exempt workers are therefore working as escorts, seeing clients at premises provided by the client.

**Street Prostitution**

Street prostitution remains illegal in Victoria. The PCA contains offences relating to street prostitution and living on the earnings of prostitution.\textsuperscript{50} Street prostitution offences apply to both workers and clients of workers, with penalties for clients being two to three times higher than penalties for sex workers. Higher penalties also apply where solicitation occurs in or near a place of worship, a hospital, a school, kindergarten or children's service centre or in a public place regularly frequented by children.\textsuperscript{51} As street prostitution does not, at the present time, form part of the legal sex industry, the working conditions of street sex workers will not be addressed in this study.

**LIVE SEXUALLY EXPLICIT ENTERTAINMENT IN VICTORIA AND ITS LEGAL REGULATION**

The legal sex industry in Victoria generally comprises legal prostitution and live sexually explicit entertainment. Live sexually explicit entertainment is a largely unregulated form

\textsuperscript{49} Section 17 of the *Prostitution Control Act 1994* (Vic) and r 10 of the *Prostitution Control Regulations 1995* (Vic) impose significant restrictions on advertisements that can be placed by prostitution service providers. In particular, s 17(3)(b) imposes a $4000 penalty on a person who "publishes or causes to be published a statement which is intended or is likely to induce a person to seek employment in a brothel or with an escort agency or any other business that provides prostitution services." This clearly contemplates the employment of staff in an ancillary capacity, such as security, cleaning and reception staff. On the difficulties of establishing an exempt brothel see Anon, "What A Nightmare: trying to work legitimately within the *Prostitution Control Act 1994*" (1999) 26 *Working Girl* 18.

\textsuperscript{50} *Prostitution Control Act 1994* (Vic) ss 10, 12, 13.

\textsuperscript{51} Ibid ss 12(1), 13(1).
of sex work in Victoria, although some provisions of the *Summary Offences Act 1966* (Vic) potentially apply. Liquor licensing conditions may also impose constraints on this form of entertainment. Before these legal rules are examined, the main forms of live sexually explicit entertainment in Victoria are discussed.

Traditionally, live sexually explicit entertainment included lingerie shows, strip shows and peep shows. Lingerie shows and strip shows involve women performing for an audience, usually in a public venue such as pub or football club, or being hired for a function in a private home. The act could involve a performer removing her clothes and dancing for customers, or could become more explicit through the performer inserting an object, such as a vibrator, into her vagina or anus. Strip performances sometimes include a second performer, usually another woman. Lingerie and strip shows involve limited physical interaction between performers and customers. This interaction is generally less sexually intimate than that which occurs between tabletop dancers and their customers and does not usually involve genital contact between performers and patrons.

Peep shows involve a worker dancing or performing in a room. The customer views the performance from a private booth, which is separated from the performance area by a window or screen. The performance is generally relatively explicit, often involving the performer masturbating herself, inserting an object into her vagina, or having sexual

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intercourse. In *Rowell v AAT*, services provided at a peep show in Richmond involved customers in private cubicles viewing a showroom, in which a woman masturbated herself and then had sexual intercourse with a man. There is no physical contact between the performers and the customers in the booth. Customers may be permitted to undress in the cubicle and are usually permitted to masturbate. Tissues and a plastic bucket may be provided for this purpose.

Tabletop dancing, which was introduced into Melbourne in August 1993, has been described as "blurring...the boundaries between stripping and prostitution". According to the Prostitution Control Act Ministerial Advisory Committee (Vic), tabletop dancing involves women performing nude or semi-nude on podiums closely surrounded by groups of men and often includes close contact or touching of customers. In between podium dances, which occur approximately every twenty minutes, workers socialise with customers to solicit private dances. Private or 'lap dances' for customers involve the worker sitting between the legs or on the lap of the customer and moving her body against the customer to stimulate him. Some venues also provide private or fantasy rooms in which a customer can take a selected performer to have a fantasy or private dance performed for an additional fee. A private dance involves workers performing a choreographed routine for clients that involves her straddling the client and stimulating

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55 Ibid 59.
56 Chapkis, above n 52, 185.
58 Lewis, above n 53, 203.
60 Interview with K, ex tabletop dancer and brothel worker (Melbourne, 4 May 2000).
61 Lewis, above n 53.
62 Interview with K, ex tabletop dancer and brothel worker (Melbourne, 11 May 2000).
his genital area, although the client is not permitted to touch the worker. Fantasy dances are similar except that the worker performs in a costume, such as that of a schoolgirl, French maid or member of a harem. Many workers are also required to participate in ‘mega strips’, in which all the dancers in the venue are on stage at the one time and obliged to strip until completely naked.

Venues that provide live sexually explicit entertainment are largely unregulated although some provisions of the Summary Offences Act 1966 (Vic), such as the prohibition on behaving in a riotous, indecent or offensive manner while in a public place, may apply. For activities occurring in licensed venues, the Liquor Control Reform Act 1998 (Vic) has general application. The Liquor Control Reform Act 1998 (Vic) authorises the Director of Liquor Licensing Victoria (LLV) to impose enforceable conditions on liquor licenses. LLV has developed a code of conduct (the Code) that relates to providers of live sexually explicit entertainment. The Code is included as enforceable conditions on the liquor licences of venues offering such forms of entertainment. The Code applies to all licensed premises which provide live sexually explicit entertainment where any form of patron participation or interaction is permitted. However, it specifically excludes venues with topless serving staff and striptease performances where patrons are restricted to the role of spectators. The requirements imposed by the Code relate to signage and

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63 Ibid.
64 Prostitution Control Act Ministerial Advisory Committee, above n 59, appendix 3.
65 Interview with K, ex tabletop dancer and brothel worker (Melbourne, 4 May 2000).
66 Summary Offences Act 1966 (Vic) s 17(1)(d).
67 See also ss 13,14, 16 of the Summary Offences Act 1966 (Vic) regarding public drunkenness. Section 3 of the Summary Offences Act 1966 (Vic) includes licensed premises in the definition of a ‘public place.’
68 Liquor Control Reform Act 1998 (Vic) s 58.
70 Ibid, cl 1.
promotion, security, and the responsible service of alcohol. Importantly, the Code requires the licensee to develop a set of house rules for the premises that will establish the standards of conduct and behaviour required of patrons and performers. The house rules must contain a description of the management and supervisory arrangements through which the licensee will take all reasonable steps to ensure that no offences under the PCA (such as prostitution) or section 17(1)(d) of the Summary Offences Act 1966 (Vic) occur on the premises. The Code prohibits the provision of live sexually explicit entertainment in areas that are not visible from the part of the premises used for the purposes of providing live sexually explicit entertainment. This effectively means that tabletop dancing venues cannot offer customers a dance in a fantasy room unless that room is visible from the main area of the venue.

**LIVE SEXUALLY EXPLICIT ENTERTAINMENT AND AMENDMENTS TO THE PROSTITUTION CONTROL ACT 1994 (VIC)**

Regulation of the legal sex industry has generally distinguished between prostitution, involving sexual penetration and masturbation of one person by another, and live sexually explicit entertainment, involving sexual interaction between performers and patrons that does not amount to penetration or actual masturbation of the patron by the worker. Accordingly, until September 1999 it was relatively easy to distinguish between providers who were required to obtain a licence under the PCA and those who were not required to obtain a licence but were nevertheless subject to general venue licensing controls. However, these lines are no longer so clearly drawn. This is because the

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71 Ibid, cl 2, 3, 5.
72 Ibid, cl 4.2.
Prostitution Control (Amendment) Act 1999 (Vic) broadened the definition of “sexual services” and hence “prostitution” to include some of the activities provided by tabletop dancing venues and peep shows. As of 1 September 1999, the definition of “sexual services” includes:

permitting one or more other persons to view any of the following occurring in their presence:

- two or more persons taking part in an act of sexual penetration;
- a person introducing (to any extent) an object or a part of their body into their own vagina or anus;
- a person masturbating himself or herself or two or more persons masturbating themselves or each other or one or more of them —

in circumstances in which —

- there is any form of direct physical contact between any person viewing the occurrence and any person taking part in the occurrence; or
- any person viewing the occurrence is permitted or encouraged to masturbate himself or herself while viewing.

For the purposes of the definition, a person may be regarded as being masturbated whether or not their genital region is clothed or the masturbation results in orgasm.74

The Explanatory Memorandum accompanying the Prostitution Control (Amendment) Bill 1999 states that “the Bill addresses community concerns over the adequacy of the Act to

73 Ibid, cl 4.5.  
74 Prostitution Control Act 1994 (Vic) s 3 as amended by Prostitution Control (Amendment) Act 1999 (Vic) s 4(3).
deal with the proliferation of unlicensed brothels and in particular certain physically-

interactive forms of live sexually explicit entertainment."\textsuperscript{76} Clause 4 states that:

The definition of "sexual services" makes it clear that activities such as those 
commonly referred to as 'lap dancing' are included within the scope of "sexual 
services" for the purpose of the Principal Act. The definition also makes it clear that 
the provision of services commonly referred to as 'peep shows' are within the scope of 
sexual services if the clients of such services are permitted or encouraged to 
masturbate themselves while viewing the performance.\textsuperscript{76}

To date there has been little judicial consideration given to the new definition. In a 
recent decision however, Byard SM of the Victorian Civil and Administrative Tribunal 
found that the concept of 'sexual services' is not limited to the things set out in the 
definition but "whatever else might be properly taken to be sexual services."\textsuperscript{77} Byard SM 
found that providing people at a party in a private home with "sexual services for voyeurs 
and exhibitionists in addition to providing a place and opportunity for sexual intercourse 
of conventional and less conventional variety", and providing "opportunities for 
masturbating while observing such activities and the observation of masturbators", 
constituted the provision of sexual services within the meaning of the PCA.\textsuperscript{78} As these 
activities occurred on more than one occasion and patrons paid a fee to attend the party, 
the premises were found to be operating as a brothel.

\textsuperscript{76} Prostitution Control (Amendment) Bill, Explanatory Memorandum, 1. 
\textsuperscript{77} Ibid 2. 
\textsuperscript{78} Monash CC \textit{v} EC \& DK Morgan [2000] VCAT 1433, para 24. While the definition of sexual services was 
considered in Monash CC \textit{v} EC and DK Morgan [2000] VCAT 1433, counsel for the respondents conceded that the 
sexual activities admitted in the evidence, including actual sexual penetration and masturbation, fell within the 
definition of sexual services. The point at issue was whether the host of a 'swinging party' were in the \textit{business} of 
providing prostitution services and therefore operating an illegal brothel. 
\textsuperscript{79} Ibid para 25.
The amended definition of 'sexual services' therefore appears to mean that 'lap dancing', which involves stimulation of a customer's genital region by a performer, may constitute a "sexual service". Peep shows similarly provide live sexually explicit entertainment involving a performer masturbating. If a customer is permitted or encouraged to masturbate himself or herself during the performance this would also constitute a "sexual service", despite the absence of any physical contact between the performer and the customer.

Accordingly, venues that provide live sexually explicit entertainment in which customers are being masturbated by dancers or where performers masturbate and customers are also permitted to masturbate are brothels. As such, proprietors of these venues are required to become licensed as prostitution service providers and to obtain valid planning permission to operate a brothel. Significantly for tabletop dancing venues, which obtain most of their revenue from alcohol sales, they will not be able to continue to supply alcohol if they become licensed brothels. Venues that do not comply with the provisions of the PCA will be liable for prosecution as illegal brothels.

**CONCLUSION**

The objective of this chapter has been to distinguish the legal sex industry in Victoria from the illegal sex industry. This is important because this thesis confines itself to the industrial regulation of legal sex work. The chapter shows how, over time, the range of activities subject to industry-specific regulation has widened considerably. In 1995, when the PCA commenced, escort agencies and exempt workers were included as part

79 Interview with K, ex tabletop dancer and brothel worker (Melbourne, 4 March 2000).
of the legal sex industry, which until that time comprised brothels alone. From September 1999, when the amended definition of “sexual services” came into effect, some lap dancing, peep shows and other types of live sexually explicit entertainment became a form of prostitution and so subject to regulation under the PCA. This may have the effect of making some activities that used to comprise part of the legal sex industry, such as lap dancing and peep shows, illegal if the PCA and other relevant statutes are not complied with. However, the lack of close judicial consideration of the definition of “sexual services” means that the distinction between legal and illegal commercial sexual activity is unclear.
CHAPTER TWO

THE PROVISION OF SEXUAL SERVICES AS WORK

INTRODUCTION

A major premise underlying this study is that the provision of sexual services, in the form of lawful prostitution or live sexually explicit entertainment, is work for the purposes of protective labour regulation. There has been considerable academic literature examining whether sex work is primarily an industrial activity with similarities to other forms of paid labour traditionally performed by women (the 'sex work is work' position) or whether it is better characterised as a manifestation of male sexual violence towards women (the 'sex work is sexual violence' position). This debate is significant because it is only when sex work is theorised as a valid form of waged labour that the potential application of protective labour mechanisms to the sex work industry is pertinent. If sex work is, as some theorists assert, a form of sexual violence against women, and so fundamentally different from other forms of paid labour in which women engage, then the role of protective labour regulation is not an issue. The appropriate response is to abolish sex work, not to attempt to reform the conditions under which it is conducted.

This chapter engages with feminist and other scholarship to assess the validity of frameworks regarding how sex work should be theorised. In doing so, the chapter examines three key inter-related concepts. First, it considers the issue of choice and consent. Second, it discusses what is exchanged between a sex worker and client during a sexual service. Third, it looks at the exercise of skill by sex workers in the work they perform. The chapter considers these concepts in relation to literature which
identifies a continuum between sex work and other forms of paid labour and literature which maintains that there is a fundamental discontinuity between sex work and all other work. It also draws upon empirical research conducted as part of the study to provide sex workers' perspectives on these three issues.

**CONSENT AND CHOICE IN SEX WORK**

Some academic scholarship, characterised by the concept of a continuum between sex work and waged labour, holds that the consent of women to a system of male dominance has been secured through a number of means.¹ These include physical force, socialisation, circumscribing educational and economic opportunities, and with marginalisation and hostility facing non-conforming women.² This literature identifies the context in which choices occur and distinguishes actual choices with idealised choices made under conditions of equality.³ The gendered allocation of household and childrearing responsibilities, the institution of marriage and family violence are related to, and affect, women’s ability to exercise ‘choice’ in the public sphere, including the decision to enter into sex work.⁴ As Overall observes about the concept of choice:

> Perhaps no other concept has confused so many people for so long. Women ‘consent’ to: a lifetime of unpaid domestic and sexual service (she wanted to get married); badly paid monotonous work (she took the job); clothing which restricts movement and damages health (no one marched her to the shop at gunpoint) etc. etc.


⁴ See for example Vera Mackie, ‘Division of Labour: Multinational Sex in Asia’ in Gavan McCormack and Yoshio Sugimoto (eds) *The Japanese Trajectory: Modernisation and Beyond* (1988), where she argues that prostitution shares many features with other types of labour commonly performed by women (at 219).
So the question becomes whether in a context of economic insecurity, sex role socialisation, and inadequate education, women choose prostitution any less than they choose other forms of traditional women's work.  

This argument has considerable resonance with prostitutes' rights groups. Bingham states that "[w]hile many prostitutes' rights organisation and supporters acknowledge that some women have been coerced into prostitution, their general view is that women choose prostitution as a form of work." COYOTE (Call Off Your Old Tired Ethics), a North American organisation committed to challenging traditional definitions of prostitution as a social problem, maintains that most women who work as prostitutes have made a conscious decision to do so, having looked at a number of work alternatives. The concept of choice was discussed by one worker interviewed as part of this study, who said "I've chosen to make a career out of it and I want to work in this industry until the day I die."  

Many prostitutes' rights groups don't claim that entry into sex work is a 'free' choice; they claim it is as free a choice as any that is made in a capitalist, patriarchal and racist system. One worker interviewed for this study stated "I don't know of anyone who's

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5 Christine Overall, 'What's Wrong with Prostitution?: Evaluating Sex Work' (1992) 17 Signs 705, 712–3. See also Cheney, who states that "arguably few women have escaped prostituting themselves for a dinner, a present, for love or security. The prostitute is really at the extreme end of a continuum few women ever escape." – Belinda Cheney, 'Prostitution: A Feminist Jurisprudential Perspective' (1986) 18 Victoria University Women's Law Review 239, 244.
8 Ibid 406. This contention is supported by a 1994 profile of workers in the sex industry in Melbourne, which found that only 2% of respondents (5 from a sample of 313 women) said they were coerced into entering the sex industry — see Priscilla Pyett, Ben Haste and Jocelyn Snow, Profile of Workers in the Sex Industry, Melbourne: Report Prepared for the Prostitutes Collective of Victoria (1994) 10. In a study of women sex workers conducted in 1999, 'forced by another person' was the least frequent response made by the participants when asked their reason for entering the industry — see Jocelyn Snow, Female Sex Workers in Victoria (Masters thesis, University of Melbourne, 1999) 48.
9 Interview with L1, private worker, (Melbourne, 16 August 1999).
10 Shannon Bell, Reading, Writing and Rewriting the Prostitute Body (1994) 111.
actually started working because they think ‘Oh what a great thing to do, I really want to be a prostitute, fantastic.’ Most people have done it for financial reasons."¹¹ Zats contends that the decision to enter into sex work may not only be a reasonable choice given the options, but may have the ability to challenge some of the structural conditions that so narrow women’s work options in the first place.¹² He states that being paid for what he terms ‘sex/affective labour’¹³ under flexible working conditions defies the male construction of the labour market, which is premised upon an “idealised male worker with a wife who cares for home and family.”¹⁴ However, the identification of elements of sex work that may challenge patriarchal structures is not the same as claiming sex work is inherently empowering for women. A reformed industry that is reflective of the needs of women working within it will still operate within existing power structures. To characterise sex workers as "rebels of the patriarchy rather than totally subservient to it"¹⁵ is to over-simplify and misrepresent the structural inequalities that permeate the sex work industry, as they permeate all gendered institutions.

Scholarship characterised by a discontinuum framework tends to deny that women can exercise any meaningful choice in relation to entry into sex work. Discontinuum theories locate sexuality as the primary site of women’s oppression and identify prostitution as the central metaphor for female sexual exploitation."¹⁶ Barry states “…while pornographic media are the means of sexually saturating society, while rape is paradigmatic of sexual exploitation, prostitution, with or without a woman’s consent, is the institutional,

¹¹ Interview with L1, private worker (Melbourne, 16 August 1999).
¹² Žats, above n 3, 287.
¹³ Ibid.
¹⁴ Ibid.
¹⁶ Bell, above n 10, 80.
economic, and sexual model for women’s oppression.” 17 Within this construct, sex work is an intrinsically abusive practice, “in and of itself ...an abuse of a woman’s body”. 18 Discontinuum theories therefore consider that the inherently oppressive and exploitative nature of sex work differentiates it from all other forms of waged labour engaged in by women.

For Overall, sex work differs in a crucial respect from all other gendered forms of women’s labour, such as cooking, child care and nursing. 19 Overall argues that while ‘women’s labour’ is often commoditised, such labour can and does exist independently of any form of commercialisation or exchange. Sex work, in contrast, is defined by the commercial relationship, by buying and selling. She states that “while cooking, nursing and child care need not necessarily be commodified, sex work is by definition the commodification of sex”. 20 The commodification that, for Overall, defines sex work, is also linked to its gender-specificity in comparison with other types of labour traditionally performed by women. While there is nothing in the labour of cooks, cleaners and child care workers that prevents those services being performed by men for the benefit of women, sex work is dependent on its value and existence on cultural constructions of dominance and submission. 21 Hence, sex work as it is constructed under patriarchy does not possess an independent value which could be manifested through the performance of sex work equally by men for women as by women for men. Zats states

19 Overall, above n 5, 716–7.
20 Ibid 717.
21 Ibid 718.
however that “the strain in reasoning should be apparent, since one could just as easily say, ‘While sexuality, nursing, and cooking are not necessarily commoditised, hired child care is by definition the commodification of child care’.”

The role of choice and consent in negotiating a sexual exchange is an important point of distinction in literature that identifies a continuum between sex work and paid labour and literature which rejects the existence of such a continuum. A comprehensive analysis of the role of consent is found in Jeffreys’ *The Idea of Prostitution*. According to Jeffreys, the concept of choice is a device used by liberal feminists, the prostitutes’ rights movement and male defenders of men’s sexual privileges to legitimise men’s access to and profit from women’s bodies. For Jeffreys, sex work is not about women but about men’s construction of women’s sexuality, which women never own or possess. It is therefore irrelevant whether women claim the right or choice to participate in sex work or whether they see themselves as victims of men’s abuse, for they have no property in their own sexuality over which to exercise agency or choice. Proponents of discontinuum theories, such as Jeffreys and Barry, explain an expression of agency or choice by a sex worker as engagement in an act of false consciousness. MacKinnon, for example, describes women who “often respond to unspeakable humiliation ... by claiming that sexuality as their own. Faced with no alternative, the strategy to acquire self-respect and pride is: I chose it.” This approach, termed the ‘brainwash theory’ by Rubin,

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22 Zats, above n 3, 289.
24 Ibid.
25 Ibid 137.
denies women's ability to give voice to their own experiences. It privileges the 'insights' of some scholars over the stated experience of women workers.  

The phraseology used by some scholars to illustrate 'what prostitution is' often has the effect of dehumanising sex workers. Dworkin has stated that it is impossible to engage in sex work and remain wholly human. Dworkin's characterisation of women engaged in prostitution as "a mouth, a vagina, and an anus," her statement that sex workers are perceived and treated as vaginal slime, and Jeffreys' use of imagery that equates sex workers with 'cunt' reduces sex workers to "the status of animals or things – mere instruments for human ends" who are by definition incapable of consent.  

Scholarship that posits a discontinuity between sex work and all other forms of paid work specifically rejects the idea that sex workers can exercise meaningful choice over their entry into the sex work industry. Many theorists who distinguish sex work from all other forms of paid work consider sex work to be a manifestation of sexual violence and the sex work industry as comparable with sexual slavery. Within this theoretical perspective, consent and choice are irrelevant considerations because it is impossible to 'choose' a life of sexual servitude or to 'consent' to participate in what is characterised as a violent, degrading and dehumanising activity. Sex work cannot therefore be work because workers engaged in 'true' paid labour have bodily property over their labour and an ability to exercise agency. Sex workers, however, are merely instruments of male

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29 Dworkin, above n 18.  
30 Ibid.  
31 Ibid.  
32 Jeffreys, above n 23, 194.  
sexual oppression; their bodies a means by which men communicate with each other. The characterisation of sex work as a form of sexual violence or sexual slavery denies the possibility of improving conditions in the sex work industry. As Sullivan observes "[i]f we accept the premise that prostitution always involves sexual slavery, then we have no way of ... distinguishing between better and worse prostitution practices, and no way to account for the professed choices of women who say they have freely chosen the work of prostitution."\(^{34}\)

Theorists who identify similarities between sex work and other forms of paid labour maintain that all choices made by women about their engagement in the workforce are constrained. Entry into sex work may be a reasonable occupational choice for many women, given the limitations on women's ability to participate in paid work. Women who enter sex work are not therefore ineluctably victims or slaves but may be exercising a rational choice to work in an industry that affords them the opportunity to make relatively large amounts of money in a short period of time. Like all women engaged in paid labour, sex workers possess the ability to consent to alienate their bodily property and can exercise a degree of choice over the conditions under which this occurs. This exercise of choice and consent by sex workers means that their work is primarily industrial in character. This affords the opportunity to examine the constraints sex workers experience in choosing their conditions of work and consider how protective legal mechanisms can assist in ameliorating the effect of these constraints.

SEX WORK AS AN EXCHANGE

The concepts of choice and consent in relation to women’s entry into the legal sex work industry are closely related with the issue of what is exchanged between a sex worker and a client when a sexual service is provided. Central to the issue of exchange is whether sex workers are providing a sexual service or whether it is sex workers’ bodies themselves which are being exchanged for money. Theorists who identify sex work as different to other forms of paid labour tend to assert that sex work constitutes an exchange of women’s bodies, amounting to a ‘sale of self’. Within this construct, sex work is a practice that is destructive to the ‘self’ of sex workers. Theorists who identify similarities between sex work and other forms of work maintain that the worker is providing a sexual service that is separate and distinct from the sex worker herself, similar to many other personal services provided in the labour market.

Theories of property and civil society such as those expounded by John Locke take for granted that the human body is owned by the person to whom it is attached. The labour of the body is also the property of the person who owns it. Thus, “work gives expression to the natural person.” However, the principles underlying traditional liberal theory create a paradox in social relations. In so far as the body is considered to be part of the person, the idea of freedom renders the body inalienable. As Owens observes, a Lockean conception of work relations, founded on a “natural and God-given constraint of ownership of self, body and labour”, would restrain any agreement to slavery.

36 Owens, Ibid.
37 Ibid 124.
However, every person has the right to choose what to do with their body, which should allow alienation of the body within an exchange economy.\textsuperscript{36} The dilemma is resolved by giving legal status to contract, which permits the transfer of the body providing the contract is about the provision of a service and not about exchange of the physical body or body parts themselves.\textsuperscript{36}

In conceiving of all rights as alienable property rights, neo-liberal theory has "invited markets to fill the social universe."\textsuperscript{40} Consequently, all valued things, attributes and experiences are potentially the subject of exchange.\textsuperscript{41} This has been termed 'universal commodification' by Radin.\textsuperscript{42} Under universal commodification, the functions of government, wisdom, a healthful environment, and the right to bear children are all commodities capable of being exchanged in the free market.\textsuperscript{43} Trebilcock, for example, argues that surrogacy contracts present potential gains for all parties, and attributes concerns with such contracts to various sources of contracting failure, such as information deficiencies.\textsuperscript{44} Adherents of universal commodification would therefore find the commercial exchange of sexual services unproblematic as sexual services, like many other personal services, are a tradeable commodity.\textsuperscript{45} For Posner, prostitution

\textsuperscript{36} Diprose, above n 35.
\textsuperscript{39} Ibid 254.
\textsuperscript{40} Ibid.
\textsuperscript{41} Wiegens, above n 2, 173.
\textsuperscript{42} Margaret Jane Radin, 'Market-Inalienability' (1987) 100 Harvard Law Review 1849, 1859. It should be noted that Radin maintains that the central harm of universal commodification is its abstraction of personal property and reduction to a marketable commodity. Radin maintains that there is an area of personal transactions that are inalienable in the public market. See further Owens, above n 35, 140–2; Sylvia A. Law, 'Commercial Sex: Beyond Decriminalization' (2000) 73 Southern California Law Review 523; 536–41.
\textsuperscript{43} Radin, ibid 1860.
\textsuperscript{44} Michael Trebilcock, Commodification, Paper Presented at the Canadian Law and Economics Association Annual Conference, University of Toronto, 27 October 1990, 11 as cited in Wiegens, above n 2, 175.
and marriage both involve an exchange of services for compensation.\textsuperscript{46} As marriage is a long-term relationship, the parties can compensate each other through the provision of reciprocal services. It is more efficient in prostitution for the customer to pay in a medium that a sex worker can use to purchase other services, rather than to provide those services directly.\textsuperscript{47} Posner also maintains that commodification of sexual services can expand the opportunities of "ugly men", who otherwise fare poorly when resources are allocated by non-market methods, presumably through the operation of physical attraction and personal taste.\textsuperscript{48} According to Posner, the criminalisation of prostitution hurts unattractive men by denying them access to a "legal market that they need more than handsome men."\textsuperscript{49}

Discontinuum theories are framed by a central understanding that it is the 'sexed body' that is exchanged in prostitution. The body as the subject of the exchange serves to distinguish sex work from other forms of work in which labour is exchanged or services provided for financial reward.\textsuperscript{50} This commodification of sexuality is viewed as an assault on personal dignity and one which reduces the woman to the status of an object, instrumental to the exchange but not valued intrinsically.\textsuperscript{51} According to Law "[t]he threat to personhood from commodification arises because essential attributes are treated as severable fungible objects, and this denies the integrity and uniqueness of the self."\textsuperscript{52} Barry, for example, states that when women sex workers are reduced to their bodies

\begin{footnotesize}
\begin{itemize}
\item[47] Ibid 131.
\item[49] Posner, above n 46, 131.
\item[51] Ibid 73.
\item[52] Law, above n 42, 536–7.
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“they are treated as lesser, as other, and are thereby subordinated.”\textsuperscript{\textit{53}} The transfer of money from the ‘john’ to the sex worker situates him as the temporary owner of “body parts separated from the self and the woman’s sexual experience.”\textsuperscript{\textit{54}} As such, the client fixes the price, decides what he needs to buy, writes the possible scripts, and determines how they are viewed.\textsuperscript{\textit{55}}

Pateman, who unambiguously states that the body of the woman and sexual access to the body is the subject of the contract,\textsuperscript{\textit{56}} uses the example of a professional sportsperson to illustrate the meaning of a woman’s body in sexual contracts. Pateman recognises that, in order to exercise civil mastery, the capitalist/master must exert control over embodied entities. Only embodied entities can perform the required labour, be subject to discipline, give recognition and offer the faithful service that makes the master a master.\textsuperscript{\textit{57}} However, the embodied self is also sexually differentiated, and while the self is not completely subsumed in its sexuality, sexual identity is inseparable from the sexual construction of the self.\textsuperscript{\textit{58}} While masters are interested in embodied functions of workers, what Pateman describes as “the sale of women’s bodies in the capitalist market” involves a sale of self in a more profound sense than the sale of a professional sportsperson or of proletarian labour.\textsuperscript{\textit{59}} In common with Barry, Pateman interprets the

\textsuperscript{\textit{53}} Barry, above n 17, 24.
\textsuperscript{\textit{56}} Pateman, above n 50, 203.
\textsuperscript{\textit{57}} Ibid 206.
\textsuperscript{\textit{58}} Ibid 207.
\textsuperscript{\textit{59}} Ibid.
sale of women's bodies as a public expression of sexual mastery, which is a major means through which men affirm their manhood.\textsuperscript{60}

Pateman claims that women engaged in sex work have developed a number of distancing strategies to deal with their clients, including positioning the condom and refusing to kiss clients. According to Pateman, these strategies evidence the sexualised nature of the exchange.\textsuperscript{61} Pateman maintains that these techniques are used by sex workers for "self protection",\textsuperscript{62} to prevent what Baldwin has called "terrible psychic injury".\textsuperscript{63} The use of distancing strategies was discussed by one sex worker interviewed as part of this study. She described sex work as "like going on stage, you have to change your persona from your everyday persona to your working persona and that takes about an hour to do and then you've got to step back out of that."\textsuperscript{64} The adoption of disengagement strategies has been identified by some feminist scholars as not only imposing personal costs but possessing a political dimension, in which the disengagement itself is an essential term of the transaction. Sex workers who adopt disengagement strategies are therefore in "happy complicity" with men in adopting the role demanded of her.\textsuperscript{65}

Given the insistence of many sex workers on seeing sex work as a profession and their ability to maintain desiring, reciprocal relationships external to their working lives, there is little basis to conclude that all sex-economic exchanges involve exchange of a

\textsuperscript{60} Ibid. For critiques of Pateman see Rosalyn Diprose, The Bodies of Women: Ethics, Embodiment and Sexual Difference (1994); Moira Gatens, Imaginary Bodies: Ethics, Power and Corporeality (1996); Sullivan, above n 1.
\textsuperscript{61} Pateman, above n 50, 208.
\textsuperscript{62} Ibid.
\textsuperscript{63} Baldwin, above n 55, 118. See also Jeffreys, above n 23, 271.
\textsuperscript{64} Interview with L1, private worker (Melbourne, 16 August 1999).
\textsuperscript{65} Baldwin, above n 55.
sexualised self or sexual identity. Many sex workers are able to successfully conceptualise their work as work, in which they are being paid by a client to provide a ‘genuine’ service. As one worker interviewed as part of this study stated “my job is to make them all feel special and as if they’re the only ones. And when they feel that when they walk out at the end of the day...I’ve done my job well.”

Equally, there is no reason to think that providing sexual services for a fee has any long term impact upon the ability of sex workers to maintain rewarding sexual relationships, in the same way as there is no reason to think that therapists cannot separate their professional and private lives.

Although sex workers adopt a working persona and may conceptualise their work in terms of a performance, this does not necessarily translate into a locus of psychological damage for sex workers. Workers in a range of industries and occupations adopt a ‘working persona’ to some degree: it may involve specific clothing, jewellery and hairstyle, different language and different methods of interacting with people than would be used in social settings. Yet there is no evidence that the adoption of a working personality has resulted in workers being “estranged and alienated from an aspect of self...that is used to do the work” or that workplace alienation is unique to women working in the sex industry. In fact, this ‘separation of feeling and face’ has been described as “an honourable act to make maximum use of the resources of memory and

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65 More than half the sex workers interviewed as part of the study were in a stable long term relationship.
66 Interview with K, ex tabletop dancer and brothel worker (Melbourne, 11 May 2000).
67 Zats, above n 3, 298.
68 Interview with K, ex tabletop dancer and brothel worker (Melbourne, 11 May 2000).
70 Arlie Hochschild, The Managed Heart (1983) 7 as cited in Jeffreys, above n 23, 171. Hochschild contends that service work generally is damaging on workers that perform it but does not identify sex workers as being specifically vulnerable to alienation through their work. Note also that Hochschild agrees that boundary control does not necessarily need to be seen as a pathology and may be viewed as evidence of the ‘plasticity of emotion’.

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feeling" in relation to work performed by therapists and child carers.\textsuperscript{71} It is only when applied to stigmatised areas of labour involving close physical and emotional contact with clients, such as sex work, that the use of distancing strategies is characterised as necessarily destructive.\textsuperscript{72}

The continuum position holds that the subject of the exchange is sexual services, not the sexed body itself. If the body was the subject of the exchange, sex work would equate with sexual slavery. Ericsson, writing within a contractarian framework, emphatically makes this distinction: "A prostitute must necessarily sell not her body or vagina, but sexual services. If she did actually sell herself, she would no longer be a prostitute but a sexual slave."\textsuperscript{73} Equally, Schwarzenbach states that:

\begin{quote}
... the prostitute no more sells 'her body' than the dancer for hire does. In both cases the individual remains the ultimate steward of her physical being and each relinquishes only particular, restricted expressions of herself for limited periods of time. This fact alone is enough to distinguish 'sound prostitution' from slavery.\textsuperscript{74}
\end{quote}

This position was echoed by a worker interviewed as part of this study, who said, "if you're a good sex worker you don't use your cunt, you avoid using it. You use your brain. You use your intelligence."\textsuperscript{75}

\textsuperscript{72} ibid.
\textsuperscript{73} Lars Ericsson, 'Charges Against Prostitution: An Attempt at a Philosophical Assessment' (1980) 90 \textit{Ethics} 335, 341.
\textsuperscript{74} Sybil Schwarzenbach, 'Contractarians and Feminists Debate Prostitution' (1990) 103 \textit{Review of Law and Social Change} 103, 116.
\textsuperscript{75} Interview with G, brothel worker (Melbourne, 23 August 1999).
The continuum between the provision of sexual services and the provision of other services by women in an exchange economy has resonance with prostitutes’ rights groups. The co-directors of COYOTE state:

A rather profound misconception that people have about prostitution is that it is ‘sex for sale’, or that a prostitute is selling her body. In reality, a prostitute is being paid for her time and skill, the price being dependent upon both variables. To make a great distinction between being paid for an hour’s sexual services, or an hour’s typing, or an hour’s acting on stage is to make a distinction that is not there. 76

The president of HIRE (Hooking is Real Employment), another North American sex worker advocate group, argues that “a woman has the right to sell sexual services just as much as she has the right to sell her brains to a law firm where she works as a lawyer ... or to sell her body when she works as a ballerina”. 77

Overall states that “from the perspective of sex workers themselves, the business may be no more intimate and personal than cutting hair”. 78 What is being purchased, therefore, is not intimacy itself but the illusion of intimacy. For example, one worker interviewed as part of this study described the ‘art’ of sex work as “a combination of truth and bullshit”, in which “the most perceptive, the most intelligent, the most with-it client will walk out of my service thinking that I have really enjoyed myself.” 79 While conceding there is much to be said for reciprocity and intimate relationships, Overall is reluctant to claim that nonreciprocity is always problematic, even in a sexual exchange. If

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77 Jenness, above n 7, 405.
78 Ibid.
79 Interview with K, ex tabletop dancer and brothel worker (Melbourne, 11 May 2000).
nonreciprocity and commodification are problematic. Overall argues, the problem is not unique to sex work. Massage and therapy are both personal, intimate services that involve a lack of reciprocity; yet the status of these activities as work is not challenged.\textsuperscript{80}

Shaver states that sex workers are actually more empowered than other workers engaged in the commercial exchange of personal labour, such as professional sportspeople.\textsuperscript{81} She contends that owners of baseball teams have greater control over the bodies of players than clients do of sex workers. Ball club owners contract in the long term, clients in the very short term. Owners buy and sell players and often require them to physically relocate, whereas clients contract for a limited set of services and have little claim over where the exchange will take place and none over where the sex worker and her family live.

While Shaver's comparisons are interesting, her analysis neglects the role of managers and operators of venues in controlling the working conditions of women engaged in sex work. Women working as private escort or brothel workers usually have a greater ability than workers in third party venues to control their working environment. A private worker interviewed as part of this study cited the issue of control as a primary reason for leaving brothel work, emphasising "being in control of my own clients, my own bookings, and being able to work the way I want to work" as major benefits of working privately.\textsuperscript{82}

Managers and operators of brothels, escort agencies, tabletop dancing venues and

\textsuperscript{80} Overall, above n 5, 715. Overall goes on to analyse sex work within the context of patriarchy and concludes that what is wrong with sex work is that it is inherently irreversible and that, as an institution, it is constructed by and reinforces male dominance. Overall states that it makes sense to defend sex workers' right to do their work but not to defend sex work as a practice under patriarchy.


\textsuperscript{82} Interview with L1, private worker (Melbourne, 16 August 1999).
peep shows largely establish and enforce the conditions of women working in these venues. In many Victorian legal brothels and tabletop dancing venues, managers determine what services are provided during a booking, what fee is charged, and the length of time the service is provided for. Managers also determine when individual workers will be providing their service through control of the roster, and many impose a series of penalties for late attendance and an unprofessional appearance. Management therefore has considerable control of the conditions under which commercial sex is exchanged in the legal sex industry, rendering Shaver’s assertion about the empowered nature of sex work questionable.

However, many forms of labour cede control to another person, including requirements to be in a certain place at a certain time, to wear a uniform, to eat certain foods (in the case of professional athletes), or maintain good humour in the face of offensive behaviour from others (in the case of school teachers, flight attendants and customer service officers). The increasing encroachment of capitalist enterprise into the lives of wage labourers through video surveillance, monitoring internet use, accessing e-mail and requiring staff to undergo health checks and submit to urine testing for alcohol and drug use provides further examples of corporate control over people’s bodies, often in a physically intrusive way. Yet, it is not argued that this is so destructive of personal autonomy that it constitutes slavery rather than work.

83 Interview with G, brothel worker (Melbourne, 28 August 1999); interview with K, ex tabletop dancer and brothel worker (Melbourne, 4 May 2000); dancer guidelines, Prostitution Control Act Ministerial Advisory Committee, Final Report (1997) appendix 3.
84 Shaver, above n 81.
85 See for example Ronald C. McCallum and Greg McCary, ‘Worker Privacy in Australia’ (1995) 17 Comparative Labor Law Journal 13. See also the Surveillance Devices Act 1999 (Vic), which authorises employers to use audio or video surveillance or tracking devices to monitor employees’ activities at work, provided that these activities are not occurring in ‘private’ areas.
As Sullivan observes, it is difficult, if not impossible, to step outside cultural meanings that construe sex work as a sale of bodies.\(^{66}\) For the community at large, sex work is often constituted as a profound sale of self, as evidenced by the disparagement and abuse of sex workers\(^{67}\) and the use of synonyms for sex work to convey images of a person acting on base and craven motivations.\(^{68}\) In Sullivan’s view, this is why it is so difficult to command respect or acknowledgment for the work that sex workers do.\(^{69}\)

Ultimately, if condemnation of sex work is premised upon contingent and culturally based assumptions about the nature of what sex workers do, the insistence that sex work is a bodily exchange that involves the commercial trade of an essential element of personhood and, more extremely, that sex work is equivalent to\(^{90}\) or is\(^{91}\) sexual slavery, reinforces these cultural assumptions. As Sullivan concludes "[s]uch an approach will not advance the position of sex workers (who already bear the burden of a broad cultural condemnation) and it will not advance a feminist challenge to gendered practices within the sex industry."\(^{92}\) This approach also excludes consideration of the role of labour regulation in the sex work industry because if sex work is a practice of men exchanging women’s bodies for money then it is not ‘work’. The appropriate response to such a practice is to seek its abolition, not to attempt to reform the conditions under which it is practised. However, if sex work is an activity in which sexual services are exchanged for financial reward in the same way that many other personal services are exchanged in

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\(^{66}\) Sullivan, above n 34, 263.

\(^{67}\) In Victoria, a specific offence of ‘offensive behaviour towards a prostitute’ has been enacted to attempt to reduce the harassment and abuse of sex workers — see Prostitution Control Act 1994 (Vic) s 16.

\(^{68}\) See for example the definition of “prostitute” as “one who debases himself or allows his talents to be used in an unworthy way, especially for financial gain” in The Macquarie Dictionary (2nd revision, 1987) 1364.

\(^{69}\) Sullivan, above n 34, 264.

\(^{90}\) Pateman, above n 50.

\(^{91}\) Barry, above n 17; Dworkin, above n 18.

\(^{92}\) Sullivan, above n 34, 264.
the labour market, then it is properly the subject of analysis as an industrial activity. This view of sex work more appropriately accommodates consideration of the role of labour regulation and invites comparisons between sex work and other service industries.

**SEX WORK AS SKILL**

The concept of skill is important in the construction of paid work. Issues associated with the definition and valuation of skill are a central concern of labour relations.\(^3\) Skill is inextricably linked with wages, work organisation, job satisfaction and power.\(^4\) Bennett contends that workers who are described as skilled invariably exercise more power within the labour market than those described as unskilled. According to Bennett, the basis for this power is that skilled workers occupy a place in the labour process that gives them greater control. The features of the work organisation that form the basis for that control are then identified as indicia of skilled work.\(^5\) Skill has been constructed in Australian labour relations so as to distinguish between male and female attributes and to reward those attributes that are identifiably masculine: technical, orientated towards objects and capable of 'objective' evaluation through reference to formal qualifications or training.\(^6\) Skills traditionally exercised by women in the paid workforce have been devalued on the basis that they spring from natural or affective capacities which, since they are innate, do not require the same level of valuation and reward.\(^7\) As engagement in sexual relations can be perceived as a 'natural' and spontaneous activity, some

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\(^6\) Kathy McDermott, 'The Ideology of Skill' (1990) 11 *Australian Feminist Studies* 61, 70.

\(^7\) Ibid.
theorists argue that sex workers do not in fact exercise skill in providing sexual services. For these theorists, the absence of identifiable skills practised by women working in the sex work industry militates against it being identified as a form of work. Conversely, other theorists maintain that sex workers do in fact evidence considerable skill in the work they perform, further supporting the identification of sex work as a form of paid labour. These different understandings of skill and sex work are explored.

Jeffreys explicitly rejects the attribution of specific skills to workers in the sex industry. Jeffreys recognises that the degree of social skills expected of a sex worker depends upon which "niche" she occupies in the market – whether she works in the legal or illegal sex industries and whether she is engaged in brothel or escort work. In Jeffreys’ view, the skill of maintaining a conversation, which she sees as one of the most significant activities undertaken by women in escort work, is insufficient to qualify sex work as a profession. Jeffreys perceives street sex workers as exhibiting even less skill in their work, which she characterises as "lift[ing] their skirts in dark alleyways." She similarly rejects the proposition that the sexual component of the activities performed by sex workers requires a higher level of skill than that required of women in non-commercial heterosexual relations. Thus, getting men to ejaculate quickly, “consisting of moving around and making noises, does not seem to be more specialised than the practices routinely learnt by heterosexual women who are not getting paid.” The only skills practised by sex workers that Jeffreys recognises are ‘survival skills’ such as

98 Jeffreys, above n 23, 166–8.
99 Ibid 167.
100 Ibid.
dissociation, being alert to danger, and limitations on the type of sexual demands fulfilled in order to preserve a sense of self.

Implicit in Jeffreys' analysis is a fixed, objective and unproblematic definition of 'skill'. Jeffreys' unfavourable comparison of the work performed by workers in the sex industry and disciplines such as law and medicine "which require the aspirant to attain a body of skills and reach an estimable standard assessed by their peers" adopts a formulation of skill which is specifically referable to public sphere, monetised and gendered assessments of worth. In addition, the disciplines identified by Jeffreys as requiring the attainment of a high level of skill are historically male provinces. Adopting Jeffreys' argument, commercial cleaners, child care attendants and nurses may not be exercising any specific skills because their tasks are those shared by unpaid heterosexual women and are therefore without value. As Bennett observes, skill must be seen as an ideological construction: there is no natural reason why certain characteristics of work or workers should be valued above others. A failure to recognise the gender dimensions in the construction of skill facilitates a ready acceptance of what Bennett describes as "the commonsense technisist conception of skill" that perpetuates the devaluation of work performed by women. It appears that Jeffreys is unable to come to terms with

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101 See for example Margaret Thornton, Dissonance and Distrust: Women in the Legal Profession (1996). Law calls the validity of Jeffreys' comparison between law, medicine and sex work into question with her observation that "[t]he classical professions - law and medicine - require long education in a complex subject and deal with matters in which incompetence has serious adverse affects. Commercial sex does not seem to fit this description" — see Law, above n 42, 599.
102 Ibid.
103 Inverting Jeffreys' conception of sex workers as unskilled, Nussbaum compared the work of a sex worker and a woman who worked in a factory plucking chickens. Nussbaum concluded "[t]he prostitute...performs a service that requires skill and responsiveness to new situations, whereas the factory worker's repetitive motion exercises relatively little human skill and contains no variety." See Martha C. Nussbaum, 'Whether from Reason or Prejudice: Taking Money for Bodily Services' (1998) 27 Journal of Legal Studies 693, 702.
104 Bennett, above n 95.
105 Ibid.
the gender dimensions in the conceptualisation of skill. Her analysis not only degrades work performed by women in the sex industry but perpetuates a manifestation of the public/private duality that identifies skilled work as men’s work.¹⁰⁶

Sullivan contends that sex workers have specific skills in the production of fantasy and sexual pleasure in addition to their knowledge about the practicality of recommended regimes for safe sex, which have value for the wider community.¹⁰⁷ This issue was discussed by sex workers interviewed as part of the study. One worker stated “it takes skill to provide a really good quality service to a client or a customer who you don’t know from a bar of soap, whose breath smells, who you, basically, are pretty disgusted by.”¹⁰⁸ Other workers distinguished between a high quality sexual service provided by a skilled worker and a “sterile” service provided by a worker with little industry experience.¹⁰⁶ A brothel worker identified techniques for encouraging clients to use safe sex practices, including purchasing latex gloves in different colours and referring to the glove as the ‘love glove.”¹¹⁰ In the context of the tabletop dancing industry, a worker discussed ‘tricks of the trade’ used to encourage customers to pay for a private dance and also ways in which workers engage in a sexually suggestive dance that minimises contact with clients, such as through straddling the customer’s body and balancing above him.¹¹¹

Bell writes that the positioning of sex workers as sex experts moves workers from being the objects of scientific discourse to being “the owners and producers of sexual

¹⁰⁷ Sullivan, above n 34, 262.
¹⁰⁸ Interview with K, ex tabletop dancer and brothel worker (Melbourne, 11 May 2000).
¹⁰⁹ Interview with S, brothel worker (Melbourne, 27 March 2000).
¹¹⁰ Interview with A, private worker (Melbourne, March 30 2000).
¹¹¹ Interview with K, ex tabletop dancer and brothel worker (Melbourne, 4 May 2000).
knowledge". PONY (Prostitutes of New York) redefines sex work as drawing on its ancient lineage, and as a "a sacred craft". By celebrating sex workers as practitioners of a sacred craft, PONY writes that "we accept and affirm our own humanity, an empowering act". Margo St James of COYOTE has also argued that sex workers can function as sex therapists, fulfilling a legitimate social need as well as providing a source of experiment and alternative conceptions of sexuality and gender. Shrage envisages a society in which people seek commercial sexual services from women in order to obtain high quality sexual experiences. Under Shrage's proposal, standards for licensing sex providers would be established by public boards or commissioners made up of service providers, community leaders, educators, and legal and public health experts. The standards imposed by these bodies should be reflective of the kind of knowledge and skill required for the sex provider's work and would protect society from any harm ensuing from her work. This could include the completion of some college level courses on human sexuality from the perspective of biology, psychology, history and medicine. In Shrage's view, a more humane, feminist and socialist sex industry could serve as a model for other kinds of labour reform.
CONCLUSION

This chapter has shown that the commercial provision of sexual services can be authentically characterised as waged labour. Sex work evidences key features of paid work in general. Women engaged in sex work are generally able to exercise choice over their decision to enter the industry. Their work involves the exchange of intimate and personal services for remuneration and workers exhibit a degree of skill in the way these services are provided. In identifying sex work as work for the purposes of protective labour regulation and recognising that social and economic constraints shape all women's decisions about entry into paid work, including sex work, theorists create a constructive basis from which to analyse workplace conditions in the sex industry. Although working within a framework that emphasises the discontinuity between sex work and other forms of work is useful in locating sex work within patriarchal structures, these accounts of sex work pathologise workers and sexual transactions that are only distinguishable from 'normal' sexual relations because of the presence of monetary exchange.\(^\text{119}\) Accounts of sex work that emphasise its dissimilarity with other forms of paid labour provide an unhelpful framework from which to assess the potential for improving the conditions under which this work is practised. They also appear to inhibit the creation of constructive alliances between sex workers, feminists and trade unions to work towards industrial reform of legal sex work.

\(^{119}\) Sullivan, above n 34, 242.
CHAPTER THREE

THE EMPLOYEE/INDEPENDENT CONTRACTOR DISTINCTION IN THE VICTORIAN LEGAL SEX INDUSTRY

INTRODUCTION

The previous chapter argued that sex work can be theorised as a legitimate form of paid labour. This chapter considers the implications of this position by examining the distinction drawn in the law between a worker who works under a contract of employment (an employee) and a worker who works under some other form of work contract (commonly referred to as an independent contractor). The chapter then draws on empirical research and Australian and North American case law to consider the situation of workers in the Victorian legal sex industry and asks whether they are employees in the common law sense. The chapter is concerned with direct work relationships between sex workers, managers and proprietors. The position of contract labourers hired by managers through a labour hire agency is not specifically considered.¹

THE COMMON LAW APPROACH TO DISTINGUISHING A CONTRACT OF EMPLOYMENT FROM OTHER WORK RELATIONSHIPS

The law recognises a variety of work relationships, including relationships of employment, contracts for the provision of services, principals and agents and directors

¹ Evidence suggests that there is one agency in Victoria which provides managerial and administrative services to managers and proprietors of licensed brothels. However, as staff of the agency declined to be interviewed for this study, the author did not have sufficient information to consider how the use of agency services might impact on the work relationship between venue managers, proprietors and sex workers.
and partners. The conceptual distinction between employees and independent contractors is, however, central to the entire structure of Australian labour law.\(^2\)

Although the utility of this distinction is the subject of some debate,\(^3\) "this approach cannot be ignored because it constitutes the essential touchstone for the determination of a whole host of workforce rights and obligations."\(^4\)

According to Creighton and Stewart "[e]mployees were those who worked under the control of another person and were dependent upon them for remuneration; while contractors were effectively considered to be supplying services as businesses in their own right."\(^5\) The existence of a right to control work is therefore an important factor in the legal inquiry undertaken into whether a worker is an employee or an independent contractor.\(^6\) The classical exposition of the role of control in employment relationships is found in the judgement of Bramwell LJ in \textit{Yewen v Noakes}, who stated that an employee "is a person subject to the control of his master as to the manner in which he shall do his work".\(^7\) This concept of 'control' as close and personal supervision of an employee by an employer has been described by as "too crude an instrument to accommodate increasingly complex work arrangements", particularly in light of the expansion in home

\(^3\) Creighton notes that there is disagreement between labour law commentators about the role of the contract of employment in labour regulation, some analysts asserting that the employment contract is in need of reform or abandonment and others asserting that the employment contract should be the sole instrument by which work relations are organised — see Breen Creighton, 'Reforming the Contract of Employment' in Andrew Fraser, Ron McCallum and Paul Ronfeldt (eds) \textit{Individual Contracts and Workplace Relations} (1997) 77. See also Adrian Brooks, 'Myth and Muddle: An Examination of Contracts for the Performance of Work' (1988) 11 \textit{University of New South Wales Law Review} 48; Rosemary Hunter, 'The Regulation of Independent Contractors: A Feminist Perspective' (1992) 5 \textit{Corporate and Business Law Journal} 165.
\(^5\) Creighton and Stewart, above n 2, 202.
based work and increasing job specialisation. The limitations inherent in equating control with direct supervision have had two effects. First, ‘control’ has been gradually modified to emphasise that it is the right to control rather than the actual exercise of control that is the crucial indicator of the existence of a contract of employment. As stated in Zujis v Wirth Brothers Pty Ltd “what matters is [that there is] lawful authority to command so far as there is scope for it.” Second, the reliance on control — even in its modified form — to the exclusion of other relevant indicia of employment has been displaced by “a more sophisticated, if less elegant, definition of employment”. This approach is characterised by consideration of number of factors before a decision about the status of a working relationship is reached. Stevens v Brodribb Sawmilling Co Pty Ltd is the leading authority that reflects this approach.

Stevens v Brodribb concerned an action in the tort of negligence by a sawmiller, Stevens, injured by the careless actions of another sawmiller, Gray, during logging operations conducted by the Brodribb Sawmilling Company. Stevens sued the Brodribb Sawmilling Company claiming that it was vicariously liable for the negligent action of Gray. Brodribb alleged that Gray was an independent contractor and so it was not vicariously liable for Gray’s negligence towards Stevens. In upholding Brodribb’s claim, the High Court stated that “the existence of control, whilst significant, is not the sole

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9 Queensland Stations Pty Ltd v Federal Commissioner of Taxation (1945) 70 CLR 539; Peter F Burns Pty Ltd v Commissioner of Stamps (1980) 24 SASR 283.
11 Creighton and Stewart, above n 2, 209.
criterion by which to gauge whether a relationship is one of employment." The court found that other relevant matters to be considered include but are not limited to:

- the mode of remuneration (for example, whether a worker is paid a fixed salary or wages, and whether this is assessed as a total sum for a task, or on the basis of time rates, or as piece rates);\(^{14}\)

- the provision and maintenance of equipment, particularly where it is a major piece of machinery such as a truck;\(^{15}\)

- the obligation to work;\(^{16}\)

- the hours of work and provision for holidays;\(^{17}\)

- the deduction of income tax under the Pay as You Earn tax scheme;\(^{18}\) and

- the power of a putative employee to delegate work.\(^{19}\)

\(^{13}\) Ibid 23 (Mason J).
\(^{14}\) Ibid 24. Payment by methods other than wages or salary, such as payment on production of an invoice or commission payments, are usually suggestive of an independent contracting arrangement. In Vabu v Commissioner of Taxation (1996) 33 ATR 537 and Bruce v Rimwade Pty Ltd (1996) 40 ALR 343 at 3-433 the fact that bicycle couriers were paid on the basis of each job worked or deliveries made and not hours worked was indicative of an independent contract. See however Federal Commissioner of Taxation v Barratt (1973) 129 CLR 395, in which Stephen J held that payment to real estate salesmen that was solely by commission was in all the circumstances irrelevant, given other indicators of control, and FCT v J Walter Thompson (Aust) Pty Ltd (1944) 69 CLR 227, where payment to radio play artists of a fixed fee per performance was not an impediment to the court finding a contract of service.

\(^{15}\) That Stevens and Gray supplied their own truck and bulldozer respectively was indicative of an independent contracting arrangement in Stevens v Brodribb Sawmilling Co Pty Ltd. Similarly, the Court in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497 found that supply and maintenance of a truck indicated an independent contracting arrangement. The supply of hand tools is generally seen as less important. See however the statement by Gray J in Re Porter (1989) 34 IR 179, 186 that there is "something rather strange about a legal principle being dependent upon the size of the money involved." On the owner driver industry generally see Clayton and Mitchell, above n 4, 59–67.


\(^{17}\) See Commissioner of Pay-Roll Tax (Vic) v Mary Kay Cosmetics Pty Ltd [1982] VR 871, where the fact that consultants were not paid holiday pay, sick leave or other employee benefits was an indicator of an independent contacting arrangement. See also Phillipa v Carmel [1996] IRCA 96/433 (Unreported, Industrial Relations Court, Western Australia, Ritter JA, 10 September 1996) <http://www.austlll.edu.au> at 2 February 1998 (copy on file with author); Bruce v Rimwade Pty Ltd (1996) 40 ALR 3-433; Building Workers Industrial Union & Ors v Odco Pty Ltd (1991) Ibid 755.

The approach taken by the High Court in Stevens v Brodribb is usually referred to as a 'mixed' or 'multiple' approach, as it draws on a range of factors. Some commentators have asserted that cases which apply the mixed approach are difficult, if not impossible to reconcile,\(^\text{20}\) inadequate to accommodate a fluid concept like that of 'employment' and fail to take cognisance of the increasing range of modern working relationships, such as agency and home-based employment.\(^\text{21}\)

Although the approach used in Stevens v Brodribb represents the current law in Australia, an alternative approach was adopted by Gray J in the 1989 case of Re Porter.\(^\text{22}\) This approach centres on the concept of 'economic dependence' and is often referred to as the 'economic realities' approach. This framework is considered by some theorists as superior to the mixed approach as a method of assessing the true nature of work relationships.\(^\text{23}\) Creighton and Stewart state that a focus on economic dependence entails "an examination of the practical realities of the economic relationship between the parties, rather than detailed scrutiny of the terms (written and oral) on which the worker is formally engaged."\(^\text{24}\) Unlike the approach taken in Stevens v Brodribb

Sawmilling Co, in which a list of factors was examined, the economic dependence

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\(^{19}\) A power of unlimited delegation is almost conclusive against a contract of service — Australian Mutual Provident Society v Allan and Chaplin (1978) 18 ALR 385, 391; Queensland Stations Pty Ltd v Federal Commissioner of Taxation (1945) 70 CLR 539 as cited in Creighton and Stewart, above n 2, 208–10. See however Narich Pty Ltd v Commissioner of Payroll Tax [1983] 2 NSWLR 597, where a limited power of delegation under a contract did not defeat a finding that an employment relationship existed.

\(^{20}\) See for example Hunter, above n 3, 167. Both Hunter and Brooks assert that although courts maintain they are engaged in an examination of the nature of the contract, they actually decide whether they think the claimant ought to enjoy the particular benefit and, if so, find justifications for it being an employment contract (Brooks, above n 3, 91).


\(^{22}\) (1989) 34 IR 179.


\(^{24}\) Creighton and Stewart, above n 2, 210.
framework can involve consideration of any circumstance that may shed light on the nature of the contract. According to Gray J:

there is no particular reason why a court should ignore the practical circumstances, and cling to the theoretical niceties. The level of economic dependence of one party upon another, and the manner in which that economic dependence may be exploited, will always be relevant factors in the determination whether a particular contract is one of employment.\(^{25}\)

Merrit contends that in examining the facts of a particular case to decipher its economic reality, the relevant indicia will relate to arrangements that are appropriate to a chance of profit. Accordingly, traditional questions of personal service will not be informative.\(^{26}\) Gray J states that one of the advantages of an explicit focus on economic dependence is that it overcomes difficulties presented where the practical constraints on a party conflict with the express stipulations in the contract.\(^{27}\) Although this type of approach received judicial support in the United Kingdom in the 1970s and 80s,\(^{28}\) Australian courts have been "less than enthusiastic"\(^{29}\) about the economic reality approach.\(^{30}\) For Creighton and Stewart, this is a missed opportunity. They argue that the potential for employers to evade their obligations to workers could be greatly reduced if adjudicators were prepared to examine the economic reality of work arrangements.\(^{31}\)

\(^{25}\) Re Porter (1989) 34 IR 179, 184–5 (Gray J).

\(^{26}\) Merrit, above n 8, 123.

\(^{27}\) Re Porter (1989) 34 IR 179, 185.


\(^{29}\) Creighton, Ford and Mitchell, ibid.


\(^{31}\) Creighton and Stewart, above n 2, 213.
WORK RELATIONSHIPS IN THE LEGAL SEX INDUSTRY

This part of the chapter examines work arrangements in the legal sex industry in Victoria and considers whether these tend to evidence a relationship of employment between sex workers and venue managers or an independent contracting arrangement, in light of the common law approaches identified above. The terms and character of contracts to perform work are found in the express contractual terms and are inferred from the way that the parties conduct themselves under it.\textsuperscript{32} Written materials used in the Victorian sex industry to regulate work arrangements, including reservation agreements, house rules, and dancers' guidelines are considered, as is empirical evidence regarding working conditions in the legal sex industry. This information is analysed in the context of the common law principles used to distinguish between contracts of employment and other work arrangements.

Whether an employer/employee relationships exists in a given case is a question of fact, taking into account all circumstances that might shed light on the nature of the contract.\textsuperscript{33} It is therefore impossible to state categorically whether women working in the legal sex industry are employees or independent contractors, as working conditions vary between and within brothels, escort agencies, tabletop dancing venues and peep shows.\textsuperscript{34} Be that as it may, the legal approaches to establishing the nature of work relationships, discussed in the preceding part, can be considered in the context of information about


\textsuperscript{33} Re Porter (1989) 34 IR 179, 184.

\textsuperscript{34} See Dixon J in Queensland Stations Pty Ltd v Federal Commissioner of Taxation (1945) 70 CLR 539, 552, who stated that "[t]he ultimate question will always be whether a person is acting as a the servant of another, or on his own behalf and the answer to that question may be indicated in ways that are not always the same and do not always have the same significance."
working conditions in the legal sex industry in Victoria to gain a generalised understanding of how such relationships are structured. In particular, this provides an opportunity to assess the robustness of the claim by venue managers that women working in the legal sex industry are independent contractors and not employees.  

Control

As Stevens v Brodribb Sawmilling Co has established, the existence of a right to control is central to categorising a work relationship as one of employer and employee. Factors that evidence the existence of a right to control may include the right to superintend and control the manner in which the work obligation is fulfilled, including costume and appearance, demeanour, safety measures, and use of equipment. The following section considers the extent to which proprietors of legal brothels, escort agencies, tabletop dancing venues and peep shows reserve the right to 'lawfully command' women workers.

Brothel Workers

The terms and conditions of work for many women working in legal brothels are established through written contracts, ‘house rules’, oral directions from management

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35 Women working in the brothel, escort, and tabletop dancing industries are usually asked to sign a contract stating that they are independent contractors or are verbally informed by venue managers that they are contractors and not employees – Interview with L, private worker (Melbourne, 18 August 1999); interview with M, union organiser (Melbourne, 27 August 1999); interview with G, brothel worker (Melbourne, 28 August 1999); interview with K, ex tabletop dancer and brothel worker (Melbourne, 4 May 2000); interview with R, brothel manager (Melbourne, 4 March 2000).


37 Zujis v Wirth Bros Pty Ltd (1955) 93 CLR 561, 572.

38 Preferential Reservation Agreement provided by R, brothel manager (Melbourne, 4 March 2000).
(either the licensed prostitution service provider or one or more approved managers, who may also act as receptionists)\(^{39}\) and work practices.

The ‘preferential reservation agreement’ which is signed by workers at one Melbourne brothel specifically addresses the issue of control. It states that:

The Proprietor agrees and acknowledges that all activities carried on by the Service Provider [the worker] in or upon the Premises, shall be and are carried on by the Service Provider as a totally independent person, and shall not be subject to the direction or control of the Proprietor, Servant, or agent of the Proprietor, in any manner whatsoever.\(^{40}\)

The agreement also explicitly identifies matters over which the proprietor has no direction or control. These include:

- any services which the Service Provider [the worker] may choose to provide or not provide;
- the times at which the Service Provider may choose to attend or leave the premises;
- the clients to whom the Service Provider chooses to provide services;
- the fees charged to the clients by the Service Provider; and

\(^{39}\) It is important to note that the term ‘management’ has a particular meaning in legal brothels. Much of the responsibility for the day to day operation of brothels lies with approved managers, who personally supervise the brothel when the licensee is not on the premises. Section 49 of the Prostitution Control Act 1994 (Vic) permits approved managers, who are required to obtain approval from the Business Licensing Authority, to manage the business in the absence of the licensee. Many approved managers also act as receptionists, particularly in smaller brothels. Accordingly, many receptionists working in the legal sex industry exercise considerably more authority than is traditionally associated with this position.

\(^{40}\) Preferential Reservation Agreement provided by R, brothel manager (Melbourne, 4 March 2000) (copy on file with author).
the standard of dress which the Service Provider shall adopt from time to time.\textsuperscript{41}

Prima facie, these provisions tend to indicate that the proprietors of venues do not reserve the right to control the work performed by women working in legal brothels. Other clauses in the Preferential Reservation Agreement, however, do evidence a degree of control over the way in which women perform their work. One clause requires the Service Provider (the worker) to abide by a number of 'rules', including:

- not bringing or consuming alcohol or illicit drugs on the premises;
- undergoing regular medical checks for the purpose of determining that she is free from sexually transmissible diseases;
- agreeing that she will only provide sexual services if she is free from sexually transmissible diseases;
- using safe sex practices at all times; and
- disposing of waste materials in a hygienic manner.\textsuperscript{42}

It should be noted however that these matters all relate to the legal obligations on licensees under the \textit{Prostitution Control Act 1994} (Vic), the \textit{Prostitution Control Regulations 1995} (Vic) and \textit{Health (Brothel) Regulations 1990} (Vic).\textsuperscript{43} In \textit{Re Municipal Association of Victoria & Ors}\textsuperscript{44} the Victorian Industrial Relations Commission drew a distinction between the concepts of regulation and control. The Commission found that measures that might be construed as indicating control by the putative employer, such

\textsuperscript{41} Ibid.
\textsuperscript{42} Ibid.
\textsuperscript{43} \textit{Prostitution Control Act 1994} (Vic) ss 5–7, 11, 19–21.
\textsuperscript{44} (1991) 33 AILR \textsuperscript{1}163.
as counselling, inspection and monitoring were in fact consistent with a system of licensing or registration, rather than indicative of a relationship of employment. This case involved home-based child care workers engaged by a government body. Although workers in the sex industry are not engaged by the government, the distinction between compliance with obligations imposed by a licensing and registration system and control for the purposes of establishing an employment relationship could be applied to the sex industry.

Many brothels also use 'house rules' and other guidelines to establish working conditions. For example, at one Melbourne brothel, the written 'explanation' provided to workers at one Melbourne brothel states that, once workers schedule a shift at the brothel, they are deemed to have agreed to the house rules and guidelines. Work rules can be incorporated into an employment contract by an employee signing a form agreeing to incorporate extraneous materials as express contractual terms. As Creighton and Stewart observe, courts have also indicated a willingness to incorporate work rules as implied terms of an employment contract. House rules are therefore important in establishing terms of the work contract. Unlike the preferential reservation agreement, which emphasises a lack of control by brothel proprietors over sex workers, 'house rules' evidence a significant degree of control over the work performed by women sex workers. In Phillipa v Carmel, a Western Australian case involving an application by

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45 Materials provided by R, brothel manager (Melbourne, 4 March 2000) (copy on file with author).
47 Creighton and Stewart, above n 2, 223. See Carus v Eastwood (1875) 32 LT 855; Mair v Bartholemew (1991) 104 ALR 537 as cited in Creighton and Stewart, above n 2, 223.
a sex worker for statutory relief against unfair dismissal, Ritter JR found that house rules were an indicator of control, consistent with the relationship being one of employment.\footnote{1996} IRCA 96/433 (Unreported, Ritter JA, 10 September 1996) <http://www.austlii.edu.au> at 2 February 1998 (Copy on file with author) [12]. Many of the house rules that appear to operate in the Victorian sex industry relate to shift scheduling and allocation. Failure to observe these rules results in shifts being reduced,\footnote{Interview with R, brothel manager (Melbourne, 4 March 2000); interview with K, ex tabletop dancer and brothel worker (Melbourne, 4 May 2000).} particular shifts being made unavailable to workers, and to workers being removed from the venue's schedule.\footnote{House rules provided by R, brothel manager (copy on file with author). It should be noted that Commissioner Cribb in Bibic v First Interstate Security Pty Ltd (unreported, Australian Industrial Relations Commission, 135/00, Melbourne, 10 February 2000) found that the fact that rosters were determined by the putative employer was evidence of an employment relationship.} For example, when workers fail to turn up for a shift they have nominated to work, their name is removed from the schedule and their locker is emptied. Workers are required to be "ready, dressed and available at the exact time allotted" and those who do not attend at the brothel "on the dot" at the designated time are sent home.\footnote{Ibid. Note that a provision in an 'industrial agreement' that stated that late attendance of 30 minutes or more by a contract carrier would result in loss of pay was held to be evidence of the presence of an employment contract – Sammartino v Mayne Nickless (2000) 98 IR 168, 210–11.} Regularly being late for the commencement of a shift in the course of a month similarly results in a worker being removed from the schedule.\footnote{House rules provided by R, brothel manager (copy on file with author).} This is effectively a right of termination for breach, a factor that the court in Narich Pty Ltd v Commissioner of Payroll Tax found to be consistent with the existence of an employment relationship.\footnote{Zujis v Wirth Bros (1955) 93 CLR 561, 572; Phillipa v Carmel [1996] IRCA 96/433 (Unreported, Industrial Relations Court, Western Australia, Ritter JA, 10 September 1996) <http://www.austlii.edu.au>Carmel> at 2 February 1998} The High Court in Zujis v Wirth Bros also identified "a right in the master to suspend or dismiss for misconduct" as a factor evidencing an employment relationship.\footnote{1983} 58 ALJR 30.
The conditions of women working in legal brothels are also established orally through directions to workers and through work practices.\(^{55}\) These matters evidence a relatively high level of control by management over the way sex workers in Victoria carry out their work. Such directions cover a range of matters including clothing and uniforms, attendance at the premises during and between shifts, and payment of shift fees. Costume and appearance has been judicially described as “matters naturally calling for control.”\(^{56}\) A high level of control is exercised over the clothing and appearance of women working in legal brothels in Victoria. Workers may be required to wear particular clothing such as lingerie and sarongs, or alternatively may be obliged to wear a uniform, which they purchase from the brothel.\(^{57}\) Workers may also have to pay for rental of a costume if the brothel requires workers to wear one.\(^{58}\) One worker reported being subjected to hand inspections and inspections to ensure that she had removed body hair.\(^{59}\) Another worker stated that she had been banned from working at a brothel because she had shaved her head and management did not permit her to work with a shaved head or to wear a wig.\(^{60}\)

The requirement that workers remain on the premises during set working hours is evidence of control consistent with the establishment of an employment relationship.\(^{61}\)

\(^{55}\) Work practices can constitute implied contractual terms if there is evidence that the custom is so well known and acquiesced that everyone making a contract in that situation is presumed to have imported that term into the contract (Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur (Australia) Ltd (1986) 160 CLR 226, 236).

\(^{56}\) Zuji v Wirth Bros Pty Ltd (1955) 93 CLR 561, 572.

\(^{57}\) Interview with G, brothel worker (Melbourne, 23 August 1999). In Vatu Pty Ltd v Commissioner of Taxation (1995) 30 ATR 303, Ireland J found that dress regulations requiring a driver to wear a uniform was evidence of control (at 308).

\(^{58}\) Interview with G, ibid; interview with L1, private worker (Melbourne, 18 August 1999).

\(^{59}\) Interview with G, ibid.

\(^{60}\) Interview with S, brothel worker (Melbourne, 27 March 2000).

Women working in legal brothels report that there is an expectation that they will remain on the premises for the duration of a shift. Workers who leave before the end of the shift will "either get sacked or not given another shift or penalised in some way."62 A particularly extreme example of this is the case of one worker who began to miscarry while on shift. When she requested that the brothel manager call her an ambulance she was told that she had to complete her booking with a client or she would not receive any further work from the brothel.63 Although workers are informed that they are not obliged to see particular clients,64 in practice there appear to be strong economic imperatives to do so. For example, one ex brothel worker stated:

[If you knock back clients in a brothel there are repercussions. They're not direct ones like 'you're going to get taken out the back at night', nothing like that. If you get tired, if you work five nights a week and you just run out of energy and say that I've got to go home, shifts are rather full the next week.65

Managerial control over sex workers is also evidenced through the imposition of fees on workers. Although it appears that the practice of fining brothel workers has decreased,66 it is common for workers in the legal brothel industry to be charged a 'shift fee' and a fee for hiring costumes.67 The shift fee is either levied on each shift or charged to workers at the end of the week. It is usually in the vicinity of $5 to $10 per shift or $45-$50 per

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62 Interview with M, union advocate (Melbourne, 27 August 1999).
63 Personal knowledge of the author obtained through her employment as a Policy Officer with Consumer and Business Affairs Victoria.
64 Reservation agreement provided by R, brothel manager (copy on file with author).
65 Interview with L2, private worker (Melbourne, 29 March 2000).
66 Interview with M, union organiser (Melbourne, 4 March 2000).
67 Interview with J, STD adviser (Melbourne, 29 July 1999); interview with L1, private worker (Melbourne, 18 August 1999); interview with G, brothel worker (Melbourne, 28 August 1999). R stated that the brothel she manages does not charge workers for toiletries and other provisions (interview with R, brothel manager, Melbourne, 4 March 2000).
week. There seems to be a lack of certainty about what the shift fee actually covers but workers report that it is to recover costs associated with providing cold drinks, sweets, coffee and tea, and toiletries. Some workers may also be charged a fee for clients’ use of credit cards.

Although venue managers have limited scope to control the sexual service that is provided by sex workers during a booking, control is exerted by proprietors to the extent to which there is scope for it to be exercised. As Ritter JR commented in *Phillipa v Carmel*, it could not be suggested that because the actual provision of sexual services is largely unsupervised, individualistic and subject to a sex worker’s own discretion and skills, she is not an employee of the brothel manager. Workers are expected to provide particular services during a booking. For example, a standard half hour booking involves a body contact massage, oral sex and penetrative sex. According to the manager of one Melbourne brothel “we let the clients know that sex and oral is included in that service.” Some brothels offer a more specialised or ‘genuine’ service involving activities like kissing and tongue massage. A women working in a brothel offering a specialised service states that she was told by management “this is the type of service that our girls provide here. Our clients have been coming here for a long time, this is

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68 Interview with J, ibid; interview with L1, ibid.
69 Interview with J, ibid; interview with S, brothel worker (Melbourne, 27 March 2000).
72 Interview with J, STD adviser (Melbourne, 29 July 1999). Some interview subjects commented that clients favour inexperienced workers because they get ‘more’ in a booking, illustrating that clients are conscious of what services comprise a standard booking. Interview with L1, private worker (Melbourne, 16 August 1999); interview with A, private worker (Melbourne, 29 March 2000).
73 Interview with R, brothel manager (Melbourne, 4 March 2000).
74 Interview with S, brothel worker (Melbourne, 27 March 2000); interview with G, brothel worker (Melbourne, 23 August 1999).
what they expect."75 Another brothel worker told of a manager who tried to "force the girls to kiss the client and do things like tongue massage."76

Evidence suggests licensees and managers of legal brothels reserve a right to control the work performed by women in legal brothels and exercise detailed control over the manner and performance of work.77 Although the existence of control is not of itself determinative, it is significant.78 The impact of other indicia, such as the power of delegation, the payment of wages, the provision of holidays and other leave and the express intention of the parties in categorising their relationship is considered later in the chapter, after an examination of control exercised in relation to escort workers, and workers in live sexually explicit entertainment.

**Escort Workers**

Escort workers do not provide sexual services at premises owned or operated by licensed prostitution service providers. Rather, they usually see clients in private homes or hotels. The fact that a worker does not work from premises controlled by the putative employer does not preclude the existence of a contract of employment.79

It appears that the location of the work does not necessarily mean that escort operators exercise less control over the work performed by escort workers than brothel managers do over the work performed by brothel workers. However, the limited information available about conditions in the escort industry makes it difficult to assess the degree of

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75 Interview with S, ibid.
76 Interview with G, brothel worker (Melbourne, 23 August 1999).
79 See for example *Commissioner of Taxation (Cth) v Barrett* (1973) 129 CLR 395; *Roy Morgan Research Centre Pty*
this control. Empirical evidence suggests that written contracts are relied upon less in the escort industry than in brothel work.\footnote{Ltd v Commissioner of State Revenue (1996) 96 ATC 4,767.} One escort worker stated that, as a new worker, she was given no written material and was told orally what the money was, what standard working hours were and that she needed a mobile telephone.\footnote{The absence of a written, signed contract can be considered evidence that there is an employment relationship in existence – see Bibic v First Interstate Security Pty Ltd (unreported, Australian Industrial Relations Commission, Cribb C, 135/00, Melbourne, 10 February 2000).} Evidence also suggests that escort agencies maintain a high degree of control over work allocation and client selection. As with the brothel industry, work is allocated according to a roster, managed by the licensee or receptionist.\footnote{Interview with A, private worker (Melbourne, 29 March 2000).} Although escort workers are not obliged to accept client bookings, in practice workers who refused bookings found that they would get “attitude” from reception staff and their volume of work would decrease.\footnote{In Commissioner of Taxation (Cth) v Barrett (1973) 129 CLR 395, attendance at offices and sales sites according to a roster was identified by the High Court as evidence of exercise of control.} Escort workers also report that, despite advising reception staff that they only wanted to work in particular geographical areas or that they did not want to accept particular types of bookings (for example, couple bookings) or bookings with specific clients, they would be booked for these 'jobs' regardless.\footnote{Interview with L2, private worker (Melbourne, 29 March 2000).} Workers are expected to collect cancellation fees from clients who cancel a booking after they have attended at the premises. One worker states that women who don’t collect the fee “get in trouble” with the agency.\footnote{Ibid; Interview with A, private worker (Melbourne, 29 March 2000).} Workers are also expected to provide specific services during the course of a booking, including oral and penetrative sex.\footnote{Interview with A, Ibid.}
The High Court in *Commissioner of Taxation (Cth) v Barrett* found that an expectation that workers report their whereabouts each day was evidence of control, despite the absence of direct supervision. There is a high level of contact between escort workers and the agency. Workers are required to telephone the escort agency upon arriving at a booking and to telephone the agency again ten minutes before the booking concludes. However, Woodward J in *Troubleshooters* questioned the relevance of this factor as there was a mutual benefit in maintaining communication. In the context of the escort industry it could be similarly argued that workers benefit from the maintenance of communication because it protects their safety.

Some features of work in the escort industry are likely to militate against the existence of lawful authority of proprietors of escort agencies to exercise control over workers. In *Vabu v Commissioner of Taxation* and *Bruce v Rimwade Pty Ltd*, both concerning bicycle couriers, flexible hours of work and the provision by couriers of their own vehicles were seen as consistent with an independent contract arrangement. These factors appear to be present in the escort industry. An escort worker interviewed as part of this study stated that escort workers are not generally told that they have to work specific hours and escort work is “very flexible if they have the ladies available.”

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87 (1973) 129 CLR 395
88 Interview with A, private worker (Melbourne, 29 March 2000); interview with L2, private worker (Melbourne, 29 March 2000). Note also that *Zuijs v Wirth Bros Pty Ltd* identified the establishment of safety features as consistent with a relationship of employment. The requirement that escort workers telephone the agency before and after bookings is itself a safety feature, as it informs the agency that the worker has not been assaulted during the booking.
89 See discussion of this issue in Nii Lante Wallace-Bruce, ‘Shooting for Trouble: When a Union Member is Not an Employee’ (1992) 5 Corporate and Business Law Journal 291, 295.
90 (1996) 81 IR 150.
91 (1996) 40 AllR 334.
93 Interview with A, private worker (Melbourne, 29 March 2000).
Escort workers are also required to provide their own transport to and from client bookings, either through the use of a private vehicle or taxi. Some escort agencies provide cars and drivers for use by workers but workers are charged approximately $25 per booking for the use of this service. Some cases involving workers undertaking work that is not subject to direct supervision by a putative employer have relied upon the existence of a manual or instruction booklet as evidencing control. As indicated earlier, it appears that escort workers are given little written or oral direction about how to perform their work, one escort worker commenting that "you're basically chucked in the deep end."

Live Sexually Explicit Entertainment

The working conditions of women working in tabletop dancing venues are established in a similar way to those of workers in legal brothels. The use of written contracts, augmented by 'dancer guidelines' and oral directions to workers, is common. 'Dancer guidelines' cover a range of matters, including rostering and shift allocation; breaks; fees and penalties; workers' behaviour and demeanour; and appearance and costume. In considering the effect of guidelines and house rules in tabletop dancing venues in North America, Reavley CJ in Reich v Circle C. Investments Inc. found that

94 Ibid.
95 See for example Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (1996) 96 ATC 4,767; Narich Pty Ltd v Commissioner of Payroll Tax (NSW) [1983] 2 NSWLR 597. See however Commissioner for Payroll Tax (Vic) v Mary Kay Cosmetics Pty Ltd [1982] VR 871, where provision of a manual was described by Gray J as "carrying no teeth." (at 880).
96 Interview with A, private worker (Melbourne, 29 March 2000).
98 Ibid.
promulgating a number of house rules was evidence of "significant control" exercised by
venue managers over exotic dancers.99

Dancer guidelines used in Victorian tabletop dancing venues are considerably more
detailed than the 'house rules' used in legal brothels and demonstrate the reservation of
a high level of lawful authority to command to venue proprietors in virtually all significant
aspects of dancers' work.100 The guidelines distinguish between 'private dances'
performed for a single customer or group of customers at their table, and podium
dances, where workers perform on a podium. The duration of these dances and the
activities of the worker during the dance is detailed in the guidelines, including stating
that workers must make plenty of eye contact with patrons and must be naked at the
completion of a podium dance.101 Dancers are required to participate in 'mega-strips', in
which all dancers perform a strip show on stage at the one time, and must be naked at
the end of the show.102 Dancer guidelines also regulate the behaviour of workers,
prohibiting them from sitting or standing together, smoking while standing up, swearing
or placing feet on seats or tables.103

The personal appearance of workers is also highly circumscribed. Dancer guidelines for
one venue state that workers will be monitored to ensure they maintain a "glamorous"

99 Reich v Circle C. Investments Inc, 998 F.2d. 324, 327 (5th Cir. 1993).
100 For a discussion of the working conditions and employment status of women working in North American tabletop
dancing venues see Holly J. Wilmet, 'Naked Feminism: The Unionization of the Adult Entertainment Industry' (1999)
7 American University Journal of Gender Social Policy & Law 465; Heidi Machen, 'Women's Work: Attitudes,
Regulation and Lack of Power within the Sex Industry' (1996) 7 Hastings Women's Law Journal 177; Carrie Benson
Fischer, 'Employee Rights in Sex Work: The Struggle for Dancers' Rights as Employees' (1996) 14 Law and
Inequality 521.
102 Interview with K, ex tabletop dancer and brothel worker (Melbourne, 11 May 2000); ibid. See also Zujis v Wirth
(1955) 93 CLR 561, 572 where the exercise of control and discretion over performers participating in a 'grand parade'
was held to be consistent with the existence of an employment relationship.
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and “sexy” image.\textsuperscript{104} Guidelines require dancers to provide specific items of clothing including a sequined g-string, two sets of lingerie and an evening dress; wear a garter at all times; and wear shoes or thigh high boots with stiletto heels of 2-3 inches.\textsuperscript{105} Workers are required to apply heavy makeup for stage shows, use perfume, deodorant and breath freshener, and style their hair.\textsuperscript{106}

In the North American case of Harrell v Diamond A Entertainment Inc,\textsuperscript{107} Bucklew J found that the imposition of fines for a variety of infractions such as tardiness and unexcused absences, a prohibition on dancers frequenting the club when not working, a requirement that dancers behave courteously and professionally towards customers, and a prohibition on dancers permitting customers to touch their genitals were particular examples of venue managers exercising control over workers.\textsuperscript{108} All these controls are contained in dancer guidelines used in some Victorian tabletop dancing venues. Dancer guidelines reserve the right to impose financial penalties on workers for a variety of infractions including lateness for shifts ($25 fine for being 15 minutes late, $50 fine for being 30 minutes late) and cancellation of a shift without notice ($70 fine). Workers can be suspended or terminated if they incur more than three penalties in one month or are continually late or leave early.\textsuperscript{109} Guidelines also regulate the behaviour of dancers towards clients, requiring them to sit and talk to the customer after a private dance has concluded, to “make him feel special” and to never look uninterested during

\textsuperscript{104} Ibid.
\textsuperscript{105} Ibid.
\textsuperscript{106} Ibid.
\textsuperscript{107} 992 F.Supp. 1343 (M.D.Fla. 1997).
\textsuperscript{108} Ibid 1350.
The amount of physical contact permissible between workers and customers is also regulated. Customers are permitted to undo workers’ clothing but are not permitted to touch workers. Some tabletop dancing venues prohibit workers from letting their breasts dangle in clients’ faces for longer than a count of three and prevent ‘open leg work’ and genital stimulation of customers with any part of their body. Little is known about working conditions in peep shows and, despite a number of attempts, no women with experience working in peep shows participated in an interview for this study. It is therefore very difficult to assess the degree of control exerted over women working in legal peep shows in Victoria. However, the limited information available suggests that workers in peep shows are subject to a lesser degree of control than workers in brothels and tabletop dancing venues. It appears that written contacts are not used in peep shows and workers are informed orally of the terms and conditions of work. Control is exerted over the type of shifts that women can work and their performance during those shifts. Workers are permitted to work ‘peep shifts’ or ‘straight shifts’ but are prevented from working both. It appears that management maintains some degree of control over the physical environment in peep shows, whereby workers are prevented from adjusting their lighting. According to a North American peep show worker, the industry is one in which seniority is a liability. Workers who are considered

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10 Ibid.
11 Interview with K, ex tabletop dancer and brothel worker (Melbourne, 4 May 2000).
13 Personal knowledge of the author, obtained in her capacity as a research/policy officer for the Prostitution Control Act Ministerial Advisory Committee.
14 Straight shifts involve a worker dancing for a customer. Straight shifts are less sexually explicit than peep shifts but involve some interaction with clients -- personal knowledge of the author, obtained in her capacity as a research/policy officer for the Prostitution Control Act Ministerial Advisory Committee.
15 Personal knowledge of the author in her capacity as a research/policy officer for the Prostitution Control Act Ministerial Advisory Committee.
too old are subject to termination without notice by management. It is not known whether this practice also occurs in Victoria, although it is contended that the imperative to hire young workers is likely to be as applicable to the Victorian sex industry as it is to the sex industry in San Francisco. As discussed previously, the reservation of the right to terminate a worker’s employment is indicative of an employment relationship.

Other Indicia

As indicated earlier in the chapter, control is not the only criteria of importance in identifying an employment relationship. Factors including payments to workers (by whom and in what form); the availability of leave and other holidays; the ability to delegate work and limitations on a workers’ ability to engage with more than one putative employer are other indicia that ought to be considered in determining whether an employment contract exists or not. The characterisation of the working relationship by the parties themselves is also significant. These factors are considered below.

Payments Made to Workers

With the exception of women working ‘peep shifts’ in peep shows, workers in the legal sex industry in Victoria are generally paid directly by their clients. Accordingly, their earnings are dependent upon the number of clients for whom they provide a sexual service or performance. In legal brothels, clients pay an “occupation fee” to the

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118 Stevens v Brodribb Sawmilling (1986) 160 CLR 16, 23 (Mason J).
receptionist upon arranging a booking and pay a further service fee to the worker in a private room. Fees for services vary between establishments but, for example, one Melbourne brothel charges $120 for a thirty minute booking, half of which is paid by the client to the brothel as an “occupation fee” and the remainder is paid by the client to the worker directly. 120 In the escort industry, workers receive payment from clients at the completion of a booking and pay a proportion of the fee to the agency for making the booking between client and worker. For an hour booking, an escort worker would receive $150 and would be required to pay $60 to the escort agency. 121

Workers in tabletop dancing venues are paid directly by clients for podium, personal and fantasy dances, usually by customers placing money in a worker’s garter. The only remuneration dancers receive is from customers. Although venues do not pay dancers, they do set the rate for each type of dance. For example, $20 is generally charged for a five minute personal lap dance, $20 for a podium dance, $25 for a five minute fantasy dance and $50 for a 10 minute fantasy dance. 122 Dancer guidelines used in tabletop dancing venues require workers to explain to customers what prices are charged for dances. 123 Management do not take a percentage of workers’ earnings for podium and personal dances. 124 Workers who are booked to provide a ‘fantasy dance’, in which

121 Interview with A, private worker (Melbourne, 29 March 2000).
123 Interview with K, ibid.
124 Some tabletop dancing venues use their own ‘tipping money’ which is purchased by customers and cashed in by workers at the end of a shift. Workers are usually only paid 90% of the face value of tipping money, meaning that venue managers in effect are taking 10% of workers’ earnings.
personal dances are performed in theme costume, pay 10% of the fee to managers.\textsuperscript{125}

Women who are working 'straight shifts' in peep shows are paid directly by customers, who purchase a tipping card for $2 in exchange for a 30 second dance. Half of this is paid to management. Women working 'peep shifts' do not interact with customers and are not paid directly by them. Customers insert $2 into a slot in exchange for watching a worker perform through a window. This money is collected by management and half is paid to workers.\textsuperscript{126}

These payment arrangements provide considerable support for the characterisation of sex workers as independent contractors. This is so for two main reasons. First, as Wilcox, Burchett and Ryan JJ observed in \textit{Troubleshooters} "the element of consideration which is essential to a contract of employment is the promise by the presumptive employer to pay for service as and when the service is rendered."\textsuperscript{127} The reservation agreement supplied by one Melbourne brothel contains no reference to payments for service made by the proprietor to the worker\textsuperscript{128} and no worker interviewed as part of this study stated that they either expected or received payment from venue managers. The decision of Ritter JR in \textit{Phillipa v Carmel} should however be noted on this point.\textsuperscript{129}

Although Ritter JR stated that the non-payment of wages by the brothel manager was a "weighty factor" that militated against the existence of an employment contract, he went on to find that the nature and extent of control exerted over the sex worker was sufficient

\textsuperscript{125} Interview with K, ex tabletop dancer and brothel worker (Melbourne, 4 May 2000); dancer guidelines, Prostitution Control Act Ministerial Advisory Committee, \textit{Final Report} (1997) appendix 3.

\textsuperscript{126} Personal knowledge of the author obtained through her employment as a Policy Officer with Consumer and Business Affairs Victoria.

\textsuperscript{127} \textit{Building Workers' Industrial Union of Australia v Odco Pty Ltd} (1991) 99 ALR 735, 743.

\textsuperscript{128} Copy of reservation agreement supplied by R, brothel manager (copy on file with author).

\textsuperscript{129} \textit{Phillipa v Carmel} [1996] IRCA 96/433 (Unreported, Industrial Relations Court, Western Australia, Ritter JA, 10 September 1996) <http://www.austlii.edu.au>Carmel> at 2 February 1998 (Copy on file with author) [13].
to prove a relationship of employment. It is also noteworthy that this payment structure appears to have been adopted by brothel managers to avoid the appearance of an employer/employee relationship. In some situations, courts have indicated a willingness to disregard matters which are designed to avoid the employer's obligations to employees.

The second aspect of payment arrangements militating against a finding of an employment relationship is that payments related to the performance of a set task, as occurs in the legal sex industry, are usually considered to be consistent with an independent contracting arrangement. In Stevens v Brodribb Sawmilling, Mason J found that the fact that workers received payment in amounts determined by reference to the volume of timber delivered and not as a fixed salary or wage was consistent with an independent contract. Courts have, however, found that remuneration by time rates or for the performance of a specific task can constitute wages. As previously indicated, women workers in the legal sex industry are paid to provide a specific service in an agreed period of time. This form of remuneration does not, in itself, preclude an employer/employee relationship.

130 Ibid.
131 Interview with J, STD adviser (Melbourne, 29 July 1999).
133 Stevens v Brodribb Sawmilling (1988) 160 CLR 16, 25 (Mason J). See also Vabu v Commissioner of Taxation (1996) 33 ATR 537, 539; Bruce v Rimwade Pty Ltd (1996) 40 AILR ¶3-443, where non payment of wages was considered to be an important indicator of an independent contract.
136 Although workers in brothels and escort agencies are booked for a specific period of time and may be fined for exceeding this time by more than fifteen minutes, there is also an expectation that a particular service will be provided during this time – Interview with J, STD adviser (Melbourne, 29 July 2000); Interview with L2, private worker (Melbourne, 29 March 2000); Interview with R, brothel manager (Melbourne, 4 March 2000).
Leave and Holidays

Workers in legal brothels, escort agencies, tabletop dancing venues and peep shows in Victoria do not have access to paid or unpaid leave, including recreation leave, sick leave, carer’s leave, or parental leave.\textsuperscript{137} If workers are unavailable for a shift they will forgo receiving any income for that shift. The common law approach to the lack of leave and holidays is to characterise it as consistent with an independent contracting arrangement, with more recent judgements placing particular reliance on the lack of provision of leave and holiday entitlements.\textsuperscript{138} The absence of paid leave was specifically identified by Ritter JR in \textit{Phillipa v Carmel} as a factor inconsistent with an employment relationship between a brothel operator and sex worker.\textsuperscript{139}

Delegation

The extent to which workers in the legal sex industry can delegate their duties is unclear. Dancer guidelines used in the tabletop dancing industry do not address the issue of delegation. However, the reservation agreement used in one legal brothel states that the proprietor will not exercise any control over service providers nominating any other

\textsuperscript{137} Interview with S, brothel worker (Melbourne, 27 March 2000); interview with M, union organiser (Melbourne, 27 August 1999); interview with A, private worker (Melbourne, 29 March 2000); interview with G, brothel worker (Melbourne, 23 August 1999); interview with K, ex tabletop dancer and brothel worker, (Melbourne, 11 May 2000); personal knowledge of the author obtained through her employment as a Policy Officer with Consumer and Business Affairs Victoria; Danielle Talbot, ‘Sex Workers May Get Award Cover’ \textit{The Age}, Saturday 23 December 1995, 3.

\textsuperscript{138} Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16, 25; Vabu v Commissioner of Taxation (1996) 33 ATR 537, 539; Commissioner of Payroll Tax v Mary Kay Cosmetics Pty Ltd [1982] VR 871; Building Workers Industrial Union & Ors v Odco Pty Ltd (1991) 99 ALR 735, 755; Bruce v Rimwade Pty Ltd (1996) 40 AILR ¶3-443; Vabu v Commissioner of Taxation (1996) 33 ATR 537. Note however that Cicchini IM of the Western Australian Industrial Magistrates Court found that failure to make provision for holiday pay was not determinative of the question of whether a worker was an employee or engaged in another form of work relationship – WA Builders’ Labourers, Painters & Plasterers Union v Pedini & Anor (Unreported, Industrial Magistrates’ Court of Western Australia, Cicchini IM, 24 September 1999); Bibic v First Interstate Security Pty Ltd (unreported, Australian Industrial Relations Commission, 135/00, Melbourne, 10 February 2000).

\textsuperscript{139} \textit{Phillipa v Carmel} [1996] IRCA 96/433 (Unreported, Industrial Relations Court, Western Australia, Ritter JA, 10 September 1996) \texttt{<http://www.austlii.edu.au>\textendash Carmel} at 2 February 1998 (copy on file with author) [13].
service provider to take their place during a reserved shift. This appears to permit sex workers to delegate their work to another sex worker. The extent to which workers are able to delegate their shifts to other workers in practice depends upon the attitude of individual venue managers. It appears that there is more limited opportunity for workers to delegate a booking that has been made with a regular client, as the client has an expectation that a particular worker will be providing them with a sexual service. The ability of workers to delegate duties to another worker has been described as “almost conclusive against the contract being a contract of service” and a clause permitting delegation is therefore a strong indicator of an independent contract rather than a contract of employment. The ability to delegate work is not of itself necessarily destructive of an employment relationship. The Privy Council in *Narich Pty Ltd v Commissioner of Payroll Tax (NSW)* found that an employment relationship existed between lecturers and a Weight Watchers business, despite the presence of a contractual clause permitting substitution, albeit only in situations of inability or temporary disqualification from teaching duties.

Exclusivity

Contracts used in the tabletop dancing industry frequently contain a clause stipulating that workers are prevented from performing at any other tabletop dancing venue for the

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140 Reservation agreement provided by R, brothel manager (copy on file with author).
141 Interview with S, brothel worker (Melbourne, 27 March 2000).
142 Interview with L2, private worker (Melbourne, 29 March 2000).
143 *Australian Mutual Provident Society v Allan and Chaplin* (1978) 18 ALR 385, 391.
144 See for example *Ready Mixed Concrete (South East) Ltd v Minister for Pensions and National Insurance* [1968] 2 QB 497; *Queensland Stations Pty Ltd v Federal Commissioner of Taxation* (1945) 70 CLR 539; *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (1996) 96 ATC 4,767, 4,773; *Bibic v First Interstate Security Pty Ltd* (unreported, Australian Industrial Relations Commission, 135/00, Melbourne, 10 February 2000).
145 (1983) 2 NSWLR 597.
duration of the contract. Breach of this clause results in termination of the working relationship.\textsuperscript{146} A worker explained "they want to market you as their girl."\textsuperscript{147} Exclusivity of service does not appear to be a feature of the brothel industry to the same degree.\textsuperscript{148} The preferential reservation agreement used in one Melbourne brothel states that the worker is not prevented from entering into other service agreements to enable her to carry on business at other premises.\textsuperscript{149} It is not known whether escort workers and women working in peep shows are informed that they are required to work exclusively for one venue. The inclusion of an express contractual term that restrains women from working in other tabletop dancing venues for the duration of the contract supports their categorisation as employees.\textsuperscript{150}

\textbf{Express Intention of the Parties}

Many women working in legal brothels and in live sexually explicit entertainment venues that provide tabletop dancing are requested to sign written contracts that contain a clause stating that they are independent contractors, not employees.\textsuperscript{151} Workers also state that it is verbally impressed upon them by venue managers that they are self-employed.\textsuperscript{152} It is less clear whether proprietors of escort agencies and peep shows specifically inform workers, either orally or in writing, that they are not employees of the

\begin{flushleft}
\textsuperscript{146} Interview with K, ex tabletop dancer and brothel worker (Melbourne, 4 May 2000).
\textsuperscript{147} Ibid.
\textsuperscript{148} A number of workers interviewed as part of this study were working or had worked concurrently in more than one brothel.
\textsuperscript{149} Preferential reservation agreement provided by R, brothel manager (copy on file with author).
\textsuperscript{150} \textit{Pratt v Australian Broadcasting Commission} (1985) 10 FCR 297; \textit{Bibic v First Interstate Security Pty Ltd} (unreported, Australian Industrial Relations Commission, 135/00, Melbourne, 10 February 2000).
\textsuperscript{151} Interview with S, brothel worker (Melbourne, 27 March 2000); interview with M, union organiser (Melbourne, 4 March 2000); interview with K, ex tabletop dancer and brothel worker (Melbourne, 4 May 2000). Preferential reservation agreement provided by R, brothel manager (copy on file with author).
\textsuperscript{152} Interview with S, Ibid; interview with M, Ibid; interview with K, Ibid.
\end{flushleft}
venue. One escort worker states that, after attending an initial interview, she was told that she would be placed on the agency’s books and that it was up to her to make the next contact to say that she was available to work. It appears that some workers in peep shows are asked to sign an employment declaration form, suggesting that venue managers view their relationship as one of employment.

The law relating to express contractual clauses characterising the working relationship was stated by Lord Denning MR in Massey v Crown Life Insurance:

[If the true relationship of the parties is that of master and servant under a contract of service, the parties cannot alter the truth of that relationship by putting a different label upon it... On the other hand, if their relationship is ambiguous and capable of being one or the other [ie. employee or another form of work relationship], then the parties can remove that ambiguity, by the very agreement itself which they make with one another.]

Express clauses are therefore relevant in two situations: as evidence in assessing factors such as control or whether the worker is in business on his or her own account, and where there is no clear classification of the relationship. In the latter case, the express intention of the parties can be determinative. Although the contracting parties are free to characterise the work relationship as they see fit, that characterisation will not necessarily be conclusive. Even where the parties enter a contract in good faith and

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153 Interview with A, private worker (Melbourne, 29 March 2000).
154 Personal knowledge of the author obtained through her employment as a Policy Officer with Consumer and Business Affairs Victoria.
155 [1978] 1 WLR 676.
157 Ibid. See also Ferguson v John Dawson and Partners (Contractors) Ltd [1976] 1 WLR 1213.
159 Cam & Sons v Sargent (1940) 14 ALJR 162; Massey v Crown Life Insurance Co [1978] ICR 590; Re Porter (1989)
with a desire that their characterisation of the relationship should be effective, the combined effect of the work relationship as a whole is more significant. As Byrne J stated in Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic) “it is a matter which must yield in its significance to the nature of the whole relationship.” In some situations, Australian courts have disregarded an express contractual term stating that a worker was an independent contractor on the basis that “[w]hat... [the worker] ...was required to do and how he was required to do it left no room for the conclusion that he was an independent contractor.”

Given the consistently high level of control exercised over workers in legal brothels and tabletop dancing venues and, to a lesser degree, over escort workers and women working in peep shows, an express clause stating that workers are independent contractors should not preclude a finding that sex workers are employees. North American case law concerned with work arrangements between tabletop dancers and venue managers takes this approach. As stated by District Judge Bucklew in Harrell v Diamond A Entertainment Inc “the fact that a licensing agreement created by Diamond A contains a boilerplate independent contractor provision does little to evidence the Plaintiff’s [worker’s] intent to be treated as an independent contractor”.

34 IR 179. In some cases it has been held that a declaration that a person is an independent contractor ought to be wholly disregarded when the remainder of the contractual terms evidence an employment relationship — Ferguson v John Dawson and Partners (Contractors) Ltd [1976] 1 WLR 1213, 1222 (Megaw J).


162 (1996) 96 ATC 4767, 4,773 (Byrne J).

163 Transport Workers Union (Aust) v Glynburn (1990) 34 IR 138, 144 (Lee J).

Evidence suggests that proprietors of some brothels have deliberately adopted practices to avoid the appearance of having an employment relationship with workers.164 As one brothel manager explained, in her brothel the relationship used to be one of employer/employee, but as workers started to leave in protest against tax being deducted from their earnings “we didn’t have much choice really but to adopt the situation where we weren’t employers any more. It was a lot of headaches, working out how to draw up a contract in the first place...and I still don’t know if it’s the right thing to do.”165 The inclusion of an express contractual term stating that sex workers are self employed is likely to be referable to this deliberate policy of classifying sex workers as independent contractors. As indicated above, courts have demonstrated a willingness to look behind the label used to describe a working relationship to identify its true nature. In the words of Gray J “[t]he parties cannot create something that has every feature of a rooster but call it a duck and insist that everyone else recognise it as a duck.”166 Evidence that a putative employer has deliberately attempted to avoid his or her obligations to workers — in effect, that the clause is a “sham” — will have bearing on the weight accorded to it.167 In *Clarke v Custom Security Services Pty Ltd*168 Linkenbach JR found that a contract that contained an express statement that a worker was not an employee was designed to avoid the employer’s obligations. The express contractual term was therefore disregarded.169

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164 Interview with M, union organiser (Melbourne, 27 August 1999); Interview with R, brothel manager (Melbourne, 4 March 2000).
165 Interview with R, ibid.
166 Re Porter (1989) 34 IHR 179, 194 (Gray J).
169 See also *Shipway v Norse Pty Ltd* (1999) 46 AILR ¶5-231, where interlocutory relief was denied to an employer because he had attempted to misrepresent and disguise the true nature of the work relationship between the
Economic Reality

As discussed earlier in the chapter, the 'economic reality' approach allows examination of "the level of economic dependence of one party upon another, and the manner in which that economic dependence may be exploited."¹⁷⁰ This framework contemplates consideration of any factor that sheds light on the economic relationship between the parties. No exhaustive list has been compiled of considerations that are relevant in exploring this relationship, but factors that may be of importance include the degree of financial risk assumed by the worker, his or her responsibility for investment and management, and the opportunity for profit in performance of tasks.¹⁷¹

This last factor is of particular significance for women working in the legal sex industry, whose opportunity for profit is significantly constrained by brothel managers and venue proprietors. One of the primary ways in which this occurs is through managerial control of shift allocation and rostering. Workers in the sex industry earn their remuneration through client bookings and their opportunity to make a profit, or indeed to earn any payment at all, is dependent upon them being rostered for shifts. Workers in brothels, escort agencies, tabletop dancing venues and peep shows are required to nominate the shifts they wish to work. These shifts are usually of eight to ten hours duration although twelve hour shifts are not unknown.¹⁷² Shifts vary in terms of their profitability: client demand increases in the late afternoon and evening, with Friday and Saturday night

¹⁷⁰ Re Porter (1989) 34 IR 179, 185 (Gray J).
¹⁷² Interview with R, brothel manager (Melbourne, 4 March 2000); interview with A, private worker (Melbourne, 29 March 2000); interview with M, union organiser (Melbourne, 27 August 1999); interview with S, brothel worker (Melbourne, 27 March 2000); interview with G, brothel worker, (Melbourne, 28 August 1999); interview with K, ex tabletop dancer and brothel worker (Melbourne, 11 May 2000).
shifts presenting the best opportunity for workers to provide services to a large number of clients.

Nominally, a worker's ability to work on a particular day and time is only constrained by the availability of the shift. In fact, workers in all parts of the sex industry appear limited in their ability to choose when they work. As a union organiser states, the preparation of the roster and the allocation of shifts is:

purely controlled by management. All this crap about them being sub-contractors, it's a joke. They [management] decide when you work. And management has this funny thing about saying 'no, the girls say when they want to work'. But management has the final say.

Evidence suggests that some brothel proprietors impose conditions on workers, such as requiring them to work a minimum number of shifts per week. The house rules for one Melbourne brothel state that workers will be restricted to weekend shifts only if they reserve or work two shifts or less per week. Shifts may also be unavailable to workers who are considered by managers to be unreliable, disruptive, or too selective in accepting client bookings. A worker with experience in the tabletop dancing industry describes the rostering process as "a real punishment mode." In the case of escort workers, workers who have refused to travel long distances to service a client or who

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173 Operational brochure provided by R, brothel manager (copy on file with author).
174 Interview with M, union organiser (Melbourne, 27 August 1999).
175 Ibid. This can vary from two to six shifts a week.
176 Rules provided by R, brothel manager (copy on file with author). As previously indicated, work rules may be expressly or impliedly incorporated as terms of a contract of employment.
177 Interview with G, brothel worker (Melbourne, 23 August 1999); Interview with M, union organiser (Melbourne, 27 August 1999); Interview with J, STD adviser (Melbourne, 29 July 1999); Interview with L1, private worker (Melbourne, 16 August 1999).
178 Interview with K, ex tabletop dancer and brothel worker (Melbourne, 4 May 2000).
have expressed a preference for working in a particular geographic area may not be recommended to clients. As one worker observed “if you turned it down it would be remembered ...you were forced into doing the job so you could keep your income moving along." According to Gray J, the practice of withholding work as reprisal for failure to attend and perform services when desired by management is evidence of economic dependence, despite workers possessing the notional freedom under contract to attend for work “on particular days at their own choice.”

The economic dependence of tabletop dancers on venue managers can be particularly observed in the practice of ‘over-rostering’. This occurs where managers roster too many workers relative to the number of clients. The advantage of this practice for management is that it increases the variety for customers. According to one worker, the proprietors of tabletop dancing venues will roster 50 workers to service 25 clients. As discussed earlier, venue managers also charge tabletop dancers a shift fee. Venue managers therefore have added incentive to ‘over-roster’, as it increases the amount of money received from workers in shift fees. The disproportionate ratio of clients to workers reduces the likelihood of each individual worker being engaged to perform podium, personal or fantasy dances. The effect on workers' opportunity to earn income is therefore highly significant, as the only income that tabletop dancers receive is from customers who pay them to perform for them. Workers who have been unable

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179 Interview with A, private worker (Melbourne, 29 March 2000).
180 Re Porter (1989) 34 IR 179, 184.
181 Interview with K, ex tabletop dancer and brothel worker (Melbourne, 4 May 2000); Wendy Chapkis, 'Power and Control in the Commercial Sex Trade' in Ronald Weltzer, Sex for Sale: Prostitution, Pornography and the Sex Industry (2000) 195.
182 Interview with K, ex tabletop dancer and brothel worker (Melbourne, 4 May 2000).
184 Chapkis, above n 181.
to attract client bookings will therefore be in debt to the venue at the end of a shift, having effectively lost money through working. 185

The application of the 'economic realities' test to North American women working in the tabletop dancing industry has consistently resulted in findings that workers are employees. 186 For example, Reavley CJ described such dancers as "far more closely akin to wage earners toiling for a living than to independent entrepreneurs seeking a return on their risky capital investment." 187 In particular, North American courts have found that dancers' opportunity for profit and loss has more to do with management's responsibility for advertising, price, location, business hours, maintenance of facilities and aesthetic than with individual dancers' initiative, 'hustle' and costume. 188

CONCLUSION

The legal sex industry in Victoria takes in a diverse range of services provided in a number of different working environments. Work arrangements between proprietors of premises that offer sexual services to clients and the workers who provide those services vary between brothels, escort agencies, tabletop dancing venues and peep shows, and also change from premises to premises. Despite this degree of variation, workers in the legal sex industry have been subject to a largely unchallenged classification by managers and proprietors as independent contractors. The common law framework used to distinguish between employment and non-employment

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185 Interview with K, ex tabletop dancer and brothel worker (Melbourne, 4 May 2000).
186 See in particular Jeffcoat v State Department of Labor 732 P.2d 1073 (Alaska 1987); Harrell v Diamond A Entertainment Inc 992 F.Supp 1343 (M.D.Fla. 1997); Reich v Circle C Investments 998 F.2d 324 (5th Cir. 1993).
187 Reich v Circle C. Investments Inc, ibid.
188 Harrell v Diamond A Entertainment Inc 992 F.Supp 1343, 1350–1 (M.D.Fla. 1997); Reich v Pri De Corp 890 F.Supp. 586, 598 (N.D.Tex. 1995); Reich v Circle C Investments 998 F.2d 324, 328 (5th Cir. 1993).
relationships does not necessarily support this characterisation of work arrangements in the sex industry. Work relationships between venue managers and women workers evidence the exercise of a high level of control over many significant aspects of work performed by sex workers. Although control is only one factor to be considered when assessing work relationships, the level of control exercised is such that it would be extremely difficult to displace. Some managers have attempted to avoid their responsibilities as employers through the adoption of work practices deliberately designed to give the appearance of an independent contractor relationship. However, the use of such mechanisms should not be an impediment to finding that many, and perhaps most sex workers in the legal sex industry in Victoria are more accurately categorised as employees rather than independent contractors at common law. A finding that sex workers are employees is also desirable from a social policy perspective, as it obliges managers and proprietors to provide their workers with basic entitlements and facilitates the access of sex workers to protective legal mechanisms. The specific nature of these mechanisms and their potential and actual application to women working in the legal sex industry is discussed in the next two chapters.
CHAPTER FOUR

THE APPLICATION OF CONTRACTS OF EMPLOYMENT AND THE WORKPLACE RELATIONS ACT 1996 (CWH) TO WOMEN WORKING IN THE VICTORIAN LEGAL SEX INDUSTRY

INTRODUCTION

The next two chapters consider how protective legal mechanisms can be used by women working in the legal sex industry to improve their working conditions. This chapter discusses the application of contracts of employment and protective legal mechanisms contained in the Workplace Relations Act 1996 (Cwth) (WRA) to this group of workers. This chapter considers awards, agreements and minimum wage orders under the WRA. It also discusses other rights such as protections against unfair or unlawful termination of employment and provisions to review unfair contracts. The next chapter considers occupational health and safety law and anti-discrimination statutes and discusses how they could improve the working lives of women in the legal sex industry in Victoria.

The availability of protective legal mechanisms often depends upon whether workers are employees or engaged in another form of work relationship. The ability of workers to use protective mechanisms may also be affected by the type of employment relationship they have with their employer. Chapter three concluded that many sex workers could be found to be in an employment relationship with venue proprietors and managers. However, the chapter also cautioned that it is impossible to generalise about work relationships in the legal sex industry in Victoria. It is therefore possible that some sex workers might not be in an employment relationship with the proprietor of the venue in
which they work. Accordingly, although the next two chapters focus on the availability of protective legal mechanisms to sex workers engaged in an employment relationship, they also consider how protective legal mechanisms might be used by women working as independent contractors in the legal sex industry in Victoria to improve their industrial conditions.

**CONTRACT OF EMPLOYMENT**

The terms of an employment contract are comprised of what is expressly agreed between the parties, orally, in writing, or both.\(^1\) Express terms embody "the norms upon which employer and employee expressly agree to base their relationship" and "represent the conception of a contract as a freely negotiated bargain."\(^2\) Work rules, procedural manuals and terms of awards, registered and unregistered agreements can also be incorporated into contracts by agreement of the parties, thereby becoming express terms.\(^3\)

The contract of employment also contains terms implied in fact and by law. Courts will imply terms in fact based on an imputed intention by both parties to include the term.\(^4\) A number of conditions must be satisfied before a court will imply such a term in a

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\(^4\) Ibid.
contract. These were established in the case of *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*.\(^5\)

According to the Privy Council, any proposed term must be:

- reasonable and equitable;

- necessary to give business efficacy to the contract, so that no term will implied if the contract is effective without it;

- so obvious that it ‘goes without saying’;

- capable of clear expression; and

- must not contradict any express terms of the contract.\(^6\)

It is not sufficient that it be reasonable to imply the term – its implication must be necessary to prevent the contract from becoming unworkable.\(^7\) Creighton and Stewart state that so long as a term must be necessary and not just reasonable, “neither employers nor employees will find it easy to mount a persuasive case for the incorporation of any given term into a contract of employment.”\(^8\)

Customs and work practices that have developed over time in a particular workplace or industry may become the source of an implied term, provided that the court is satisfied

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\(^5\) (1978) 52 ALJR 20.

\(^6\) Ibid 26; Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337.

\(^7\) Codelfa Construction Pty Ltd v State Rail Authority of NSW (1982) 149 CLR 337, 346. Note Hawkins v Clayton (1988) 154 CLR 539, 573 where Deane J attempted to formulate a new test for contracts which are purely oral or contain some oral terms. However, this test still incorporates the requirement that the term be necessary for the effective operation of the contract. Creighton and Stewart state that it is debatable whether this test is any easier to satisfy (above n 1, 222).

\(^8\) Creighton and Stewart, above n 1, 222. See Byrne v Australian Airlines Ltd (1995) 185 CLR 410; Brackenridge v
that the term is "so notorious that everybody in the trade enters into a contract with that usage as an implied term". This can be ascertained from the conduct of the parties at the time the contract was entered into and their subsequent performance of the contract. Thus, the fact that one or both of the parties had no knowledge of the practice at the time the contract was made is not an impediment to its subsequent inclusion as an implied term. The implication of a contractual term into an employment contract between a sex worker and a venue proprietor, based on standard industry practice, could be of assistance to workers. One example relates to 'fantasy money' — money that workers have earned for acting out a fantasy at a client's request. It is well established that women working in the sex industry keep all their 'fantasy money' and do not give a percentage to the venue manager. Sex workers' right to keep all of their fantasy money could potentially be implied as a contractual term and enforced in law.

Courts also imply terms by law into contracts of employment. These are potentially an important source of protection for women working in the legal sex industry in Victoria. For this reason terms implied by law are explored in the following discussion of contract of employment. Although the range of issues that can potentially be governed by the

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11 Interview with R, brothel manager (Melbourne, 4 March 2000); interview with K, ex tabletop dancer and brothel worker (Melbourne, 11 May 2000); interview with G, brothel worker (Melbourne, 23 August 1999); dancer guidelines, Prostitution Control Act Ministerial Advisory Committee, Final Report (1997) appendix 3.

12 Many standard industry practices that could potentially be implied as contractual terms would not serve to protect women workers. These could requiring workers in brothels and escort agencies to provide a 'standard service' to a client comprised of a contact massage, oral sex and penetrative sex. Workers who failed to provide such a service would be in breach of a contractual term. However, it should be noted that an express contractual term stating that a venue has no control over services that are provided by workers would prevail over an implied term. House rules, such as those which impose financial penalties on workers for late attendance, may also be implied as contractual terms — see Carus v Eastwood (1875) 32 LT 855; Mair v Bartholomew (1991) 104 ALR 537, as discussed in Creighton and Stewart, above n 1, 223.

13 Ibid 58.
implication of terms into the employment contract is only limited by the range of
questions that can arise between employer and employee, there are generally accepted
duties that venue proprietors owe to women workers employed by them. These include
an obligation to pay wages, a duty to provide work and a duty of care for the health and
safety of employees.\textsuperscript{14} The obligation to maintain mutual trust and confidence is less
well established in Australia but has received some judicial support.\textsuperscript{15} The following
material considers the implied duty to pay wages, to provide work and to maintain trust
and confidence. As health and safety issues for women working in the legal sex industry
are largely regulated by statute, this issue will be addressed in the next chapter in the
context of the \textit{Occupational Health and Safety Act 1985} (Vic). This part of the chapter
also considers the implied duty of obedience and cooperation, although it is a duty owed
by an employee to an employer. This implied term is significant for women working in
the legal sex industry in Victoria because it imposes limits on venue managers’ and
proprietors’ ability to command workers to obey their directions.

\textbf{Implied Duty to Pay Wages}

The work/wages bargain has been described as “the foundation of the contract of
employment.”\textsuperscript{16} The work/wages bargain is an expression of ‘mutuality of obligation’
between an employer and employee, where remuneration is provided for work that is
performed. As discussed in the previous chapter, women working in the legal sex
industry in Victoria, with the possible exception of some women working in peep shows,

\textsuperscript{14} Wyong Shire Council \textit{v} Shirt (1980) 146 CLR 40; Bankstown Foundry Pty Ltd \textit{v} Braistina (1986) 160 CLR 301.
72 IR 186; Watson \textit{v} NSW BHP Steel Pty Ltd (1998) EOC \sfrac{192-959}{78,392}. See also discussion in Creighton and
Stewart, above n 1, 257.
\textsuperscript{16} Wheelwright, above n 3, 59.
do not appear to receive any remuneration from venue managers for the work that they perform. They are paid directly by clients for the services they provide. If this fact is not determinative in characterising workers as independent contractors (and it is contended in the previous chapter that there are strong public policy grounds why women working in the legal sex industry should be found to be employees), proprietors would have an obligation implied in law to pay sex workers for services provided. Written contracts such as preferential reservation agreements and other materials such as dancer guidelines do not usually specify the rate of wages or salary to be paid to workers. In the absence of an award or agreement establishing rates of pay for sex workers, a worker could claim payment of a 'reasonable' amount according to market rates.

The general position is that an employer is not liable to pay wages unless they have been earned by service. It is conceivable that, under the expression of the 'mutuality of obligation', proprietors could assert that workers who are not booked by a client during their rostered shift to provide a sexual service or sexually explicit performance have not provided a service. As such, their entitlement to wages would be denied. An alternative view of 'mutuality of obligation' asserts that an employer is engaging a worker's availability to perform duties. The consideration is provided by a worker being willing and able to provide a service if called upon, regardless of whether any actual service is provided. A worker who indicates her willingness to provide a service by rostering

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18 Fagan v Public Trustee (1934) 34 SR (NSW) 189; Way v Latilla [1937] 3 All ER 759 as cited in Creighton and Stewart, above n 1, 236.
herself on for a shift and, in the case of brothel workers, tabletop dancers and workers in peep shows, attends at the premises to provide a service, has therefore assumed a sufficient 'burden' to warrant payment. This type of fact situation was discussed by Dixon J in *Automatic Firesprinklers v Watson*, who stated that a worker's availability for duty may constitute active performance in some circumstances.21 Rogers J in *Csomore v Public Service Board (NSW)* contemplated a broader application of this principle in stating "payment of wages is conditional upon performance by the employee of the full range of work assigned or, at least, a readiness and willingness to do so."22 On this view, sex workers who notify venue managers that they are willing and available to work, whether by orally notifying the venue manager or by some other method such as nominating a preferred shift on a roster, have assumed an obligation deserving payment of wages.

Women workers in the legal sex industry often also provide services to their employers that could warrant the payment of wages, in addition to provision of sexual services to clients. In the case of brothel workers, these services include participation in client introductions and cleaning tasks such as vacuuming and washing, folding and stacking towels.23 Introduction services in particular are seen as essential to the continued operation of legal brothels. As a union official commented "...if you weren't there to meet the client the place couldn't open its doors."24 Women working in tabletop dancing venues also provide services to management in addition to paid dances, such as

21 (1946) 72 CLR 435, 466. See also *Csomore v Public Service Board* (1987) 10 NSWLR 587.
22 *Csomore v Public Service Board* Ibid 598.
23 Interview with L1, private worker (Melbourne, 16 August 1999); interview with M, union organiser (Melbourne, 27 August 1999).
24 Interview with M, Ibid.
participation in ‘mega strips’ and socialising with customers. Businesses are therefore receiving value from having sex workers present, whether or not they provide sexual services to clients. The provision of these services could constitute ‘active performance of duty’ and venue managers would be obliged, pursuant to a term implied into the employment contract, to pay workers at a market rate for providing these services.

Implied Duty to Provide Work

A term could also be implied into an employment contract between a venue proprietor and a sex worker that obliges him or her to provide work for the worker to undertake. This would be of considerable assistance to sex workers. There is no general requirement at common law for an employer to provide work as long as a salary is paid. However, where payment is directly linked with performance, as it is in the case of women in the sex work industry, an employer has an obligation to provide sufficient work to allow the worker to earn a wage. This is a manifestation of the principle that an employee must be given an opportunity to earn wages. In addition, where employees such as actors, entertainers and professional sportspeople can establish that a failure to provide work, or work of an agreed sort, will result in a loss of public exposure, courts have been prepared to imply terms requiring employers to provide sufficient suitable work. In Herbert Clayton v Oliver, Lord Buckmaster found that the success of an actor

25 Wheelwright, above n 3, 66. See also Turner v Sawdon & Co [1901] 2 KB 653; Collier v Sunday Refereeing Publishing Co Ltd [1940] 2 KB 647 as cited in Creighton and Stewart, above n 1, 239.
26 Devondale v Rosser & Sons (1906) 2 KB 728; Bauman v Hulton Press Ltd (1952) 2 All ER 1121; Langston v Amalgamated Union of Engineering Workers [1974] ICR 510 as cited in ibid.
27 Creighton and Stewart, ibid.
28 White v Australian and New Zealand Theatres Ltd (1943) 67 CLR 266; Curro v Beyond Productions Pty Ltd (1993) 30 NSWLR 337; Penrith District Rugby League Football Club Limited v Bradley Scott Fittler; Penrith District Rugby League Football Pty Ltd v Matthew Charles Sing (Unreported, Supreme Court of New South Wales, Santow J, 8 February 1996) <http://www.austlii.edu.au/cgi-bin/disp.pl/cases/nsw/supertme_cl/unrep223.html> at 26 September 2000 (Copy on file with author).
"entirely depends upon pleasing the public, and upon being constantly before the public", obliging the employer to give the actor the part of a specific character in a play.  

It could be argued on behalf of women working in the legal sex industry that public exposure is essential to their ability to obtain client bookings and to develop a regular client base. The ability to earn additional remuneration, such as through endorsements, was identified by Santow J as a relevant factor in implying a contractual term obliging an employer to provide an opportunity for employees to play football. This is an issue in the tabletop dancing industry in particular, where workers are dependent upon exposure to patrons in order to attain the status of featured performers and to obtain other work such as posing for men's magazines. The fact that work performed by women in the legal sex industry involves an element of performance is likely to be of assistance to workers in establishing an entitlement to be provided with work.

Implied duty to Maintain Trust and Confidence

Creighton and Stewart state that over the past 20 years, English courts have come to recognise a duty on the part of the employer not to damage or destroy trust and confidence between the parties, thereby undermining the employment relationship. They observe that although it has taken some time for Australian courts to address the issue, some more recent judgements indicate that the implied duty of trust and

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29 (1930) AC 209, 216 (Buckmaster LJ).
31 Some women who work in the sex industry attain particular status which enables them to command appearance fees at venues and to earn additional income through nude pictorials - Wendy Chapkis, 'Power and Control in the Commercial Sex Trade' in Ronald Weitzer, Sex for Sale: Prostitution, Pornography and the Sex Industry (2000) 195.
confidence is recognised in Australian law.33 ‘Trust and confidence’ has been described as “concepts of degree...[w]hat is important in an employment relationship is that there be sufficient trust to make the relationship viable and productive.”34 Actions of an employer that have been found to constitute a breach of the implied duty to maintain trust and confidence include failing to investigate a reasonable and bona fide grievance affecting an employee’s safety,35 failing to respond to allegations of sexual harassment,36 the method used to terminate a worker’s employment,37 and unreasonably increasing an employee’s billing targets to a level she was unlikely to be able to meet.38

The implied duty to maintain trust and confidence could be used to provide protection to women working in the legal sex industry. For example, some workers interviewed as part of this study state that venue managers failed to respond to workers’ complaints about inadequate alarms and security systems in brothels,39 failed to adequately address the concerns regarding the potential for workers to slip when getting in and out of spas,40 or to address the issue of workers in tabletop dancing venues being required to dance on slippery surfaces in high heels.41 Failure by an employer to investigate a grievance relating to sex workers’ health or safety could potentially be destructive of the relationship of trust and confidence, constituting an actionable breach of a contractual term. Similarly, the venue manager who reputedly ‘blackbanned’ a worker because she

34 Perkins v Grace Worldwide (Aust) Pty Ltd ibid 191 (Moore J).
36 Western Excavating (E.C.C) Ltd v Sharp [1978] ICR 221.
37 Burazin v Blacktown City Guardian Pty Ltd (1996) 142 ALR 144.
38 Linkstaff International Pty Ltd v Roberts (1996) 40 AILR ¶11-047.
39 Interview with S, brothel worker (Melbourne, 27 March 2000).
40 Interview with L2, private worker (Melbourne, 29 March 2000).
41 Interview with K, ex tabletop dancer and brothel worker (Melbourne, 11 May 2000).
made a WorkCover claim, if found to have arbitrarily singled the worker out for special
treatment, may also be in breach of an implied duty to maintain trust and confidence.\textsuperscript{42}

\textit{Malik v Bank of Credit and Commerce International SA}\textsuperscript{43} is authority for the proposition
that the behaviour of the employer does not have to be specifically directed at
employees to constitute a breach of the implied duty of mutual trust and confidence.\textsuperscript{44} In
this case, the employer's breach lay in running a dishonest or corrupt business which
prejudiced the career prospects of employees tainted by association with the business.\textsuperscript{45}
Sex workers who have difficulty obtaining employment as a result of being associated
with a venue where dishonest or corrupt activity took place could conceivably rely upon
\textit{Malik} to establish a breach of an implied term of mutual trust and confidence. Sasha’s,
a brothel in inner-city Melbourne, was ordered to be closed in November 1999 by the
Victorian Civil and Administrative Tribunal because a person with convictions for child
prostitution offences was involved in the management of the business. Women working
at Sasha’s before its closure may therefore be able to initiate action against their former
employer for breach an implied contractual term to maintain trust and confidence if they
experienced difficulty in obtaining alternative employment because of their association
with the brothel.\textsuperscript{46} This type of claim could also apply to women working as tabletop

\textsuperscript{42} Interview with L2, private worker (Melbourne, 29 March 2000). This would also seem to constitute a breach of the

\textsuperscript{43} [1998] AC 20.

\textsuperscript{44} For a discussion of this decision see Richard Naughton, ‘The Implied Obligation of Mutual Trust and Confidence: A
of Employment’, in Australian Centre for Industrial Relations Research and Training, \textit{Legal Developments Affecting

\textsuperscript{45} Creighton and Stewart, above n 1, 256.

dancers at a hotel used by the proprietor to unlawfully imprison women imported to work in brothels.\footnote{Mark Forbes, 'Pub boss pimp charges' \textit{The Sunday Age}, Melbourne, Sunday 9 May 1999, 1.}

As Naughton observes however, it might be quite difficult in practical terms to establish breach of an implied obligation of this type. Sex workers seeking to rely on breach of this implied duty would have to identify "extreme and deliberate" conduct on behalf of the employer.\footnote{Naughton, above n 44, 289.} This might involve the proprietor of a brothel or escort agency conducting an information campaign asserting that workers engage in unsafe sexual practices with customers.\footnote{Note that s 19(2)(a) of the \textit{Prostitution Control Regulations 1995 (Vic)} provides that licensees and approved managers must ensure that people acting as receptionists or telephone receptionists do not misrepresent the qualities of any prostitute. This regulation does not appear to prohibit the licensee or approved manager from so doing, provided that he or she was not acting in the capacity of a receptionist. It should also be noted that these examples are also relevant to the implied duty of obedience and cooperation owed by an employee to an employer.} In the case of workers in tabletop dancing venues, this might involve advising customers that workers are available to provide sexual services when engaged to perform a private dance. Conduct of this type could constitute "extreme and deliberate" behaviour, as it could endanger the physical health and wellbeing of workers and expose them to violence from clients who have a particular expectation of the types of services that they will provide. It might also prevent workers from obtaining employment at other venues because of the perception that workers engage in unsafe and possibly unlawful activity.

The implied duty of mutual trust and confidence is another potentially important protection for women employed in the legal sex industry in Victoria against behaviour by venue proprietors that might be destructive of that relationship. However, the behaviour of the employer would need to be manifestly dishonest or corrupt for an action to
succeed where his or her behaviour was not specifically directed at sex worker employees.

**Implied duty of Obedience and Cooperation**

Every employment contract contains a general implied duty on employees to obey the lawful and reasonable directions of their employer. Accordiingly, orders that would require sex workers to break the law or that expose them to personal danger are not lawful and no breach of the contract would be established by their refusal to obey such orders. An order that, if obeyed, would put the life of a sex worker at risk is clearly unlawful. According to one worker, some managers of escort agencies routinely accept bookings from clients who are listed as ‘ugly mugs’ (those who have previously assaulted sex workers). Directing a worker to attend a booking with a client who is known to be violent or in possession of a firearm would constitute an unlawful order and a worker who failed to attend the booking would not be in breach of her obligation of obedience and cooperation. Directing a worker to practice unsafe sex would also constitute an unlawful order. Orders that fall outside the scope of the employee’s contract are also not lawful. If an employee is engaged to perform work of a particular type, he or she is only obliged to comply with instructions that “properly appertain” to the character of that work.

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50 Creighton and Stewart, above n 1, 248. Note however McCarr’s analysis of the common law duty to obey lawful and reasonable orders, where he concludes that reasonableness is “inmaterial” at law — see C.J. McCarr, “The Employee’s Duty to Obey Unreasonable Orders” (1984) 58 Australian Law Journal 327, 332.

51 Ibid.

52 Ottoman Bank v Chakarian [1930] AC 277 as cited in Creighton and Stewart, above n 1, 248.

53 Interview with L2, private worker (Melbourne, 29 March 2000).

54 This would also constitute an offence under r 7(b) of the Health (Brothels) Regulations 1990 (Vic).

If a command relates to the subject matter of the employment and is lawful, the obligation to obey the command depends upon its reasonableness.\(^6\) As Dixon J observed, what is ‘reasonable’ is not determined in a vacuum. The nature of the employment, the established usages affecting it, the common practices that exist in the workplace and the general provisions of the instrument (such as an award) governing the relationship are relevant to the determination of what is reasonable.\(^7\) The inquiry is directed towards whether it is reasonable in the circumstances for the command to have been issued.\(^8\)

The issue of the lawfulness and reasonableness of orders is relevant to the question of whether sex workers can be ordered to perform cleaning duties. These issues overlap to some extent.\(^9\) Sex workers are commonly required to undertake a range of cleaning tasks at the beginning and end of each shift. This involves workers wiping shower tiles and glass, washing dishes, cleaning ashtrays, changing linen and replacing toiletries after a room has been used in a client booking.\(^10\) As discussed earlier, workers may also be required to undertake general cleaning duties such as folding towels and vacuuming.\(^11\) It is arguable that directing sex workers to engage in cleaning duties is not lawful because such work does not properly appertain to the character of their employment, which is to provide sexual services to clients. However, given that at least one recent decision on this issue appears to have considered industry pressures and

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\(^{7}\) R v Darling Island Stevedoring and Lighterage Co Ltd, ibid.

\(^{8}\) Creighton and Stewart, above n 1, 248.


\(^{10}\) House rules provided by R, brothel manager (copy on file with author).
other economic factors in the context of the lawfulness and reasonableness of directions to employees, it can be contended that this might be an unnecessarily rigid application of principle.\textsuperscript{62} It is also arguable that requiring sex workers to dispose of potentially hazardous waste, such as used condoms, while performing cleaning duties might expose them to risk, particularly if they are not provided with protective clothing or trained in appropriate waste disposal methods. However, it would need to be established that such activity would expose workers to “substantial danger outside the contemplation of the contract of service.”\textsuperscript{63}

As discussed in the previous chapter, employers exercise a significant degree of control over the costume and appearance of sex workers. This includes directing workers to wear particular clothing (lingerie, bikinis, evening wear)\textsuperscript{64} and to project a specific image, one that a worker describes as “an American look.”\textsuperscript{65} Workers in tabletop dancing venues are also directed as to how much clothing they are required to remove. Dancer guidelines in one venue state that dancers “MUST be naked” at the completion of a podium dance and dancers are also required to strip until naked during ‘mega-strips’\textsuperscript{66}.

\textit{Australian Telecommunications Commission v Hart} establishes that what an employee should wear to work comes within the duty to obey lawful and reasonable commands.\textsuperscript{67}

\begin{flushleft}
\textsuperscript{61} Interview with M, union organiser (Melbourne, 27 March 1999);
\textsuperscript{63} \textit{Bouzourou v Ottoman Bank} [1930] AC 271, 275. See also \textit{Miller v University of New South Wales} (2000) 96 IR 106, 112 for a discussion of the relationship between an express contractual term requiring an academic to undertake "duties consistent with his position" and the implied obligation to obey lawful and reasonable orders.
\textsuperscript{64} Interview with M, union organiser (Melbourne, 27 March 1999); interview with G, brothel worker (Melbourne, 23 August 1999); dancer guidelines, Prostitution Control Act Ministerial Advisory Committee, \textit{Final Report} (1997) appendix 3.
\textsuperscript{65} Interview with G, ibid.
\textsuperscript{67} (1982) 43 ALR 165. This issue also arises in relation to equal opportunity law – see \textit{Equal Opportunity Act 1995}
\end{flushleft}
In Hart it was found that the employee, who had infrequent contact with the general public through his work, failed to fulfil his duty by disobeying a direction to maintain a standard of dress acceptable in the community and in Telecom. Fox J stated that “a reasonable employer...can be allowed to decide what, upon reflection and mature consideration, could be offensive to the customers and the fellow employees.” As sex work involves workers presenting a sexualised image to clients, it may not be reasonable for workers to wear street clothing or leisure wear while working. However, it is reasonable to expect that workers should be given some latitude in determining the image they present, provided they are not causing offence to clients.

It appears that the impetus to impose strict controls over workers’ appearance may not emanate from clients. In the absence of offence being caused to clients or fellow workers, it is arguable that it is unreasonable for venue managers to direct sex workers to conform to a physical and sexual stereotype. This view was endorsed by Fox J in Hart, who stated that “if...it was desired to provide that Telecom have a right to give a direction that all officers should maintain a standard of dress acceptable to it, this could well have been regarded as unduly arbitrary, authoritarian and unreasonable.” It is also strongly arguable that it is unreasonable in all the circumstances to require women working in the tabletop dancing industry to strip until completely naked during the course

(Vic) s 24.


Interview with G, brothel worker (Melbourne, 23 August 1999); interview with M, union organiser (Melbourne, 27 August 1999).

of a sexually explicit performance, particularly where workers report feeling demeaned by having to comply with the direction.\textsuperscript{71}

Conclusion

Implied contractual terms represent an important potential source of industrial protection for women employed in the legal sex industry in Victoria. Contractual terms implied by law have the potential to ameliorate some of the harsher working conditions experienced by women in the legal sex industry. The obligation of an employer to pay employees for services provided is a potentially productive avenue for sex workers to pursue to obtain payment for presenting for work, fraternising with clients and taking part in ‘mega-strips’. The obligation to provide work may similarly present an avenue by which workers can seek to be provided with regular employment, such as client bookings or performances. The obligation of mutual trust and confidence, while still emerging in Australia, also potentially gives sex workers recourse against employers who behave capriciously or fail to respond appropriately to grievances affecting workers’ health and safety. The fact that employees are only obliged to obey lawful and reasonable orders similarly may present workers with grounds upon which to challenge managerial directions regarding which clients they see, their physical appearance and the performance of duties unassociated with their substantive work.

\textsuperscript{71} Interview with K, ex tabletop dancer and brothel worker (Melbourne, 4 May 2000).
AWARDS, AGREEMENTS AND MINIMUM WAGE ORDERS UNDER THE
WORKPLACE RELATIONS ACT 1996 (CWT)

Victorian employers and employees in the private sector have largely unrestricted
access to the award-making and agreement provisions of the WRA. According to, sex
workers who are in an employment relationship have the ability to obtain award
coverage and enter into collective and individual agreements with their employers.
These instruments, in particular awards, are potentially a potent source of industrial
protection for women employees in the legal sex industry. Some commentators have
argued that AWAs are not principally ‘protective mechanisms’ in the same way as
awards and collective agreements are, as they are more concerned with increasing the
productivity and efficiency of business. However, the fact that the content of AWAs
must be assessed against a relevant award, comply with other approval requirements
and contain protections against duress and intimidation means that AWAs are
potentially a protective mechanism for this group of workers. Victorian workers,
including sex workers, who are not otherwise subject to an award, certified agreement or
AWA made pursuant to the WRA and who fall within certain occupational classifications

72 Workplace Relations and Other Legislation Amendment Act (No 2) 1996 (Cwth); Creighton and Stewart, above n 1,
89, 191. Note however that the Bracks government introduced the Fair Employment Bill 2000 into the Legislative
Assembly on October 25, 2000. The Bill creates minimum conditions of employment for Victorian employees and
establishes a Fair Employment Tribunal to review minimum conditions of employment, make and vary industry sector
orders, and resolve workplace grievances. Passage of the Bill without significant amendment will result in the
reinstatement of a limited state based conciliation and arbitration system in Victoria. When Parliament rose after the
Spring 2000 session the Bill had been passed by the Legislative Assembly with amendments on 16 November 2000
and had been second read in the Legislative Council.

73 See for example James Judge, ‘Australian Workplace Agreements’ (1998) 23 Alternative Law Journal 75; Ron

74 Workplace Relations Act 1996 (Cwth) s 170VPA.

75 Ibid s 170VPA.

76 Ibid s 170WG(1).

77 Note also parties negotiating a certified agreement or Australian Workplace Agreement can also engage in
'protected industrial action' against their employer, provided that a bargaining period has been notified and a range of
other conditions have been met – see ss 170ML, 170MO, 170MR, 170MT, 170MT, 170MU, 170WC, 170WE
may have minimum wage rates set by the Australian Industrial Relations Commission (AIRC). These orders, known as Minimum Wage Orders, are also a potential, albeit limited, source of protection for women working in the legal sex industry. These different legal mechanisms are examined in turn.

Awards

Awards are documents that lay down the rights and obligations of parties engaged in an industrial dispute. The most common way for an industrial dispute to arise is through service of a log of claims on employers (known as a ‘paper dispute’). By rejecting the log of claims, ignoring it or serving a counter log of claims, employers enter into an industrial dispute with employees that attracts the jurisdiction of the AIRC to conciliate and (as a last resort) arbitrate the dispute. An award is a means of settling an industrial dispute if it cannot be resolved by conciliation.

Constitutional limitations on the ability of the Commonwealth to make laws on the subject of industrial disputes means that the jurisdiction of the AIRC to conciliate and arbitrate can only be invoked where parties are engaged in an industrial dispute extending beyond the limits of any one state, although the ‘interstateness’ element is not a requirement for Victorian private sector employees. Creighton and Stewart identify

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76 Workplace Relations Act 1996 (Cth), ss 500–509, sch 1A. The relevant occupational classifications are those established by the Victorian Employee Relations Commission before 1997.
77 Margaret Lee, ‘Bargaining Structures under the Workplace Relations Acts’ in Margaret Lee and Peter Shelton (eds), Workplace Relations, Workplace Law and Employment Relations: Papers from the Conference Held by the Centre for Research on Employment and Work (CREW), Brisbane 14 March 1997 (1998) 34; Creighton and Stewart, above n 1, 123.
80 Workplace Relations Act 1996 ss 3(d)(ii), 89(a).
81 The AIRC is also empowered to make an award or order by consent, Workplace Relations Act 1996 (Cth) s 111(1)(b). For a discussion of consent awards see Creighton and Stewart, above n 1, 148, 196.
82 Australian Constitution s 51(xxv), Workplace Relations Act 1996 (Cth) s 493; Creighton and Stewart, above n 1,
three specific issues related to the broad term 'industrial'. These are what constitutes a dispute in an industry, what is an industrial matter and what constitutes being engaged in an industrial relationship.\(^3\) Although in the past these concepts have been interpreted narrowly, and in a way that probably excluded sex workers, these words have been given a broader meaning since 1983, when the Social Welfare Union Case was decided.\(^4\) According to Creighton and Stewart, the High Court's decision in this case effectively signalled that all types of employees may have the capacity to access the federal system. Creighton and Stewart further note that the ordinary meaning of an 'industrial dispute' would appear to import no restrictions on what may form the subject matter of such a dispute, provided that the disputants were employers and/or employees and there was a possibility that industrial action could be used to further the dispute.\(^5\) Accordingly, there is a clear ability for women working in the legal sex work industry to engage in an 'industrial dispute' with their employers.

The types of matters that could form the basis of an award between women working in the legal sex industry and employers has been constrained by the WRA.\(^6\) Therefore, the AIRC is limited in its ability to arbitrate on particular matters, even where they are

\(^{123, 191}\) The 'interstateness' requirement was unlikely to have been a practical impediment to making an award covering women working in the legal sex work industry in Victoria. This is because the Australian Capital Territory has a legalised sex industry and employers of sex workers in that state could have been served with a log of claims. Note also that the Federal Minister for Workplace Relations, the Hon. Peter Reith MP, has issued two discussion papers that questions the merits of continued reliance on the industrial relations power in the Constitution and proposes that the corporations power is "a better foundation for a system of modern workplace relations" - Breaking the Gridlock: Toward a Simpler Workplace Relations System, Discussion Paper 1: The Case for Change (April 1999) and Discussion Paper 2: A New Structure <http://www.simplerwrsystem.gov.au>, 24 October 2000 (copy on file with author).

\(^3\) Creighton and Stewart, above n 1, 77-82.


\(^5\) Creighton and Stewart, above n 1, 76. However, Creighton and Stewart state that it is unlikely that the High Court would regard a dispute of a predominantly social or political nature as "industrial".

industrial in character. With the exception of the inclusion of incidental and exceptional matters, only disputation involving twenty allowable award matters will invoke the jurisdiction of the AIRC. These matters are designed to act as a 'safety net' of minimum wages and conditions of employment. Some of the most significant matters for sex workers are:

- classification of employees and skill-based career paths;
- ordinary time hours of work and the times within which they are performed, rest breaks, notice periods and variation to working hours;
- rates of pay generally (such as hourly rates and annual salaries);
- type of employment, such as full time employment, casual employment, regular part-time employment and shift work; and
- personal carer's leave, including sick leave, family leave and compassionate leave.

Bennett contends that awards had traditionally "come to provide social or family time through limitations on shift work and disincentives for weekend or public holiday work." Constraints of this type would be valuable for women working in the legal sex industry in Victoria, as they would limit an employer's ability to direct workers to perform shift work. However, awards can no longer contain provisions that limit the number or proportion of

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87 Workplace Relations Act 1996 (Cwlth) ss 86A(6), 89A(7).
88 Ibid s 3(d)(ii).
89 Ibid s 89A(2)(a).
90 Ibid s 89A(2)(b).
91 Ibid s 89A(2)(c).
92 Ibid s 89A(2)(q).
93 Ibid s 89A(2)(s).
employees that an employer can engage in a particular type of employment.\textsuperscript{94} Lee maintains that disputes about independent contractors are excluded from the ambit of the ‘twenty allowable award matters’ under the WRA.\textsuperscript{95} Given that venue managers in the legal sex industry in Victoria frequently assert that sex workers are independent contractors, this exclusion is significant. The health risks presented by sex work and the lack of well-established health and safety practices in the legal sex industry also makes the exclusion of occupational health and safety issues notable.\textsuperscript{96}

The AIRC is required to ensure that its awards or orders do not contain matters of detail that could more appropriately be dealt with by agreement at the workplace or enterprise level or contain provisions that have the effect of hindering productivity.\textsuperscript{97} The AIRC is also required to ensure that awards do not contain provisions that discriminate against employees for reasons including race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.\textsuperscript{98}

Obtaining award coverage is an attractive mechanism for achieving minimum standards in the legal sex work industry. The fact that there is extremely limited labour regulation in this industry means that there are a number of ‘allowable matters’ that could form the basis of an industrial dispute between women workers and employers, thus attracting the jurisdiction of the AIRC. Creating an industrial dispute within the meaning of the WRA would not be difficult. Licensees of legal brothels, escort agencies and tabletop

\textsuperscript{94} Ibid s 89A(4).
\textsuperscript{95} Lee, above n 80.
\textsuperscript{96} Ibid. See also Award Simplification: First Test Case (1998) 43 Federal Cases ¶3-683, 190; Pittard, above n 86, 72.
\textsuperscript{97} Ibid s 143(1B).
\textsuperscript{98} Ibid s 143(1C)(f).
dancing venues are easily identifiable through the register of prostitution service
providers maintained by the Business Licensing Authority. It would therefore be
relatively simple to serve proprietors of brothels and escort agencies with a log of claims,
making each a party to the dispute. Liquor Licensing Victoria similarly maintains a
record of continuous and non-continuous providers of live sexually explicit entertainment
in licensed venues, making them easily identifiable. The small number of peep shows
in Melbourne means that proprietors of these venues would also be relatively simple to
identify through, for example, telephone or internet directories.

More difficult is the issue of the ambit of the claim and how to draft the award
application. In considering the prospect of award coverage for sex workers, Gleeson
identifies work classification and characterisation of activities, work value, and pay rates
as potentially challenging matters for the drafters of an award application. A union
organiser with the Liquor Hospitality and Miscellaneous Workers Union (LHMWU) was
involved in an attempt by the industry to gain award coverage for sex workers in the mid
1990s. It was contemplated by the union that, instead of drawing up a new award to
cover sex workers, an existing award would be used as a basis and modified as
appropriate. In terms of wages, it was envisaged that a minimum rate would be

99 Section 55(1) of the Prostitution Control Act 1994 (Vic) states that the Register of the Business Licensing Authority
must enter full particulars of the granting, renewal, suspension, cancellation or surrender of a licence and the address
of the premises where the prostitution service providing business is being carried on. Section 55(2)(b) states that this
register is searchable by any person upon payment of a prescribed fee.
100 Workplace Relations Act 1996 (Cwth) s 149(1).
101 Personal knowledge of author gained through her employment as a Policy Officer with Consumer and Business
Affairs Victoria.
102 Victor Gleeson, 'Industrial Aspects of the Sex Industry', Sally-Ann Gerull and Boronia Halstead (eds) Sex Industry
103 An award application made at that time would have been governed by the Industrial Relations Act 1988 (Cwth).
The 'interstages' element would have needed to be established as the negotiations were occurring prior to
Victoria's reference of industrial powers to the Commonwealth.
104 Interview with M, union organiser (Melbourne, 4 March 2000). A health and fitness award or a childcare industry
award were being considered as possible models. The NSWIRC determined that the Miscellaneous General
established for a standard service. Although the organiser stated that the union didn’t get far into the detail of the proposed award, it was also contemplated that recreation and sick leave would be calculated on a pro-rata basis.\textsuperscript{105}

**Certified Agreements**

While award-making is still provided for under the WRA, the statute’s clear emphasis is upon the negotiation of agreements directly between employers and employees at the workplace or enterprise level.\textsuperscript{106} The Act provides a basis for certified agreements to be made between employers and employees whose employment will be subject to the agreement.\textsuperscript{107} Certified agreements are therefore a protective legal mechanism with the potential to be used by women working in the legal sex industry to improve their working conditions. While valid, these agreements will prevail over any award or order of the AIRC to the extent that there is any inconsistency.\textsuperscript{106}

The WRA provides for three types of certified agreements: agreements between employees or a union and an employer (Division 2 agreements);\textsuperscript{109} agreements to resolve and interstate industrial dispute (Division 3 agreements);\textsuperscript{110} and Greenfields

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\textsuperscript{105} Interview with M, union organiser (Melbourne, 4 March 2000).

\textsuperscript{106} For example, s 88A(d) of the Workplace Relations Act 1996 (Cth) states that one of the objects of Part VI of Act is to ensure that the AIRC’s functions and powers in relation to making and varying awards are performed and exercised in a way that encourages the making of agreements between employers and employees at the workplace or enterprise level.

\textsuperscript{107} Ibid s 170LK(1). See also John Colvin and Graeme Watson (eds), The Workplace Relations Handbook: A Guide to the Workplace Relations Act 1996 (Cth) (1998) 64. Note that the requirement that the employer be a constitutional corporation or the Commonwealth does not apply to Victorian employers — Workplace Relations Act 1996 (Cth) s 494.

\textsuperscript{108} Ibid s 170LY(1)(a).

\textsuperscript{109} Ibid Division 2, Part ViB.

\textsuperscript{110} Ibid Division 3, Part ViB.
agreements. Division 2 and 3 agreements are agreements that relate to all or part of a ‘single business’. A single business is defined as “a business, project or undertaking that is carried on by an employer.” This definition is unlikely to be problematic for employers in the legal sex work industry, who usually operate readily identifiable and discrete business enterprises such as brothels and escort agencies. Section 170LB(3) of the WRA would also allow sex workers to enter into a certified agreement with their employer relating to parts of a single business, defined as a geographically distinct part of the single business, or a distinct operational or organisational unit within the single business. As Creighton and Stewart observe, this provision “means that employers can enter into different industrial arrangements in relation to different parts of their business at various locations around the country.” This could potentially be utilised in relation to employers who are operating a brothel and escort agency or agencies. These employers might agree to different terms and conditions for women working in house and those engaged in escort work, provided that it can be established that these are distinct parts of the business. Similarly, employers who operate more than one tabletop dancing venue or peep show could enter into different industrial arrangements with workers in each venue.

It is significant to note that there are constraints on the tactics that could be used by venue managers, proprietors and workers in negotiating a certified agreement. The

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111 Ibid s 170LL.
112 Ibid s 170LB.
113 Ibid s 170LB(1)(a).
114 Creighton and Stewart, above n 1, 150.
115 Note the decision of Smith C in Re Council of Holmesglen Institute of TAFE (1998) 83 IR 172, who stated that there must be some “real substance” to the concept of part of the business (at 174).
116 Section 75 of the Prostitution Control Act 1994 (Vic) prohibits licensed prostitution service providers from having an interest in more than one licence or planning permit relating to a brothel at the one time.
WRA prevents a person from “taking or threatening to take any industrial action or other action” or “refraining from or threatening to refrain from taking any action” with the intention of coercing another person to agree or not to agree to making a Division 2 or 3 certified agreement.\textsuperscript{117} The experience of industrial organising in Northern America suggests that sex workers may be fired if they attempt to negotiate a workplace agreement with venue managers, or a trade union intervenes on their behalf.\textsuperscript{118} Any similar action taken by employers of sex workers in Victoria, including a threat to dismiss workers or reduce their shifts, would be in contravention of the WRA.\textsuperscript{119} This is an important protection for women employed in the legal sex industry, who report that some venue managers ‘punish’ workers who are seen as ‘troublemakers’ by reducing their shifts or removing them from rosters.\textsuperscript{120}

**Division 2 Agreements**

Division 2 agreements are usually based in the corporations power in section 51(XX) of the Australian Constitution, and so require that the employer be a constitutional corporation. However, the referral of Victoria’s industrial relations power to the Commonwealth means that incorporated and unincorporated Victorian employers can seek certification of a Division 2 agreement.\textsuperscript{121} Unlike awards, the contents of Division 2 certified agreements are not confined to twenty allowable matters, although the contents

\textsuperscript{117} Workplace Relations Act 1996 (Cth) s 170NC(1).


\textsuperscript{119} Note that sections 298K and 298L of the Workplace Relations Act 1996 (Cth) makes it unlawful for an employer to dismiss a worker, refuse to engage them, discriminate against them in the terms in which they are offered employment or otherwise injure them in their employment where one of the reasons for doing so is that they are intend to become a member, office or delegate of a trade union.

\textsuperscript{120} Interview with L2, private worker (Melbourne, 29 March 2000); interview with M, union organiser (Melbourne, 4 March 2000).

\textsuperscript{121} Workplace Relations Act 1996 (Cth) s 494; Wheelwright, above n 3, 202.
of the agreement must have an appropriate connection with the employment relationship. This means that women working in the sex work industry could conceivably enter into a certified agreement in relation to matters that would otherwise be excluded from an award by operation of section 89A of the WRA. Provisions relating to the use of independent contractors, occupational health and safety issues, and restrictions in relation to part-time work, which are not allowable award matters, could therefore be included in a certified agreement negotiated between sex workers and their employers.

Division 2 agreements can either be in the form of an agreement between an employer and a trade union\textsuperscript{123} or directly between employers and employees.\textsuperscript{124} Section 170LJ(1) provides that employers and trade unions can enter into certified agreements provided that the union has at least one member employed in the business or part of business whose employment will be subject to the agreement, and that the trade union is entitled to represent the industrial interests of the member in relation to the work that will be subject to the agreement. Unlike awards, which can bind non unionised workforces, certified agreements made under section 170LJ will only bind employers whose workforce has at least one union member. This may be a difficult requirement to satisfy in the legal sex industry in the absence of a concerted membership campaign by a trade union, as there is an extremely low level of union membership amongst women working in the legal sex industry.\textsuperscript{125}

\textsuperscript{122} Ibid s 170LJ(1); Creighton and Stewart, above n 1, 152.
\textsuperscript{123} Workplace Relations Act 1996 (Cwth) s 170LJ.
\textsuperscript{124} Ibid s 170LK.
\textsuperscript{125} Interview with M, union organiser (Melbourne, 27 August 1999). It is difficult to assess how many sex workers are members of a trade union but no one interviewed as part of this study was able to nominate a sex worker who was
At least one attempt was made under the Industrial Relations Act 1988 (Cwth)\textsuperscript{126} to negotiate a certified agreement between a legal brothel and a trade union to establish terms and conditions of employment for workers at that brothel.\textsuperscript{127} The agreement sought to address a range of matters including rates of pay, leave entitlements (including leave during menstruation), superannuation contributions, termination and grievance procedures.\textsuperscript{128} It also provided for payment of an hourly retainer to workers in addition to income from client bookings and for workers to pay a 10\% booking fee to venue managers.\textsuperscript{129} This agreement was not successful. Factors that might have contributed to this outcome are considered in chapter six.

Division 2 also allows a venue manager or proprietor to enter into a non-union collective agreements with a valid majority of sex workers employed at the time whose employment will be subject to the agreement.\textsuperscript{130} The employer would be obliged to notify sex workers who are a member of a trade union of their right to request the union to represent them in meetings and confer with the employer about the agreement.\textsuperscript{131} The union must also be given a reasonable opportunity to meet and confer with the employer before the agreement is made.\textsuperscript{132} In all other instances, "unions can have no involvement in bargaining, vetting or enforcing agreements in non-unionised workplaces.

\textsuperscript{126} Industrial Relations Act 1988 (Cwth) Division 2, Part VIB.
\textsuperscript{127} Interview with M, union organiser (Melbourne, 4 March 2000); Industrial Agreement Between (name of brothel) and the Australian Liquor, Hospitality and Miscellaneous Workers Union, Victorian Branch (1997) (copy on file with author).
\textsuperscript{128} Ibid cl 7-14.
\textsuperscript{129} Ibid cl 7.1, 7.5.
\textsuperscript{131} Workplace Relations Act 1996 (Cwth) s 170LK(4).
\textsuperscript{132} Ibid s 170LK(6).
or wherever union members do not explicitly notify their employer that they wish the union to act as their enterprise bargaining representative. 133

In order for an agreement between sex workers and their employers, or an agreement between sex workers' trade union and their employers to become certified, the agreement needs to be approved by a valid majority of employees to whom it is to apply. 134 The approval must be accompanied by an explanation of the terms of the agreement 135 and workers must have access to a written copy of the agreement at least 14 days before its approval. 136 The explanation must have regard to the particular circumstances and needs of the employees, which in the case of sex workers could include unfamiliarity with some of the industrial concepts and entitlements contained in the agreement. 137 The AIRC must also satisfy itself that the agreement passes the 'no disadvantage' test whereby certification of the agreement would result in a reduction overall in the terms and conditions of employment measured against relevant or designated awards and state and territory legislation. 138 The agreement must also contain procedures for preventing and settling disputes between sex workers and employers about matters arising under the agreement 139 and contain a nominal expiry

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134 Workplace Relations Act 1996 (Cth) ss 170LJ(2), 170LK(1), 170LT. For a discussion of the impact of the 'valid majority' provision on collectivism see Ronfeldt ibid.
135 Workplace Relations Act 1996 (Cth) ss 170LJ(3), 170LK(7), 170LT(7).
136 Ibid ss 170LJ(3), 170LK(3).
137 Ibid s 170LT(7).
138 Ibid ss 170LT(1), 170XA(1), 170XA(2).
139 Ibid s 170LT(8). Conceivably, the use of individual or collective agreements in the sex industry could effect improvements in working conditions because they contain procedural safeguards such as the 'no disadvantage' test. However, the process of award simplification, which is consistent with the emphasis in the Workplace Relations Act 1996 (Cth) on enterprise bargaining as the primary means organising work relationships, has reduced the contents of awards to twenty minimum conditions. This in turn reduces the threshold for the purposes of establishing comparative disadvantage.
date.\textsuperscript{140} The AIRC must refuse to certify an agreement where it is satisfied that a provision of the agreement discriminates against a person whose employment will be covered by the agreement because of, inter alia, sex, race, sexual preference, age and family responsibilities.\textsuperscript{141} However, a provision of an agreement is not discriminatory merely because it discriminates on the basis of the inherent requirements of the job.\textsuperscript{142}

The ‘no disadvantage’ test requires identification of a relevant award with which to compare the provisions of the proposed agreement with. The relevant award is that which is the “closest match” to the type of work that forms the subject of the agreement.\textsuperscript{143} If there is no relevant federal award, the AIRC must designate an appropriate award that regulates the terms and conditions of employment of employees engaged in the same kind of work as those people under the agreement.\textsuperscript{144} Although it is conceivable that an appropriate award could be determined for comparison with a certified agreement purporting to cover workers engaged in tabletop dancing, such as the \textit{Licensed Clubs (Victoria) Award 1998}, it is difficult to imagine a relevant federal or state award that regulates the terms and conditions of employees engaged in similar work to women working in licensed brothels or escort agencies. However, it appears that if an award deals with at least one condition of employment in the type of industry seeking to be covered by the agreement, it can constitute a relevant award for the purpose of the ‘no disadvantage’ test.\textsuperscript{145} There is some indication from the New South

\textsuperscript{140} \textit{Workplace Relations Act 1996} (Cwth) s 170LT(10).
\textsuperscript{141} Ibid ss 170LT, 170LU(5).
\textsuperscript{142} Ibid s 170LU(6)(b).
\textsuperscript{143} \textit{Australian Guarantee Corporation Limited v Finance Sector Union} (2000) 47 AILR ¶4-214.
\textsuperscript{144} \textit{Workplace Relations Act 1996} (Cwth) s 170XF(3)(b).
\textsuperscript{145} \textit{Australian Guarantee Corporation Limited v Finance Sector Union} (2000) 47 AILR ¶4-214.
Wales Industrial Relations Commission that a general miscellaneous services award may be the most appropriate award to apply to a brothel.\textsuperscript{146}

\textbf{Division 3 Agreements}

Division 3 agreements allow an employer who is carrying on a single business and that is or was a party to an industrial dispute to enter into an agreement with a trade union to prevent or settle an industrial dispute.\textsuperscript{147} Division 3 agreements can also be used to prevent an industrial situation from developing into an industrial dispute.\textsuperscript{148} As Creighton and Stewart state, these agreements are attractive to unions because they have a guaranteed role in the negotiation process.\textsuperscript{149} In addition, they impose obligations upon employers in relation to all employees but only impose obligations on employees who are members of the trade union which is party to the agreement.\textsuperscript{150} As there appear to be very few women working in the legal sex industry who are members of a trade union, a Division 3 agreement would have very limited scope to impose obligations on sex workers. Although a Division 3 agreement requires the existence of an industrial dispute or industrial situation, this is likely to be a “minor irritant in practice.”\textsuperscript{151} The process for approval of Division 3 agreements is the same for that of Division 2 agreements made pursuant to section 170LJ.\textsuperscript{152}

\textsuperscript{146} Whitehead & Anor and Lernworth Pty Ltd 1997 (Unreported, New South Wales Industrial Relations Commission, IRC 1261 and 1262, O'Neill C, 21 November 1997). It should be noted that this decision concerned award coverage for the purposes of an unfair dismissal application does not relate to identification of an award for the purposes of the no disadvantage test.

\textsuperscript{147} Workplace Relations Act 1996 (Cwth) s 170LO.

\textsuperscript{148} ibid s 170LP.

\textsuperscript{149} Creighton and Stewart, above n 1, 155.

\textsuperscript{150} ibid; Re National Tertiary Education Industry Union; Ex parte Quickenden (1996) 71 ALJR 75.

\textsuperscript{151} ibid.

\textsuperscript{152} Workplace Relations Act 1996 (Cwth) s 170LR.
Greenfields Agreements

Greenfields agreements are available to employers who are proposing to establish a new business.\textsuperscript{153} A greenfields agreement is made with a trade union before the employment of any of the people who will be necessary for the formal operation of the business, provided that the trade union is entitled to represent the industrial interests at least one of the employees whose employment is likely to be subject to the agreement.\textsuperscript{154} The new business does not have to be an entirely new site or enterprise. It is sufficient that the business be a new activity from the point of view of the employer.\textsuperscript{155} Greenfields agreements could therefore be available to new operators and to current employers who are seeking to operate a new type of business. Conceivably, a brothel that successfully sought variation of its licence to operate an escort business as well could argue that this constituted a new business and could enter into a greenfields agreement with a trade union. However, as there is little evidence of a willingness by employers in the sex industry to negotiate with trade unions, it is unlikely that they would seek to enter into an agreement that must by definition be negotiated with a trade union.

Certified agreements under the WRA are potentially a valuable protective legal mechanism for women working in the legal sex industry in Victoria, both to regulate their working environment and to settle industrial disputes. The fact that these agreements must pass a 'no disadvantage' test when compared with a relevant award, must not include discriminatory provisions and cannot involve coercion during their negotiation.

\textsuperscript{153} Ibid s 170LL.
\textsuperscript{154} Ibid s 170LL(2).
\textsuperscript{155} Creighton and Stewart, above n 1, 154.
indicates that women workers in the legal sex industry in Victoria could achieve significant improvements to their working conditions through the use of certified agreements. Given that there appears to be a lack of equality of bargaining power between women workers and their employers, it would seem that agreements negotiated between a trade union and employers of sex workers would be particularly useful in improving industrial conditions for women working in the legal sex industry. However, evidence suggests that trade union involvement in improving conditions for women working in the legal sex industry in Victoria has been limited. This means that the likelihood of such agreements being entered into is remote.

**Australian Workplace Agreements (AWAs)**

AWAs are written (and registered) agreements between employers and employees that deal with matters pertaining to the individual relationship between an employer and an employee.\(^{156}\) As with collective agreements, the content of AWAs is not constrained by the twenty allowable award matters, although their content must pertain to the relationship between employer and employee. In addition, AWAs must contain a prescribed provision relating to discrimination\(^{157}\) and a dispute resolution procedure.\(^{158}\) All Victorian employers and employees have the capacity to enter into an AWA.\(^{159}\) The AWA process provides limited opportunities for third party involvement – trade unions can only engage in direct negotiations regarding an AWA if appointed by an employee,
in writing, to be her bargaining agent.160 The WRA does not specify any qualifications for a bargaining agent so sex worker advocacy groups such as the Prostitutes Collective of Victoria or Voice could feasibly be appointed by a sex worker to act as their bargaining agent in negotiations with an employer regarding an AWA.161

In the absence of a bargaining agent being appointed, employers and employees are required to directly negotiate with each other over the proposed terms and conditions of employment. As Creighton and Stewart observe "meaningful negotiation...between individual employees and employers is only possible in very rare instances."162 Many women working in the legal sex industry, particularly new workers, are unlikely to possess adequate knowledge and skills in order to negotiate an AWA containing provisions which are favourable to her.163 The WRA prohibits a person from applying duress to an employer or employee in connection with an AWA,164 which provides some protection against coercive action by the manager of a brothel, escort agency, tabletop dancing venue or peep show against a sex worker to agree to the terms of an AWA. Creighton and Stewart observe however that the WRA contains no definition of "duress" and if the common law definition of the term is to be favoured, it is likely to provide limited protection to employees who are pressured to enter into an agreement or to agree to particular terms and conditions.165 It is unlikely, for example, that refusal to offer

160 Ibid s 170VK(1).
161 McCallum, above n 156, 55. Note that s 170VK(5) of the Workplace Relations Act 1996 (Cth) states that a 'person' includes a group of persons.
162 Creighton and Stewart, above n 1, 177.
165 Creighton and Stewart, above n 1, 180.
employment to a sex worker unless they agree to sign an AWA would amount to duress for the purposes of a breach of section 170WG(1) of the Act.\textsuperscript{166}

AWAs possess many of the characteristics of an individual contract of employment but their content is subject to scrutiny and approval by a public functionary and they are enforceable in public law rather than contract.\textsuperscript{167} The 'public functionary' is the Employment Advocate, who must approve an AWA before it becomes enforceable. The Employment Advocate must determine that an AWA passes the 'no disadvantage' test\textsuperscript{168} and satisfies other additional approval requirements.\textsuperscript{169} When considering whether an AWA meets the 'no disadvantage' test, the Employment Advocate must consider any "applicable federal statutory entitlements."\textsuperscript{170} These include the provisions of the Racial Discrimination Act 1975 (Cwth), the Sex Discrimination Act 1984 (Cwth), and the Disability Discrimination Act 1992 (Cwth).

As discussed above, the 'no disadvantage' test requires the AWA to be measured against any relevant or designated awards.\textsuperscript{171} As it is not possible for the Employment Advocate to approve an AWA without first determining a relevant award, it would be incumbent upon the Employment Advocate to identify an award with coverage of an industry with some similarities to the sex work industry.\textsuperscript{172} The Employment Advocate

\textsuperscript{166} See discussion of this issue in Joo Cheong Tham, "'Take it or Leave it' AWAs: A Question of Duress" (1999) 12 Australian Journal of Labour Law 142, where the author's analysis of Australian Services Union v Elektrix Pty Ltd (unreported, Federal Court of Australia, Marshall J, 11 March 1999) and the Explanatory Memorandum for the Workplace Relations Bill 1996 leads him to conclude that offering employment that is conditional on an employee signing an AWA is not duress. The author goes on to state that 'take it or leave it' AWAs, in conjunction with other circumstances, can amount to duress.

\textsuperscript{167} Creighton and Stewart, above n 1, 174.

\textsuperscript{168} Workplace Relations Act 1996 (Cwth) s 170VPB(1)(a).

\textsuperscript{169} Ibid ss 170VPB(1)(b), 170VPA(1).

\textsuperscript{170} Ibid s 170XA(2)(b).

\textsuperscript{171} Ibid s 170XA(2)(a).

\textsuperscript{172} McCallum, above n 156, 54. See the decision of the AIRC in Shop, Distributive and Allied Employees Association v Bunnings Building Supplies (1997) 42 AILR 3-680, in which it was held that a company had mislead its employees
compares the terms and conditions of an AWA with the relevant award provisions to ensure that the proposed AWA does not on balance disadvantage employees in relation to their terms and conditions of employment.\(^\text{173}\) If the Employment Advocate has concerns about the ‘no disadvantage’ test it may refer the AWA to the AIRC for it to determine whether the AWA passes the ‘no disadvantage’ test.\(^\text{174}\) The AIRC has what McCallum describes as a “narrowly based public interest test” which it applies in determining whether the no disadvantage test has been satisfied.\(^\text{175}\) This obliges the AIRC to approve an agreement where it is considers that it is not contrary to the public interest to do so.\(^\text{176}\)

After approval, an AWA operates to the exclusion of any award that would otherwise apply to the employee’s employment and will also prevail over an inconsistent certified agreement, except in a limited number of situations.\(^\text{177}\) AWAs also override relevant state industrial laws save for occupational health and safety legislation, workers’ compensation, apprenticeships, termination of employment and other legislation that has been prescribed in the regulations.\(^\text{178}\) If an AWA was successfully entered into between a woman working in the legal sex industry and her employer, it would be unlawful for her

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by presenting a document to them that compared changes under a proposed Certified Agreement with an existing agreement and not the relevant award.

\(^{173}\) Workplace Relations Act 1996 (Cwlth) s 170XA(1).
\(^{174}\) Ibid s170VPB(3).
\(^{175}\) McCallum, above n 157, 57.
\(^{176}\) Workplace Relations Act 1996 (Cwlth) s 170VPG(4). For a discussion of the no disadvantage test in operation see Judge, above n 73, 76–7.
\(^{177}\) Ibid s 170VQ(3). However, an AWA does not operate to the exclusion of an exceptional matters order but prevails to the extent of any inconsistency.
\(^{178}\) Ibid s 170VR(2).
to engage in any industrial action in relation to the employment to which the AWA relates.¹⁷⁹

The limited opportunity for trade union involvement in the process of negotiating an AWA means that women working in the legal sex industry are likely to obtain greater improvements in their working conditions through the certified agreement process, particularly section 170LJ agreements. Nevertheless, AWAs do offer some protection to women working in the legal sex industry, particularly given the current lack of labour standards in the industry. The prohibition on the use of duress in negotiating AWAs and the requirement that AWAs pass a no-disadvantage test would assist sex workers in attempting to negotiate a fair and equitable individual agreement with their employers. AWAs negotiated with the assistance of a bargaining agent may also increase the likelihood that such agreements served to protect the industrial interests of sex workers.

**Minimum Wage Orders**

The WRA makes provision for minimum wage rates to be set for Victorian workers who are not otherwise subject to an award, certified agreement or AWA, and who fall within certain occupational classifications established by the Victorian Employee Relations Commission before 1997.¹⁸⁰ The ‘personal and other services industry’ is one of these established occupational classifications. A Personal and Other Services Industry Sector Minimum Wage Order was made on 15 August 1997.¹⁸¹ Clause 4.2 of the Order states that it applies to workers involved in the provision of ‘other personal services’ including

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¹⁷⁹ Ibid s 170VU(1).
¹⁸⁰ Ibid ss 500–509; Creighton and Stewart, above n 1, 237.
those employed in laundries and/or dry-cleaners, hairdressing and/or beauty salons; and “personal services not elsewhere classified in this sector.” According to the Office of Workplace Services in the Department of Employment, Workplace Relations and Small Business, minimum rates of pay for employees in brothels are provided for in this Order.\textsuperscript{182} Given the breadth of the definition of ‘other personal services’, it is likely that it would also apply to workers in escort agencies, tabletop dancing venues and peep shows.

The Order specifies minimum pay rates for workers depending upon their classification and whether they are working as permanent or casual employees. The Order also incorporates five standard minimum conditions contained in Schedule 1A of the WRA relating to paid annual, sick and parental leave, minimum rates of pay and notice of termination or compensation in lieu of notice.\textsuperscript{183} The provision of leave entitlements and the requirement that employers provide notice of termination or pay compensation in lieu of notice would represent improvements to the working conditions of women in the legal sex industry in Victoria, as evidence suggests that these entitlements are not currently available. Paying workers at a standard hourly rate may also be of assistance, as sex workers would be assured of an income from attending at work, even if they do not provide clients or customers with a service. However, minimum pay rates could also conceivably disadvantage workers who see many clients or who are regularly engaged to provide sexually explicit entertainment. This is because such workers are likely to

\textsuperscript{182} Correspondence from Stephen Butler, Manager, Wageline, Office of Workplace Services, Department of Employment, Workplace Relations and Small Business, 9 February 1998 states “[In Victoria, the minimum rates of pay for work performed by employees in a brothel are provided in the Personal and Other Services Industry Sector Minimum Wage Order.” cited in (1999) 26 Working Girl 20.

\textsuperscript{183} The leave entitlements in minimum pay orders are lower than those for workers covered by federal awards but would nevertheless be an improvement in the Victorian sex industry, where workers in general do not have any leave
earn more that the minimum hourly rate prescribed in the Order.\textsuperscript{184} It is also significant that the Order does not address issues including payment of a retainer for workers obliged to participate in introductions, overtime, penalty rates, shift allowances, rest and meal breaks and leave loading.\textsuperscript{185} Accordingly, sex workers appear to receive limited benefit from coverage by the Order.

**Conclusion**

The current lack of regulation of working conditions in the legal sex industry in Victoria means that women workers would obtain significant improvements through use of awards, certified agreements, AWAs and, to a more limited extent, minimum wage orders. Provided it can be established that women working in the legal sex industry in Victoria are employees, there would appear to be no major legislative impediment to women workers bringing about coverage through an award, enterprise or individual agreement or obtaining the benefit of the Personal and Other Services Minimum Wage Order. Yet, a proposal by the Liquor, Hospitality and Miscellaneous Workers Union (LHMWU) to obtain award coverage for sex workers did not proceed beyond consultation with employers and an attempt to negotiate an enterprise agreement at a Melbourne brothel was not successful. It also appears that women workers have not attempted to utilise AWAs or minimum wage orders to improve working conditions.
Some reasons why the mechanisms discussed in this part of the chapter have not been widely used in the legal sex industry in Victoria are discussed in chapter six.

**OTHER RIGHTS UNDER THE **WORKPLACE RELATIONS ACT 1996 **(CWT)

**Termination**

An important protective mechanism for women employed in the legal sex industry is proceedings under the WRA for redress against an unfair dismissal or unlawful termination. The WRA distinguishes between two types of termination of employment:

i) unfair dismissal (termination of employment at the instigation of the employer that is alleged to be harsh, unjust or unreasonable);\(^{186}\) and

ii) unlawful termination (termination of employment at the initiative of the employer which is alleged to:

- be for a prohibited reason;\(^{187}\)

- fail to provide the requisite period of notice for termination;\(^{188}\) or

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\(^{186}\) *Workplace Relations Act 1996 (Cwth) s 170CE(1).*

\(^{187}\) Ibid s 170CK(2)(a)-(h). These reasons include temporary absence from work because of illness or injury within the meaning of the Regulations; trade union membership or participation in trade union activities outside working hours or, with the employer's consent, during working hours; non-membership of a trade union; and race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

\(^{188}\) Ibid s 170CM.
• fail to notify the Commonwealth Employment Service (now Centrelink) in the case of termination of more than fifteen employees for reasons of an economic, technological, structural or similar nature;\textsuperscript{189} or

• contravenes an order of the Australian Industrial Relations Commission (AIRC) relating to severance pay or similar benefits.\textsuperscript{190}

In order for a sex worker to have access to unfair dismissal and unlawful termination proceedings, they would need to establish that they have been dismissed.\textsuperscript{191} Dismissal is defined in section 170CD of the WRA as "termination of employment at the initiative of the employer." This term has been construed by the Full Bench of the Industrial Relations Court of Australia as one where "the action of the employer is the principal contributing factor which leads to the termination of the employment relationship."\textsuperscript{192} If the action of the employer "results directly or indirectly in the termination of the employment and the employment relationship is not voluntarily left by the employee",\textsuperscript{193} it is likely that a ‘termination’ has occurred for the purposes of accessing unfair dismissal or unlawful termination proceedings under the WRA.\textsuperscript{194} It is important to note that sex workers who are ‘truly’ casual employees\textsuperscript{195} and who have been refused further work will be unable to successfully utilise unfair dismissal or unlawful termination proceedings, as

\textsuperscript{189} Ibid s 170CL.
\textsuperscript{190} Ibid ss 170CN, 170FA.
\textsuperscript{191} Creighton and Stewart, above n 1, 324.
\textsuperscript{193} Mozhazab v Dick Smith Electronics Pty Ltd ibid 205.
\textsuperscript{194} Chapman states that "[s]uch an interpretation is likely to be applied to the WR Act." (above n 193, 90).
\textsuperscript{195} For a discussion of who is a "true" employee see Blue Suits Pty v’as Toongabbie Hotel (2000) 47 AILR ¶5-044 and Joe Catanzariti, Toongabbie Hotel Case Redefines ‘Causal Employee’ (2000) 38 Law Society Journal 33. See also Ross v Court Recording Services (NSW) Pty Ltd (2000) 47 AILR ¶4-188.
failure to provide further work will not constitute a dismissal for the purposes of these
proceedings.196

Creighton and Stewart state that a ‘termination’ has been held to incorporate the
concept of a ‘constructive dismissal’.197 McCarrt describes a constructive dismissal as “a
departure from employment which, although formally accomplished by the act of an
employee, is to be regarded...as a dismissal by an employer.”198 Although constructive
dismissals have most commonly arisen in ‘resign or be fired’ cases,199 it has also been
found in situations where the employee leaves in response to conduct by an employer
that amounts to a repudiatory breach of the employment contract.200 This is an important
consideration for women working in the legal sex industry, many of whom report being
obliged to leave a brothel or escort agency because the proprietor of the venue has
‘dried up’ their bookings.201 This can occur for a range of reasons, including where a
worker is considered to be too old or ‘stale’, or where a worker has behaved in an
assertive or challenging manner towards a manager.202 As discussed earlier in the
chapter, employers are likely to be under an implied duty to provide an opportunity for
workers to earn a wage.203 Where an employer engages in conduct that denies sex
workers that opportunity, he or she is in breach of this contractual obligation. If the

196 Creighton and Stewart, above n 1, 214, 324.
197 Ibid 324.
199 Ibid 513. See for example Roberts v Prince Alfred College (1979) 46 SAIR 598; Re Michaelis Bayley Trading Co
and New South Wales Sales Representatives and Commercial Travellers Guild re Dismissal [1979] AR (NSW) 392;
Attorney-General v Western Australian Prison Officers Union of Workers (1995) 62 IR 225.
200 Creighton and Stewart, above n 1, 324 and cases cited at footnote 245.
201 Interview with L1, private worker (Melbourne, 16 August 1999); interview with L2, private worker (Melbourne, 29
March 2000); interview with M, union organiser (Melbourne, 4 March 2000).
202 Interview with G, brothel worker (Melbourne, 28 August 1999); interview with L2, private worker (Melbourne, 29
March 2000).
203 Devondale v Rosser & Sons [1906] 2 KB 728; Bauman v Hulton Press Ltd [1952] 2 All ER 1121; Langston v
worker leaves as a result, the employer’s actions could conceivably constitute a constructive dismissal. It is likely that the failure of an employer to abide by their implied contractual obligation to provide employees with an opportunity to earn a wage would amount to a repudiatory breach, given the centrality of the wages/work bargain to the contract of employment. If a breach is not repudiatory or a worker’s resignation can be characterised as voluntary there is no constructive dismissal. Thus, it is not possible to obtain access to statutory relief.204

Unfair Dismissal

Most Victorian employees, including sex workers, have access to unfair dismissal proceedings under the WRA.205 However, the WRA excludes a number of groups of employees from the operation of unfair dismissal provisions.206 The most relevant of these exclusions for sex workers are employees who are engaged for a specific period of time,207 employees engaged for a specific task,208 and casual employees engaged for a short period, defined in the Regulations as not engaged on a regular and systematic basis, not employed for twelve months or who did not have a reasonable expectation of continuing employment.209 It should be noted that the meaning of ‘casual employee’ for the purpose of unfair dismissal proceedings appears to have been narrowed as a result

204 Gunnedah Shire Council v Grant (1996) 134 ALR 156.
205 Workplace Relations Act 1996 (Cth) s 432.
206 Workplace Relations Regulations 1996 (Cth) r 30B(1). Note commentary in Creighton and Stewart, above n 1, 319–20, which discusses the persistent efforts by the Howard Government to exclude small businesses which employ 15 or less employees from the operation of unfair dismissal provisions. If successful, this would probably deny workers in small brothels and escort agencies a remedy for unfair dismissal, and may well also exclude women working in peep shows, which are usually small business ventures.
208 Workplace Relations Regulations 1996 (Cth) r 30B(1)(b).
209 Ibid r 30B(1)(d). See also Reed v Blue Line Cruises Ltd (1997) 73 IR 420; Bluesuits Pty Ltd v/as Toongabbie Hotel (2000) 47 AILR ¶5-044.
of the decision in *Bluesuits Pty Ltd t/a Toongabbie Hotel*[^210]. In this case the Full Bench of the New South Wales Industrial Relations Commission favoured the "ordinary and natural" meaning of the term over the concept of casual employment used in the ILO Termination of Employment Convention. This means that "even though employees are employed in regular and systematic work and have a reasonable expectation of continued employment, if they are classified as casual they will be treated as casual at law."[^211]

The casual work status of a brothel worker for the purposes of unfair dismissal proceedings was considered in *Claudia v Allmen Pty Ltd t/as Body Line*.[^212] In this case the applicant sought a remedy for unfair dismissal and the respondent claimed that such a remedy was not available to her as she was a casual employee engaged for a short period of time, as defined within Regulation 30B(1)(d) of the *Workplace Relations Regulations 1996* (Cwth). The respondent brothel owner claimed that the irregular nature of the worker's employment was evidenced by her pay, hours, shifts and jobs per shift. Specifically, she was:

- entitled to refuse a shift;
- offered work which she could accept or reject;
- not committed to work any certain number of shifts; and

[^210]: *Blue Suits Pty Ltd t/a Toongabbie Hotel* ibid.
not the only person on the books.\textsuperscript{213}

The worker responded that the pattern of work was regular and systematic and of the nature of a core regular roster with additional shifts worked as required. Once the roster was fixed, approximately a week in advance, there was little prospect for altering it.\textsuperscript{214}

Watson SDP found that the characteristics of the brothel worker's employment were consistent with the type of casual employment excluded from the operation of Division 3, Part VIA of the WRA by Regulation 30B(1)(d). Although he accepted that work was allocated on the basis of weekly rosters with limited flexibility for change and that there were repeated patterns of work, this was construed as being consistent with a desire by the respondent to manage the workforce efficiently and did not detract from the pattern of work being offered without obligation.\textsuperscript{215} Similarly, Watson SDP noted that although there was some regularity in the number of shifts worked, there was some variation in the days and nights worked and considerable variation in the income the applicant received.

It should also be noted that workers who earn remuneration over a prescribed amount ($71,200 for 2000-1 but indexed for inflation) are also prevented from seeking a remedy under the WRA for unfair dismissal.\textsuperscript{216} Although the average earnings of brothel workers are estimated to be between $30,000 and $40,000 per annum, some workers have the

\textsuperscript{213} ibid 3.  
\textsuperscript{214} ibid.  
\textsuperscript{215} Note also that a casual hospitality employee who worked four regular shifts a week, with hours varying between 24 and 38, who was included in rosters set in advance and who was required to give notice if he was going to be absent from work was denied the right to claim unfair dismissal as he had been employed for less than twelve months—see Blue Suits Pty Ltd v As Toongabbie Hotel (2000) 47 AILR ¶5-044.  
\textsuperscript{216} Workplace Relations Regulations 1996 (Cwth) r 30B(1)(f).
ability to earn $1000 per night. If workers are consistently earning up to $1000 for one shift, their total annual remuneration may be sufficient to exclude them from access to unfair dismissal proceedings.

**Harsh, unjust or unreasonable**

The right of sex workers to make application to the AIRC for relief from being unfairly dismissed is founded upon a termination being ‘harsh, unjust or unreasonable’. In making this assessment, the AIRC must have regard to a number of matters, contained in section 170CG(3) of the WRA. These can be broadly grouped into three principle grounds:

- whether there was a valid reason for the termination related to the capacity or conduct of the employee or to the operational requirements of the employer’s undertaking, establishment or service;
- whether the employee was afforded procedural fairness, specifically being notified of the reason, being given an opportunity to respond and whether a warning was given regarding unsatisfactory performance; and
- any other matters that the AIRC considers relevant.

The AIRC must also consider the principle of a ‘fair go all round’.

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217 Interview with M, union organiser (Melbourne, 27 August 1999).
218 Workplace Relations Act 1996 (Cwlth) s 170CE(1)(a).
219 Ibid s 170CE(1)(a).
220 Ibid s 170CE(1)(b)-(d).
221 Ibid s 170CE(1)(e).
222 Ibid s 170CA(2). Re Loty; Holloway v Australian Workers Union [1971] AR (NSW) 95.
Valid reason

The words “valid reason” have been described as “ordinary non technical words which are intended to apply to an infinite variety of situations where employment is terminated.” 223 Even so, the reason for dismissal must be connected to the conduct or capacity of the employee, or to the operational requirements of the business, in order to be valid. The reason must be “sound, defensible, and well founded”. 224

According to a union organiser, “workers are constantly dismissed unfairly in the sex industry for the most trivial silly reasons.” 225 One worker interviewed as part of this study told of being dismissed for telling another worker how to make an unfair dismissal application. 226 Another worker in a tabletop dancing venue told of how a colleague was dismissed for using a sunbed between podium dances. 227 A brothel worker also spoke of being fired after being unable to attend at work because she had to care for a sick child and was unable to engage a babysitter. 228 Guidance on whether terminating the employment of a worker who is undertaking caring duties for a sick child is harsh unjust or unreasonable is provided in the decision of Johnston v Kew Aged Care Pty Ltd v As Parkland Close. 229 In this case, the AIRC found that the dismissing a worker for failure to attend at work over a weekend, in circumstances in which the worker subsequently advised her employer that her failure to attend was because her child was hospitalised with diabetes, did not constitute a valid reason for dismissal. Foggo C found that the

224 Shorten v Australian Meal Holdings Pty Ltd (1996) 70 IR 360, 369 (Ross VP).
225 Interview with M, union organiser (Melbourne, 4 March 2000).
226 Ibid.
227 Interview with K, ex tabletop dancer and brothel worker (Melbourne, 4 May 2000).
228 Interview with G, brothel worker (Melbourne, 23 August 1999).
worker's failure to give an explanation for her absence or the fact that she was employed to care for elderly residents, who prefer little change in their routine and staff, did not prevent a finding that the termination was harsh, unjust and unreasonable.\footnote{Ibid.} Applying this reasoning, a sex worker whose employment was terminated because of the need to care for a sick child may therefore have a valid basis upon which to seek redress for unfair dismissal.

The issue of a 'valid reason' was also considered in \textit{Brooke v Coppin Café Pty Ltd.}\footnote{Unreported, [1996] 501/96, Industrial Relations Court of Australia, Murphy JR, 16 October 1996. Note that this case was decided pursuant to section 170DE(1) of the \textit{Industrial Relations Act 1988} (Cwlth), which is substantially the same as relevant provisions in the \textit{Workplace Relations Act 1996} (Cwlth).} This matter involved an application for compensation by a sex worker who was suspended from work for two weeks after two altercations with a client. Murphy JR of the Industrial Relations Court did not consider the matter in detail but found that the worker's termination, which occurred after she inquired whether it was possible to be paid workers compensation for the two weeks suspension, did not constitute a valid reason for termination.\footnote{Ibid 3.} This was the first unfair dismissal application pursued by the LHWMU on behalf of a sex worker. It subsequently assisted approximately thirteen brothel workers with unfair dismissal applications, all but one of which were negotiated at conciliation.\footnote{Interview with M, union organiser (Melbourne, 27 August 1999).}

In \textit{Phillipa v Carmel}, Ritter JR considered whether drunkenness and oppressive conduct towards other workers in the brothel amounted to a valid reason for a brothel manager to terminate the employment of a sex worker.\footnote{Phillipa v Carmel (Unreported, WI 2523 of 1995, Industrial Relations Court of Australia, Western Australia, Ritter} In considering the evidence as a whole,
Ritter JR was satisfied that the employee did consume alcohol relatively regularly and on some occasions drank to excess, when her behaviour could become disruptive. Nevertheless, he considered that the termination of employment occurred in the context of a power struggle between the sex worker and brothel manager and that the worker's drunkenness and behaviour was not the reason for her dismissal. Accordingly, Ritter JR did not find that there was a valid reason for the termination.235

Procedural fairness

In considering whether a termination is harsh, unjust or unreasonable, the AIRC must have regard to whether the employee was afforded procedural fairness. Under section 170CG(3)(b)-(d), the AIRC is required to take into account whether the employee received notice of the reason for their termination, whether the employee was given any opportunity to respond to any reason related to their capacity or conduct, and whether the employee was warned about their unsatisfactory performance before termination. Creighton and Stewart state that the AIRC has placed "a strong emphasis on procedural fairness,"236 particularly where an employer alleges that an employee is guilty of misconduct. It has also been established that an employer should not dismiss an employee for incompetence or poor performance without first alerting the employee to the problem and giving them a reasonable opportunity to improve.237 There is evidence that sex workers in Victoria have not always been afforded procedural fairness. As mentioned earlier, one worker interviewed as part of this study described the dismissal

235 Ibid 12.
236 Creighton and Stewart, above n 1, 326.
237 Ibid. See also Lloyd v R J Gilbertson (Qld) Pty Ltd (1996) 68 IR 277; Hurskin v Australian Jewish Press Pty Ltd (1996) 69 IR 123.
of a colleague who was discovered using a solarium between dances. It would seem that the venue manager did not observe procedural fairness in this instance, as the worker was not given an opportunity to explain why she was using the solarium.\textsuperscript{236} Nor was she given an opportunity to highlight extenuating circumstances or make undertakings regarding her future conduct that may have persuaded the venue manager not to terminate her employment.\textsuperscript{239}

As Chapman observes, the items contained in section 170CG(3) of the WRA are no longer separate substantive rights but "merely indicia under a single test – was the dismissal harsh, unjust or unreasonable?".\textsuperscript{240} The absence of a valid reason or a lack of procedural fairness will not therefore prima facie constitute an unfair dismissal. The WRA is only contravened if, in the circumstances of the case, the absence of a valid reason or the lack of procedural fairness lead to the dismissal being harsh, unjust or unreasonable.\textsuperscript{241} This means that the AIRC would need to consider whether terminating a worker in a tabletop dancing venue for using a solarium between performances is a valid reason and whether the process of termination was unfair. In the fact situation that arose in \textit{Brooke v Coppin Café}, the AIRC would similarly be required to consider, for example, whether the brothel owner accorded with the requirements of procedural fairness in terms of informing the worker that he was dissatisfied with her manner of

\textsuperscript{240} Chapman, above n 192, 92.
\textsuperscript{241} Ibid.
dealing with clients, giving her an opportunity to respond to his concerns, and the means by which her dismissal was communicated to her.\textsuperscript{242}

\textbf{Fair go all round}

Section 170CA(2) of the WRA states that the remedies of conciliation, arbitration and court proceedings must be exercised in such a way as to ensure a ‘fair go all round’ between the employer and employee. The principle of a ‘fair go all round’, derived from a 1971 decision of the New South Wales Industrial Commission, requires consideration of (to varying degrees) the right of the employer to manage his or her business; the nature and quality of the work being performed; the circumstances surrounding the dismissal; and the likely practical outcome of a reinstatement order.\textsuperscript{243} Creighton and Stewart observe that the incorporation of the ‘fair go all round’ principle into federal legislation and the explicit requirement to consider a range of factors in deciding whether an employee has been unfairly dismissed makes it “abundantly clear” that most unfair dismissal cases will turn on their own facts.\textsuperscript{244} This makes it difficult to generalise about the extent to which sex workers will be able to successfully use unfair dismissal proceedings, particularly in light of the decision in \textit{Claudia v Allmen}. However, it appears that proceedings for unfair dismissal has been the protective legal mechanism most widely used by women working in the legal sex industry in Victoria.

\textsuperscript{242} \textit{Pfizer Pty Ltd v Freeman} (Unreported, A IRC, O'Connor P, Drake DP, Larkin C, Print N8052, 15 January 1997).

\textsuperscript{243} \textit{Re Loty; Holloway v Australian Workers Union} [1971] AR (NSW) 95, 99 (Sheldon J).

\textsuperscript{244} Creighton and Stewart, above n 1, 327.
Unlawful Termination

Unlawful termination proceedings are available to all employees in Australia, including women working in the legal sex work industry in Victoria. However, the \textit{Workplace Relations Regulations 1996} (Cwth) excludes some workers from using unlawful termination proceedings. As discussed above, workers who are engaged for a specified period of time,\footnote{245} for a specific task,\footnote{246} or for a short period\footnote{247} or who are high income earners will not have the ability to access unlawful termination proceedings. The decision in \textit{Claudia v Allmen}, which found that a brothel worker was a casual employee for the purposes of unfair dismissal proceedings, suggests that some sex workers may also be denied access to a remedy for unlawful termination because of their employment status.\footnote{248}

Subdivision C of Division 3 of the WRA imposes obligations on employers relating to notice periods or payment in lieu of notice, prohibited grounds of dismissal and redundancy.\footnote{249} Only notice periods and prohibited reasons will be addressed in this chapter, as redundancy is not an issue that appears to have arisen in the context of the legal sex work industry.

An employer is prevented from terminating the employment of an employee without giving the requisite period of notice or paying compensation in lieu of notice, unless the

\footnote{245} \textit{Workplace Relations Regulations 1996} (Cwth) r 30B(1)(a). See also \textit{Qantas Airways Limited v Fetz, Duhigg and Hennessy} (1998) 43 AILR ¶3-786.
\footnote{246} Ibid r 30B(1)(b).
\footnote{247} Ibid r 30B(1)(d).
\footnote{248} \textit{Claudia v Allmen Pty Ltd t/as Body Line} (Unreported, Australian Industrial Relations Commission, 162/98, Watson SDP, 13 February 1998) <http://203.2.143.14/vtopics.vtc?ac...resultStart%3D1%26ResultCount%3D50> at 12 January 2000 (copy on file with author).
\footnote{249} See Chief Justice Murray Wilcox, 'Dismissal: A Fair Go All Round?' in Lee and Shelton above n 79, 79; Chapman, above n 192, 95-100.
employee is guilty of "serious misconduct." The amount of notice required is dependent upon the number of years spent in continuous service of the employer and the age of the employee. Compensation in lieu of notice is required to equal or exceed the amounts that the employee would have received if he or she had continued in employment during the required notice period. Compensation is based on the ordinary hours of work, the amounts payable in respect of these hours and any other amounts payable under the contract of employment.

According to a union organiser with experience in the legal sex industry, notice periods are rarely observed in legal brothels. She states that "you're not given notice or anything like that...they're just effectively told "you don't have a job here, see you later." The failure of venue proprietors and managers to provide women workers with adequate notice of termination could give rise to unlawful termination proceedings.

However, the concept of 'continuous service' for the purpose of calculating the appropriate notice period and compensation in lieu of notice may be potentially problematic. This is because engagement in sex work is often short term and periodic. One worker states that "[a] lot of girls keep going back, break and coming back." This means that the period of continuous service for the purpose of calculating the requisite notice period may not be particularly long. In the case of Brooke v Coppin Café for example, the applicant was entitled to compensation in lieu of one

250 Workplace Relations Act 1996 (Cwth) ss 170CM(1)(a),(b).
251 Ibid s 170CM(2).
252 Ibid s 170CM(4).
253 Ibid s 170CM(5).
254 Interview with M, union organiser (Melbourne, 4 March 2000).
255 Interview with R, brothel manager (Melbourne, 4 March 2000).
256 Interview with G, brothel worker (Melbourne, 23 August 1999).
257 Note that s 170CM(3) of the Workplace Relations Act 1996 (Cwth) permits the making of regulations to specify
week's notice as she had been working at the brothel for less than one year, totalling $667.\textsuperscript{258} However, there are some women working in the sex industry who have been working consistently at the same venue for up to twelve years.\textsuperscript{259} These workers would be entitled to at least four weeks notice or compensation in lieu of notice if they were aged under 45 years, or at least five weeks notice if aged over 45 years.\textsuperscript{260}

**Serious misconduct**

A sex worker employed in the legal sex industry whose employment is terminated because she is guilty of serious misconduct would not be entitled to notice of termination or payment in lieu of notice.\textsuperscript{261} "Serious misconduct" is misconduct of such a nature that it would be unreasonable to require the employer to provide notice of termination of employment.\textsuperscript{262} Regulation 30CA of the *Workplace Relations Regulations 1996* (Cwth) provides that "serious misconduct" includes:

a) wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment; and

b) conduct that causes imminent and serious risk to the health and safety of a person or to the reputation, viability or profitability of the employer's business;

c) an employee, in the course of employment, engaging in theft, fraud or assault;

d) an employee being intoxicated at work; or

\textsuperscript{258} The applicant was also awarded additional compensation of $667.
\textsuperscript{259} Interview with R, brothel manager (Melbourne, 4 March 2000).
\textsuperscript{260} *Workplace Relations Act 1996* (Cwth) s 170CM(2).
\textsuperscript{261} Ibid s 170CM(1)(c).
\textsuperscript{262} Ibid.
e) an employee refusing to carry out a lawful and reasonable instruction that is consistent with the employee’s contract of employment.

Sex workers who engage in unsafe sex could potentially be guilty of engaging in serious misconduct, as it is behaviour that causes a serious risk to the health of the customer and the worker. Any “wilful or deliberate” behaviour by a sex worker that could give rise to disciplinary proceedings against a licensee under the *Prostitution Control Act 1994* (Vic) or amount to a breach of a condition of a liquor licence under the *Liquor Control Act 1998* (Vic) may also constitute serious misconduct. Such conduct would affect the viability and profitability of the employers’ business by exposing the licensee to disciplinary proceedings, including a fine and suspension or cancellation of his or her licence to provide prostitution services. It is also worth noting that the applicant sex worker in *Phillipa v Carmel* was allegedly drunk at work, which (if true) would also constitute ‘serious misconduct’ under the WRA. Women working in legal brothels in Victoria are also prohibited by the *Prostitution Control Act 1994* (Vic) from consuming alcohol at work.263

**Prohibited reasons**

It is unlawful to dismiss an employee (who is not otherwise excluded under the *Workplace Relations Regulations 1996* (Cwth)) for a reason prohibited by section 170CK(2) of the WRA. These include:

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263 *Prostitution Control Act 1994* (Vic) s 21. It should be noted that Snow’s study of female sex workers in Victoria found that only a “tiny minority” of sex workers drank daily overall and only 12% of respondents said that they drank alcohol to cope with sex work (Jocelyn Snow, *Female Sex Workers in Victoria* (Masters thesis, University of Melbourne, 1999) 67).
Chapter Four – The Application of Contracts of Employment and the Workplace Relations Act 1996 to Women Working in the Legal Sex Industry in Victoria

- temporary absence from work because of illness or injury;\(^{264}\)
- absence from work during maternity and other parental leave;\(^{265}\)
- race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;\(^ {266}\) and
- trade union membership or participation in trade union activities.\(^{267}\)

Some women working in the legal sex industry need to take frequent breaks from their work. According to one worker, the stress of dealing with clients and the need for sex workers to maintain a 'double life' puts pressure on their immune system, making them more prone to illness than workers in other industries.\(^{268}\) Women may also not wish to work while menstruating.\(^{269}\) The need for women working in the legal sex industry to be periodically absent from work makes them potentially vulnerable to termination. If however a worker is "temporarily absent" because of illness or injury then such termination will be unlawful.

The Workplace Relations Regulations 1996 (Cwth) provide that an absence from work will constitute a temporary absence if the employee provides a medical certificate for the illness or injury within 24 hours after the commencement of the absence, or such longer

\(^{264}\) Workplace Relations Act 1996 (Cwth) s 170CK(2)(a).
\(^{265}\) Ibid s 170CK(2)(h).
\(^{266}\) Ibid s 170CK(2)(f).
\(^{267}\) Ibid s 170CK(2)(b).
\(^{268}\) Interview with G, brothel worker (Melbourne, 23 August 1999).
\(^{269}\) This raises the issue of whether menstruation constitutes an "illness" or "injury." It should be noted that if an employer terminates the employment of an employee on the grounds that the employee took sick leave without a proper basis (ie. the worker was not in fact suffering from an illness or injury), the reason will not be for a temporary absence – see St Francis Cabrini Hospital (1996) 67 IR 427.
period as is reasonable in the circumstances.\textsuperscript{270} Alternatively, an absence from work will be temporary if an employee complies with the terms of an industrial instrument that requires the worker to notify the employer of an absence from work and substantiate the reason for the absence.\textsuperscript{271} Sex workers who are concerned about being identified as a sex worker may be reluctant to see a doctor to obtain a medical certificate, particularly if they are suffering from a condition that might require them to disclose their occupation. This may make it difficult for some sex workers to satisfy the requirement of a 'temporary absence' within the meaning of the \textit{Workplace Relations Regulations 1996 (Cwlth)}. However, some sex workers may be more comfortable than other workers in visiting a doctor, as they have frequent contact with the medical profession through undergoing regular health checks. It should also be noted that an absence that extends for more than three months will not be temporary unless the employee is on paid sick leave for the duration of the absence.\textsuperscript{272}

\textit{Inherent requirement of the position}

As noted above, section 170CK(2)(f) of the WRA prohibits termination of employment by reason of, inter alia, age. However, an exception to the prohibition on terminating employment on discriminatory grounds is the 'inherent requirement of the particular position.'\textsuperscript{273} A number of workers interviewed as part of this study observed that many owners and managers of brothels, escort agencies and tabletop dancing venues have a policy of hiring younger workers, many of whom are obliged to conform to a physical

\textsuperscript{270} \textit{Workplace Relations Regulations 1996 (Cwlth) r 30C(1)(a).}  
\textsuperscript{271} Ibid r 30C(1)(b).  
\textsuperscript{272} Ibid r 30C(2).  
\textsuperscript{273} \textit{Workplace Relations Act 1996 (Cwlth) ss 170CK(2)(f), (3).}
sterotype. One worker with experience in the tabletop dancing industry said that “...the dance places have a guideline for new girls coming in up to the age of about 30. If you’re over the age of 30 you tend not to be able to get an interview, unless you can show up and you’re reasonably good looking enough and look young enough”. Venue managers tend to have a preference for younger workers because they are less likely to assert themselves than older and more experienced workers. Evidence suggests that clients of brothels and escort agencies often prefer younger, naive workers because they may provide more services during a booking than more experienced workers, and are therefore popular with clients. Workers who have the greatest capacity to earn income, and therefore generate revenue for the business, are “blonde, beautiful, busty girls, young as well”. This suggests that age discrimination may be an issue in the legal sex industry.

The concept of ‘inherent requirement’ was explored by the High Court in Qantas Airways Ltd v Christie. This involved proceedings for unlawful termination by a Qantas pilot whose employment relationship was terminated after he turned 60 years of age.

Qantas conceded that the employment relationship was terminated because of the

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274 Interview with G, brothel worker (Melbourne, 23 August 1999); interview with M, union organiser (Melbourne, 4 March 2000); interview with K, ex tabletop dancer and brothel worker (Melbourne, 4 May 2000); interview with L1, private worker (Melbourne, 16 August 1999).
275 Interview with K, ibid.
276 Interview with S, brothel worker (Melbourne, 23 March 2000); interview with L2, private worker (Melbourne, 29 March 2000).
277 Interview with L2, ibid.
278 Interview with M, union organiser (Melbourne, 27 August 1999). See also Chapkis, above n 31, 186.
pilot’s age, but sought to defend its decision on the basis that he was no longer able to perform the inherent requirements of the position by reason of his age. An inherent requirement was characterised in this case as an “essential” feature or defining characteristic of the position,\textsuperscript{281} and by Kirby J as one that can be considered “permanent” and “integral.”\textsuperscript{282} A key issue in Christie was the use of a roster system to allocate flights between pilots, based upon a bidding system which recognised seniority of service. Brennan CJ found that the roster system was an integral part of the machinery by which Qantas operated its services and represented an “efficient, equitable and non-discriminatory” method of selecting pilots for duty.\textsuperscript{283} Accordingly, Brennan CJ found that the ability of Christie to participate effectively in the bidding system was an inherent requirement of his position. Christie’s age meant that he would be unable to participate equally in the bidding and selection system with other pilots of similar seniority, which would in turn “skew the equitable operation of the system.”\textsuperscript{284}

Employers in the legal sex industry are also highly dependent upon rosters to organise which workers are available for clients to select from.\textsuperscript{285} Workers nominate preferred shifts but management appear to exercise a wide discretion over allocating shifts to workers, dependent upon the reliability of the worker and their ability to earn money for the business.\textsuperscript{286} On the basis of Brennan CJ’s reasoning it could therefore be argued that older sex workers would not be participating equally with younger sex workers. Older

\textsuperscript{281} Christie v Qantas Airways Ltd (1998) 193 CLR 280, 295 (Gaudron J).
\textsuperscript{283} Qantas Airways Ltd v Christie (1998) 193 CLR 280, 286 (Brennan CJ) as cited in Chapman, above n 280, 752.
\textsuperscript{284} Ibid.
\textsuperscript{285} Interview with R, brothel manager (Melbourne, 4 March 2000); interview with M, union organiser (Melbourne, 27 August 1999); interview with G, brothel worker (Melbourne, 23 August 1999); interview with S, brothel worker (Melbourne, 27 March 2000); interview with K, ex tabletop dancer and brothel worker (Melbourne, 4 May 2000).
workers are arguably less likely to be selected by clients to provide a service and are therefore less likely to be allocated shifts, particularly during periods of high demand. This too could skew the "equitable operation" of the roster and introduction systems. An argument could be sustained, based upon Brennan CJ's reasoning, that it is an inherent requirement of sex work that workers can take part in the roster system in the same way as all other workers and, as older workers cannot, this provides a defence to allegations of unlawful termination on the basis of age.\textsuperscript{287}

Conclusion

The unfair dismissal and unlawful termination provisions appear to be the protective legal mechanisms that are most widely used by women working in the legal sex industry in Victoria to improve their working conditions. Workers have achieved some success in obtaining redress for their employment being terminated without a valid reason or where procedural fairness has not been observed. Workers have also found modest success in pursing compensation for termination that has occurred without provision of the requisite notice or payment of compensation in lieu of notice. The decision in \textit{Claudia v Allmen}, in which a sex worker was denied access to unfair dismissal proceedings because she fell within the definition of a casual worker in the \textit{Workplace Relations Regulations 1996} (Cwth) indicates that the availability of these procedures to sex workers is more limited under the WRA. The broad construction of the term 'inherent requirement' by Brennan CJ also has the potential to give an imprimatur to venue

\textsuperscript{285} Interview with M, ibid; interview with G, ibid.
\textsuperscript{286} As Chapman observes however, Brennan CJ appears to have incorporated notions of reasonableness and justifiability in to his consideration of the application of 'inherent requirements', which are not specifically included in the \textit{Industrial Relations Act 1988} (Cwth) or the WRA — Chapman, above n 280, 757. This could be a basis upon which Brennan CJ's reasoning could be distinguished in subsequent consideration of section 170CK(3) of the WRA.
managers to lawfully engage in discriminatory conduct if such conduct is consistent with the operational requirements of the business.

Unfair Contracts

As discussed earlier in the chapter, there are strong grounds in law and social policy for finding that women working in the legal sex industry in Victoria are employees rather than independent contractors. However, it is likely that some women working in the legal sex industry are independent contractors. It is therefore necessary to consider protective legal mechanisms that could be used by women working in the Victorian sex industry as independent contractors. The unfair contracts procedure under section 127A of the WRA is one such mechanism. This provision allows the Federal Court to vary a contract for services or set it aside if the court is satisfied that the contract is harsh or unfair. The contract must involve the performance of work other than for private or domestic purposes for the other party and the contractor must be a natural person. As women working in the legal sex work industry are unlikely to have difficulty satisfying these threshold conditions, the unfair contracts provisions potentially provide an avenue for sex workers to challenge ‘preferential reservation agreements’ or other instruments that seek to regulate their working conditions, even if they are not employees.

In determining whether a contract is harsh or unfair, the Federal Court may have regard to:

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286 See also sections 127A–127B Industrial Relations Act 1988 (Cwth). These provisions were amended slightly by the Industrial Relations Reform Act 1993 (Cwth), which transferred jurisdiction from the AIRC to the Industrial Relations Court. Sections 127A–127C Workplace Relations Act 1996 (Cwth), under which the unfair contracts provisions are transferred from the Industrial Relations Court to the Federal Court of Australia. Note also that the reference to “or against the public interest” as contained in the Industrial Relations Act 1988 (Cwth) was excluded in

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• the relative strengths of the parties' bargaining positions and, if applicable, any persons acting on behalf of the parties;

• whether any undue influence or pressure was exerted on, or any unfair tactics were used against, a party to the contract;

• whether the contract provides total remuneration that is, or is likely to be, less than that of an employee performing similar work;

• any other matter that the court thinks relevant.\(^{290}\)

The provisions confer a broad discretion upon the court to make value judgements about what is fair in an industrial context, in light of accepted community standards and the factors set out in section 127A(7).\(^{291}\)

As described in chapter two of this study, many sex workers are subject to highly restrictive and, in many cases, punitive clauses inserted into reservation agreements and other documents used to regulate workers' conditions. The imposition of fines and penalties, restrictions on working arrangements and the reservation of summary dismissal powers for minor breaches are particularly objectionable and appear to evidence the requisite degree of unfairness to satisfy the requirements of the unfair contracts provisions. For example, Munro J found that a contract which provided for one month's notice of termination and did not make provision for payment in lieu of notice

\(^{1994}\) after the commencement of the *Industrial Relations Reform Act 1993* (Cwth).

\(^{290}\) *Workplace Relations Act 1996* (Cwth) ss 127A(1), 4(1A).

\(^{291}\) *Ibid* ss 127A(4)(a)–(e).

was found to be "neither adequate nor fair." Contracts that contain clauses which state that a sex worker will be removed from the work roster if she is late for a shift, which effectively constitutes termination of her services without notice, may be deemed to be unfair. Colvin and Watson, in reviewing decisions made pursuant to unfair contracts provisions in New South Wales legislation, maintain that a contract which acts as an unreasonable restraint of trade on an independent contractor may be unfair. The practice of contractually limiting some workers in brothels and tabletop dancing venues to working for only one employer may therefore also be reviewable and set aside or varied under the unfair contracts provisions.

Although the unfair contract provisions appear to act as an important protective mechanism for women engaged as independent contractors in the legal sex industry, Creighton and Stewart observe that there have been only a limited number of cases in which sections 127A and 127B have been utilised. They question how valuable the provisions really are in protecting contractors, given their low level of usage.

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293 "House standards" provided by R, brothel manager (copy on file with author).

294 Industrial Arbitration Act 1940 (NSW) s 88F; Industrial Relations Act 1991 (NSW) s 275; Industrial Relations Act 1996 (NSW) s 106.

295 Colvin and Watson, above n 107, 301. They state that the unfair contracts provisions contained in the Workplace Relations Act 1996 were intended to mirror the effect of New South Wales legislation (at 300).

296 The practice of limiting some workers to one venue was discussed in interviews with K, ex tabletop dancer and brothel worker (Melbourne, 4 May 2000) and with G, brothel worker (Melbourne, 23 August 1999).


298 Creighton and Stewart, above n 1, 274.
also appears to be limited recognition of the availability of this course of action within the LHMWU, which is the trade union principally concerned with the sex work industry.\(^{269}\)

This would appear to reduce the likelihood of women engaged as independent contractors in the sex work industry using the unfair contracts provisions to improve their working conditions.

**CONCLUSION**

As has been shown, women who are employed in the legal sex industry in Victoria potentially have access to a range of mechanisms under the contract of employment and the WRA that may offer them improvements in their terms and conditions of employment. Given sex workers’ lack of experience in negotiating agreements with their employers about their working conditions and the fact that many venue managers appear to exercise considerable control over women workers, mechanisms that maximise the opportunity for involvement by trade unions are likely to achieve the greatest improvements in women’s working conditions. Nevertheless, certified agreements negotiated without the assistance of trade unions and AWAs negotiated directly between sex workers and employers also have the potential to result in improved working conditions for sex workers, particularly given the operation of the ‘no disadvantage’ test. More limited protections are available through the minimum wage order process, which could be utilised by women working in the legal sex industry to establish minimum pay rates and employment conditions. Proceedings to obtain redress for unfair dismissal or unlawful termination appear to be the legal mechanisms most widely used by women working in the legal sex industry in Victoria. These

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\(^{269}\) Interview with M, union organiser (Melbourne, 4 March 2000).
provisions have the potential to continue to be an important source of protection for sex workers. However, the exclusion of casual workers from unfair dismissal and unlawful termination proceedings is likely to reduce the protection afforded to sex workers whose dismissal is harsh, unjust or unreasonable, or whose employment is terminated for a prohibited reason. Women working as independent contractors in the legal sex industry have the opportunity to use the unfair contracts provisions to seek review of contracts they consider to be inequitable. The fact that independent contractors in any industry do not frequently use this procedure suggests that it is unlikely to be used to improve the working conditions of independent contractors in the legal sex industry in Victoria.
CHAPTER FIVE

THE APPLICATION OF OCCUPATIONAL HEALTH AND SAFETY LAW AND EQUAL OPPORTUNITY AND ANTI-DISCRIMINATION STATUTES TO WOMEN WORKING IN THE VICTORIAN LEGAL SEX INDUSTRY

INTRODUCTION

The previous chapter considered how contracts of employment and mechanisms available under the Workplace Relations Act 1996 (Cwth) (WRA) could be used by women employed as sex workers in the Victorian legal sex industry to improve their working conditions. It also considered the position of women working as independent contractors in the sex industry and how the unfair contracts provisions could similarly be used to review oppressive or unjust contracts. Broadly speaking, women working in the legal sex industry in Victoria are entitled to protection from occupational health and safety and equal opportunity law regardless of their employment status. However, this chapter draws a distinction between employees and independent contractors for the purposes of considering occupational health and safety law, as its application to independent contractors is more limited than its application to employees. Although available evidence tends to support a finding that women working in the Victorian legal sex industry are engaged as employees, it is impossible to generalise on behalf of all women working in the legal sex industry in Victoria.
OCCUPATIONAL HEALTH AND SAFETY

In Victoria, occupational health and safety is regulated by a number of statutory provisions, the most important of which is the *Occupational Health and Safety Act 1985* (Vic) (the OHSA).¹ Some of the provisions of the *Prostitution Control Act 1994* (Vic) are also directed towards the attainment of occupational health and safety in the prostitution industry. The effective utilisation of these Acts would assist in ameliorating or eradicating some of the major hazards that are experienced by women working in the legal sex industry. This part of the chapter first discusses the general duties under the OHSA. Next, it considers a range of occupational health and safety hazards experienced by women working in the legal sex industry in Victoria and how workplace health and safety could be improved by using the general duties in the OHSA. It then goes on to consider Regulations and Codes of Conduct made under the OHSA and elsewhere, and the types of hazards that might be ameliorated through the use of these mechanisms. Finally, it examines occupational health and safety provisions in the *Prostitution Control Act 1994* (Vic), *Prostitution Control Regulations 1995* (Vic) and *Health (Brothel) Regulations 1990* (Vic).

The *Occupational Health and Safety Act 1985* (Vic)

The OHSA creates general duties and establishes standards through regulations and codes of practice. The obligations imposed by general duties, regulations and codes of practice are expressed to cover “employers”, “employees” and “self employed persons”.

According to Johnstone, a key aspect of Australian occupational health and safety statutes is their definition of "a workplace" and when an employee is "at work". This is a potentially important issue for women working in the escort industry who, as they visit clients at their homes or hotels, do not have a defined workplace. Section 4 of the OHSA defines "a workplace" as "a place, whether or not in a building or structure, where employees or self employed persons work." This broad definition appears to encompass work being performed by escort workers in clients' homes, hotels and other places nominated by clients where sexual services are provided.³

**General Duties Under the OHSA**

Under section 21 of the OHSA, an employer has a positive duty to provide and maintain a working environment for employees that is safe and without risks to health, in so far as it is practicable to do so.

Section 21(2) specifically identifies contraventions of sub-section 21(1), including failure to:

- provide and maintain plant and systems of work that are so far as is practicable safe and without risks to health;

- maintain so far as is practicable any workplace under control and management of the employer in a condition that is safe and without risks to health;

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³ Note that Lord Goddard in *George Bull & Sons v Still* (1954) 52 LGR 508, 509 broadly interpreted the concept of a workplace as "a place where work is done" as cited in ibid 122.
• provide adequate facilities for the welfare of employees at any workplace under the control and management of the employer; and

• provide such information, instruction, training and supervision to employees as is necessary to enable the employees to perform their work in a manner that is safe and without risks to health.4

The employer’s general duty is very broad and capable of being interpreted to place an ongoing responsibility on an employer to set up and maintain a safe system of work.5 The duty arises “whenever accidents of some class or other might conceivably happen”.6 However, employers are not required to ensure that accidents never happen.7 According to Harper J, the general duty requires employers to:

[t]ake such steps as are practicable to provide and maintain a safe working environment...remembering that...such a responsibility can only be discharged by taking an active, imaginative and flexible approach to potential dangers in the knowledge that human frailty is an ever-present reality.8

The term ‘safe and without risks to health’ has been described as “a compendious phrase to cover all risks both of direct physical injury and subsequent illness, infection, disease or significant physical or mental handicap or disability”.9 Creighton and Rozen state that a commonsense interpretation of the term “working environment” would

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7 ibid 123.
8 ibid.
include the workplace itself; the plant, machinery and substances used at the workplace; the work processes; work arrangements, such as shift work and overtime; the physical environment; and the intangible environment, including the presence of stress factors such as cramped and overcrowded conditions, harassment by fellow employees, the length of working hours, the availability of recreational facilities and so on.\textsuperscript{10} Section 21(3) deems independent contractors engaged by the putative employer to be employees for the purpose of sections 21(1) and 21(2) of the OHSA. However, s 21(3) of the OHSA provides that workers who are 'self employed' or independent contractors are only owed a duty in relation to matters over which the employer has control.

Section 22 of the OHSA requires every employer and self-employed person to ensure, so far as it is practicable, that persons other than their own employees are not exposed to risks to their health and safety arising from the conduct of their undertaking. This means that proprietors of brothels, escort agencies, tabletop dancing venues and peep shows owe a duty to all contractors and clients whose health and safety may be affected by the way in which they carry on their undertaking. Venue proprietors may therefore owe a duty to sex workers simultaneously under sections 21 and 22 of the OHSA.

**Occupational Health and Safety Hazards in the Victorian Legal Sex Industry**

The matters identified by Creighton and Rozen as falling within the purview of section 21 all have relevance to the sex work industry, particularly in relation to maintaining safe premises and safe systems of work. Several sources indicate the existence of a range

\textsuperscript{9} *TTS Pty Ltd v Griffiths* (1991) 105 FLR 255, 267 (Asche J).
\textsuperscript{10} Creighton and Rozen, above n 1, 65–6.
of occupational hazards for sex workers.\textsuperscript{11} The hazards that will be addressed in this part of the chapter are sex workers’ physical work environment; systems of work used in the sex industry; exposure to coercion and violence; and lack of adequate training and supervision. These issues were discussed by workers interviewed as part of this study. In addition, the risk of contracting a sexually transmissible disease is an obvious occupational hazard. This issue is discussed later in the chapter in the context of the \textit{Prostitution Control Act 1994} (Vic), the \textit{Prostitution Control Regulations 1995} (Vic) and the \textit{Health (Brothels) Regulations 1990} (Vic).

\textbf{Physical environment}

There are a range of hazards for women working in the legal sex industry that are related to the physical environment in which they work. The Victorian Sex Industry Information Project, conducted in 1992, found that workplace hazards included restricted egress in an emergency; lack of suitable dining facilities; poor lighting; an absence of designated changing rooms; and poor maintenance of floor coverings, particularly on stairs.\textsuperscript{12} The difficulty experienced by workers required to walk up and down steep stairs while wearing high-heeled shoes was discussed by one worker interviewed as part of this study. She told of how a colleague had fallen while walking down stairs at a brothel and broken her leg. The response of the venue manager was to ask her to drive the


\textsuperscript{12} Occupational Health and Safety Authority, \textit{Sex Industry Information Project} ibid 5–7.
injured worker to hospital, as he believed that the presence of an ambulance would scare customers away.\textsuperscript{13} A study conducted by a workplace safety consultant similarly identified the combination of steep stairs and impractical footwear as hazardous.\textsuperscript{14}

Women working in tabletop dancing venues are at risk of slipping from podiums and table tops, the effects of which are exacerbated by the location of tables and chairs around performance areas.\textsuperscript{15} The possibility of injury being caused through slipping is also a factor in brothels and in escort work, where workers have a shower after each client booking and may also enter a spa with a customer. One brothel worker told of injuring her back after slipping on wet tiles when entering a spa, rendering her unable to work for a number of weeks. The worker said that there was nothing affixed to the spa to prevent her slipping, despite having brought the matter to the attention of the venue manager.\textsuperscript{16}

Women working in legal brothels and a woman with experience working in the tabletop dancing industry also identified other hazards associated with their working environment, including lack of ventilation, an absence of natural lighting and cigarette smoke.\textsuperscript{17} One worker observed:

\begin{quote}
[m]ost of these brothels, a couple that I'm aware of, they're all dark, there's no daylight and there's no fresh air. And that used to really annoy me. Windows were all jammed
\end{quote}

\textsuperscript{13} Interview with S, brothel worker (Melbourne, 27 March 2000).
\textsuperscript{14} Jones, above n 11, 19.
\textsuperscript{15} Interview with K, ex tabletop dancer and brothel worker (Melbourne, 4 May 2000).
\textsuperscript{16} Interview with L2, brothel worker (Melbourne, 29 March 2000).
\textsuperscript{17} Interview with M, union organiser (Melbourne, 4 March 2000); interview with G, brothel worker (Melbourne, 23 August 1999); interview with K, ex tabletop dancer and brothel worker (Melbourne, 11 May 2000).
up and prostitutes smoke a lot because they’re waiting around for clients so they puff, it’s a smoky environment. 18

Escort workers are particularly vulnerable to exposure to unclean or unsafe premises, as the primary workplace for women involved in escort work is the client’s home or hotel. Although hotels are usually clean and well maintained, this is not necessarily the case with private homes. One woman who worked for an escort agency described a booking made for her at a client’s home:

[i]his one guy they sent me out to had VB cartons as blinds on all the windows, all the ashtrays were overflowing, there were bottles everywhere, the mattress on the floor was just disgusting. I wouldn’t even use his bathroom, I just wouldn’t go barefoot in there. And this is a regular client. 19

Systems of work

The Sex Industry Information Project identified a range of matters associated with failure to maintain a safe system of work in licensed brothels. Stress arising from diminished control over a number of factors, including the right to refuse a client or service; being required to participate in the ‘introduction system’; and having to monitor clients’ condom use; are particular issues for women working in the legal sex industry. 20 One worker interviewed as part of this study stated that clients will often attempt to remove a condom during a booking or may try and pierce it, necessitating constant vigilance by

18 Interview with M, union organiser (Melbourne, 27 August 1999).
19 Interview with A, private worker (Melbourne, 29 March 2000).
20 Occupational Health and Safety Authority, Sex Industry Information Project, above n 11, 8.
sex workers. Women working in the legal sex industry are regularly required to work long shifts, often of ten to twelve hours duration, which can result in stress and fatigue.

Women working in the legal sex industry are also at risk of developing infectious diseases, dermatitis and skin infections when employers do not ensure that linen, sex toys or surfaces upon which women are required to perform are regularly cleaned and disinfected. One worker interviewed as part of this study reported that women working in tabletop dancing venues are often required to perform naked or semi-naked on tables that have not been adequately cleaned, resulting in workers developing large sores on their buttocks. Women working in tabletop dancing venues are also at risk of contracting an infectious disease if required to perform on bar mats that are not regularly washed. Workers are also vulnerable to developing sensitivities to massage oils and lubricants, causing skin irritations.

Violence

The use of physical violence against workers, resulting in injury and sometimes death, is an extreme manifestation of a failure to provide a safe workplace and system of work for sex workers. Women working in the legal sex industry appear to be less exposed to threatened and actual physical violence from clients than street workers, but

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21 Interview with L1, private worker (Melbourne, 16 August 1999).
22 Interview with M, union organiser (Melbourne, 27 August 1999); Poole, above n 11, 1.
23 Occupational Health and Safety Authority, Sex Industry Information Project, above n 11, 7–8; Scarlet Alliance, above n 11, 23–4.
24 Interview with K, ex tabletop dancer and brothel worker (Melbourne, 11 May 2000). See also Prostitution Control Act Ministerial Advisory Committee, above n 11, 25;
25 Prostitution Control Act Ministerial Advisory Committee, ibid.
26 Poole, above n 11, 1.
nevertheless workers in the legal industry report enduring verbally aggressive clients and the implicit violence present in some clients’ fantasies. At least one woman working alone in a brothel is known to have been sexually assaulted and murdered by a client. The likelihood of women working in prostitution being a victim of violence appears greater in escort work than brothel work. The practice of escort managers or receptionists misrepresenting the age or appearance of escort workers to clients creates the potential for workers to be verbally abused by clients if they do not meet their expectations. If the client decides to cancel the booking, workers are directed to collect a cancellation fee, which may result in conflict between the worker and the client. The risk of serious physical violence in escort work was discussed by a worker interviewed for this study. She reported that she decided to stop doing escort work after a client assaulted her at knifepoint. Earlier, the worker had learnt that an escort worker who worked for the same escort agency was murdered during a booking, presumably by the client. Of concern is a finding of the National Occupational Health and Safety Commission (NOHSC) that among workers murdered in connection with their work, prostitution is a common occupation where this occurs. Yet according to the NOHSC, none of the relevant occupational health and safety or compensation authorities

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30 Hatty, above n 28, 237.
32 Interview with L2, private worker (Melbourne, 29 March 2000); interview with A, private worker (Melbourne, 29 March 2000).
33 Ibid.
34 Interview with L2, private worker (Melbourne, 29 March 2000).
35 Ibid.
recorded the death of prostitutes in their statistics of workers killed in connection with their employment.\textsuperscript{36}

**Training**

Failure to provide information and training to employees to enable them to perform their work safely is identified in section 21(2) as a breach of the general duty in section 21(1). It appears that venue proprietors and managers provide minimal training to workers, either before they commence working or during the working relationship. Some brothel managers will provide workers with basic training including an explanation of how to inspect clients for evidence of sexually transmissible diseases and the health and safety requirements under the Act.\textsuperscript{37} Although it appears that venue managers provide workers with training or make training available to workers about safe sex practices and STDs,\textsuperscript{38} many venue proprietors and managers are heavily reliant upon workers supporting each other and providing informal advice and assistance to new workers about other matters, such as what services are provided during a booking and how to manage clients.\textsuperscript{39} For example, the only training new workers may receive is through being scheduled on a shift with a ‘house regular’.\textsuperscript{40} A brothel manager stated:

we ask another lady to go in to the first booking with the girl to show her how the inspections are done and if possible we try and get a twin booking where both girls are paid but the client’s only paying for the one lady. That way we can have a twin

\textsuperscript{37} Interview with R, brothel manager (Melbourne, 4 March 2000).
\textsuperscript{39} Interview with S, brothel worker (Melbourne, 27 March 2000); interview with A, private worker (Melbourne, 29 March 2000); interview with L2, private worker (Melbourne, 29 March 2000).
\textsuperscript{40} Interview with S, ibid; interview with J, STD adviser (Melbourne, 29 July 1999).
booking and the new girl can get to see how a booking works for real. That's about as much as we can do.\textsuperscript{41}

Equally, some new workers in tabletop dancing venues are paired up with an experienced dancer who explains costume, routines, how to get money from customers and how much physical contact is permitted between dancers and customers.\textsuperscript{42} Even less formal training and support appears to be provided to escort workers. One escort worker described being unaware of basic job practices when she started working, including what comprised a standard booking, how to conduct a massage, the need to use lubricant with condoms, and how menstruation would affect her ability to work.\textsuperscript{43}

The Application of the General Duties to Occupational Health and Safety Hazards in the Victorian Legal Sex Industry

The general duties contained in the OHSA have the potential to act as an important mechanism to ensure that women working in the legal sex industry in Victoria work in a healthy and safe environment. However, it is important to note that venue proprietors' and managers' obligations to workers under section 21 of the OHSA are limited by the concept of 'practicability'. Section 4 of the OHSA defines the term 'practicable' as having regard to:

(a) the severity of the hazard or risk in question;

(b) the state of knowledge about the hazard or risk and any ways of removing or mitigating that hazard or risk;

\textsuperscript{41} Interview with R, brothel manager (Melbourne, 4 March 2000).
\textsuperscript{42} Interview with K, ex tabletop dancer and brothel worker (Melbourne, 4 May 2000).
\textsuperscript{43} Interview with A, private worker (Melbourne, 29 March 2000).
the availability and suitability of ways to remove that hazard or risk; and

(d) the cost of removing or mitigating that hazard or risk.\textsuperscript{44}

Johnstone states that "a measure is not (reasonably) practicable if a reasonable employer, weighing the risk of an accident against the measures (including the technological feasibility and cost of those measures) necessary to eliminate the risk, considers that the risk of injury or disease is insignificant relative to the burden of taking the requisite measures."\textsuperscript{45} Women working in the legal sex industry in Victoria face a number of occupational hazards and risks. The main issues relate to the conditions of staircases, slipping from tabletops whilst dancing, environmental smoke, overuse syndrome and repetitive strains, allergies to lubricants and oils, violence and sexually transmissible diseases (STDs). These all present potential contraventions of sections 21 and 22 of the OHSA. There are many measures that it would be reasonably practicable for employer to implement to reduce hazards to workers. These issues are explored in turn.

In relation to sex workers' physical working environment, failure to maintain staircases in a condition that does not present risks to workers' safety potentially constitutes a contravention of section 21(1) and section 22(2)(c) of the OHSA. In \textit{Langley v State of South Australia}\textsuperscript{46} an employer was found to be negligent in tort due to unsafe premises after an employee fell down a flight of stairs which were too steep and were badly worn. This case suggests that venue managers who fail to maintain stairs in reasonable

\textsuperscript{44} See also \textit{Chugg v Pacific Dunlop Ltd} (Unreported, Supreme Court of Victoria, Full Court, 5 May 1989); \textit{Holmes v Re Spence & Co Pty Ltd} (1993) 5 VIR 119 and commentary in Creighton and Rozen, above n 1, chapter 5.

\textsuperscript{45} Johnstone, above n 2, 76. See also \textit{Chugg v Pacific Dunlop} (1990) 170 CLR 249, 260.

\textsuperscript{46} (1983) 32 SASR 260.
condition may not be meeting their obligation to sex workers under section 21 of the
OHSA to provide a safe workplace. It would be reasonably practicable for venue
managers to ensure that steps are well maintained, particularly given the footwear often
worn by women workers. Alternatively, venue managers could introduce policies
relating to workers’ footwear that encourages them to wear low or flat heeled shoes.
Similarly, proprietors of tabletop dancing venues could easily reduce the risk of workers
being injured during performances by falling from tables by applying non-stick coatings
to surfaces, abandoning directions to workers which require them to wear high-heeled
shoes, and removing chairs from around performance areas.

The Scarlet Alliance has developed a number of suggestions for employers in the sex
work industry to reduce workers’ and clients’ exposure to environmental smoke. These
include creating designated areas where smoking is permitted; making the workplace a
completely non-smoking environment, including vehicles used by escort workers; and
providing practical support to employees who wish to give up smoking.\(^47\) The availability
of programs to assist people who wish to give up smoking, such as the Quit program,
and the low cost of establishing designated smoking areas (unless such areas are to be
purpose built) suggests that such measures would be practicable to implement,
particularly given the dangers to health associated with smoking and environment
smoke. However, it is unlikely that it would be reasonably practicable for managers of
escort agencies to ensure that clients refrain from smoking during a booking with an
escort worker. This is because clients’ homes and hotels are not areas over which the
venue manager has a right of entry or ability to assert control.

\(^47\) Scarlet Alliance, above n 11, 30.
There are also a number of practicable measures that proprietors of brothels, escort agencies, tabletop dancing venues and peep shows could adopt to improve work systems. The Scarlet Alliance has a number of suggestions about how proprietors can reduce the incidence of occupational overuse syndrome and repetitive strains in brothels. These include:

- carrying out regular health and safety audits of the workplace;

- ensuring that all beds and other workstations support the back and allow for a variety of services to be performed without strain or discomfort; and

- conducting a review of work tool design, such as vibrators and sex toys.\(^{48}\)

Supplying lubricants and massage oils which are non-allergenic and ensuring that workers have adequate breaks between clients and between shifts to avoid stress and fatigue are also measures which could be implemented by proprietors to ensure that work systems are safe and do not present risks to workers' health. Ensuring that cleaning staff are available to clean podiums and tables between performances in tabletop dancing venues would also reduce the risk of tabletop dancers developing skin infections.

The risk of violence presented to workers could be reduced by the development and enforcement of polices regarding when an agency will accept a client booking. These policies could include refusing to send an escort worker out when the client is drunk, ensuring that each potential client is checked against the list of 'ugly mugs' maintained

\(^{48}\) Ibid 26–7.
by the Prostitutes Collective of Victoria,\textsuperscript{49} or rejecting clients who have been the subject of complaints by other workers.\textsuperscript{50} Ensuring that escort workers are contacted by the agency or contact the agency themselves after arriving for a client booking and before leaving the booking would also ensure that the agency monitors workers' activities and is take appropriate measures if a worker is not able to be contacted.\textsuperscript{51} Hiring adequately trained security staff and ensuring that alarms are maintained and regularly serviced would also be practical measures which would reduce the potential for sex workers to be exposed to violence.\textsuperscript{52}

It would also be reasonably practical for venue managers to provide all new workers with information, introduce induction programs for new workers and to provide workers with regular training. In discussing this issue one worker stated “I feel that with brothels and escort you need to get a letter about conditions or some information, a pack or a video, so you can digest it and know exactly what your health and safety options are.”\textsuperscript{53} The Prostitutes Collective of Victoria provides education, information\textsuperscript{54} and training on the use of safe sex practices in the legal sex industry on an outreach basis, at no cost to employers.\textsuperscript{55} There are also information products available about working in the legal sex industry in Victoria, such as the ‘Hussies Handbook.’\textsuperscript{56} The Scarlet Alliance also recommends that proprietors provide comprehensive training in the safe use of all

\textsuperscript{49} The Prostitutes Collective of Victoria (PCV) maintains a register of 'ugly mugs' — clients who have been abusive or physically violent towards sex workers. This list is readily obtainable from the PCV. The PCV was a joint national winner of the Australian Institute of Criminology's violence prevention award in 1996 for this initiative.

\textsuperscript{50} Interview with L2, private worker (Melbourne, 29 March 2000).

\textsuperscript{51} Ibid.

\textsuperscript{52} Interview with S, brothel worker (Melbourne, 27 March 2000).

\textsuperscript{53} Interview with A, private worker (Melbourne, 29 March 2000).

\textsuperscript{54} For example, the Prostitutes Collective distributes copies of the Commonwealth Department of Human Services and Health's \textit{STD Handbook: A Reference Guide for Sex Workers to Sexually Transmissible Diseases} (1998).

\textsuperscript{55} Interview with J, STD adviser (Melbourne, 29 July 1999).

equipment and in correct massage techniques. Although training programs specifically directed at sex workers do not appear to be available (except for training provided by the Prostitutes Collective of Victoria) the National Safety Council of Australia provide a range of general training programs, as do many other service providers. The Victorian government has also developed a Small Business Safety Program, designed to provide training to small businesses to evaluate workplace risks and reduce hazards.

It is important to note that the obligations of proprietors of escort agencies towards escort workers under the OHSA may be less than obligations owed to workers in brothels or working in live sexually explicit entertainment. This is because sections 21(2)(c) and (d) of the OHSA are limited to workplaces under the control and management of employers, which would be difficult to establish in the case of escort workers. As Brooks suggests, the use of the term 'under the control and management of the employer' in sections 21(2)(c) and (d) illustrates that these provisions have been formulated in relation to workplaces where large groups of workers work together, rather than in relation to small, diffuse, isolated workplaces, such as those occupied by escort workers. In addition, women working in the legal sex industry as independent contractors may be limited in their ability to obtain improvements to their working environment through reliance on section 21(3) of the OHSA. This is because a putative employer's obligation to workers who are 'self employed' or independent contractors

57 Scarlet Alliance, above n 11, 26–7.
only extends to matters over which the ‘employer’ has control.\textsuperscript{61} As Creighton and Rozen observe however, it is impossible to determine in the abstract whether an employer can be said to have control over relevant matters for the purpose of section 21(3).\textsuperscript{62}

Working in the legal sex industry in Victoria presents a number of serious hazards to women workers. The broad duties imposed on employers through sections 21 and 22 of the OHSA could be utilised by women working as employees and independent contractors to improve the health and safety of their work environment. There are limitations on the operation of the general duties to women working in the legal sex industry in Victoria, particularly in terms of their application to independent contractors and to escort workers. However, the range and seriousness of risks presented to sex workers and the relative ease with which venue managers and proprietors could reduce some risks suggests that it would be difficult for managers and proprietors to avoid making significant improvements to workplaces and work systems.

**Regulations Under the OHSA**

Under the OHSA, the Governor-in-Council can make regulations for or with respect to the safety, health and welfare of persons at workplaces.\textsuperscript{63} Regulations made under the OHS with some application to the legal sex industry include the *Manual Handling Regulations 1999 (Vic)* and the *Occupational Health and Safety (Issue Resolution)*...
Regulations 1999 (Vic). Regulation 13 of the Manual Handling Regulations 1999 (Vic) provides that an employer must ensure that any task undertaken by an employee involving hazardous manual handling is identified. ‘Employee’ is defined to include an independent contractor and ‘hazardous manual handling’ is defined to include a repetitive or sustained awkward posture and repetitive or sustained movement.

Women working in the legal sex industry are required to engage in repetitive movement and sustain awkward postures. One woman engaged in sex work stated that she experienced back strain as a result of straddling clients to massage them and workers in tabletop dancing venues may also develop knee, back and neck injuries as a result of adopting contorted body positions on hard surfaces. Women workers may also suffer from repetitive stress injuries of the wrist and shoulder from masturbating clients and may experience jaw pain from performing fellatio. If a risk of hazardous manual handling is identified, the employer must ensure that a risk assessment is made to identify whether there is any risk of a musculoskeletal disorder affecting an employee as a result of performing that task. The Regulations also provide that an employer must ensure that any risk of a musculoskeletal disorder affecting an employee is eliminated or reduced in so far as that is practicable. As discussed earlier in the context of the

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64 See particularly Parts 4 and 5 of the Occupational Health and Safety (Manual Handling) Regulations 1999 (Vic) and ss 5–7 of the Occupational Health and Safety (Issue Resolution) Regulations 1999 (Vic).
65 Occupational Health and Safety (Manual Handling) Regulations 1999 (Vic) r 11(a).
66 Ibid r 13(2)(a)(ii),(iii).
67 Interview with A, private worker (Melbourne, 29 March 2000).
71 Ibid r 15(1).
general duties, there are a number of practical measures that venue managers could take to reduce the risk of sex workers developing repetitive strain disorders.

The *Occupational Health and Safety (Issue Resolution) Regulations 1999 (Vic)* require an employer or management representative to meet with a health and safety committee or nominated employee after a health and safety issue has been reported.\(^2\) The resolution of the issue includes taking into account whether the hazard can be isolated, the number and location of employees affected by it and responsibility for performing and overseeing the removal of the hazard.\(^3\) Evidence from workers interviewed as part of this study suggests that the consultative procedure laid out in the Regulations has not been followed when health and safety issues, such as inadequate alarm systems, have been reported.\(^4\)

**Codes of Practice**

Section 55(1) of OHSA provides that the Minister may approve any code of practice for the purpose of providing practical guidance to, inter alia, employers, self-employed people, and employees.\(^5\) Breach of a provision in a code is not an offence but is relevant in proceedings under the Act.\(^6\) The *Code of Practices for Workplaces 1988* is...

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\(^2\) Part IV of the *Occupational Health and Safety Act 1985 (Vic)* allows for the creation of designated work groups (s 29), the election of a health and safety representative of the designated work group (s 30), and for the establishment of health and safety committees (s 37).

\(^3\) Ibid rt 5(a), 5(b)(f).

\(^4\) Interview with S, brothel worker (Melbourne, 27 March 2000).

\(^5\) In addition to Codes made under the OHSA, national codes of practice may also have relevance to women working in the legal sex work industry. The National Occupational Health and Safety Commission has declared a National Code of Practice for Health Care Workers and Other People at Risk of the Transmission of Human Immunodeficiency Virus and Hepatitis B in the Workplace (National Occupational Health and Safety Commission: 2010, 1993). The purpose of the Code is to assist employers and employees to meet requirements under State and Territory occupational health and safety legislation as it relates to HIV and Hepatitis B in the workplace. It appears that the Code has not yet been approved by Victoria.

\(^6\) *Occupational Health and Safety Act 1985 (Vic)* ss 56, 55(8).
of relevance to women working in the legal sex work industry.\textsuperscript{77} In particular, it contains provisions relating to the size and location of changing rooms and storage facilities, washing accommodation and workplace cleanliness.\textsuperscript{78} The \textit{Code of Practice for Manual Handling 2000}\textsuperscript{79} provides guidance on how to comply with the \textit{Occupational Health and Safety (Manual Handling) Regulations 1999}, discussed earlier in the chapter. The \textit{Code of Practice for First Aid in the Workplace} is designed to provide statutory guidance on meeting requirements under section 21(2)(d) of the OHSA.\textsuperscript{80} It discusses what first aid facilities are appropriate in a workplace, what should be contained in a first aid kit and recommends that employers provide instructions to employees on the arrangements for first aid facilities. A study into the occupational health and safety needs of brothels found that although some larger brothels had first aid kits on the premises, these had not been reviewed against the requirements of the Code of Practice.\textsuperscript{81}

\textbf{The \textit{Prostitution Control Act 1994}}

The \textit{Prostitution Control Act 1994} (Vic) also contains provisions relating to occupational health and safety. One of the objects of the \textit{Prostitution Control Act 1994} (Vic) is to "promote the welfare and occupational health and safety of prostitutes."\textsuperscript{82} The Act creates specific offences for prostitution service providers (and sex workers) regarding working while knowingly infected with a sexually transmissible disease.\textsuperscript{83} In addition, a criterion used by the Business Licensing Authority in assessing the suitability of an

\textsuperscript{77} Occupational Health and Safety Authority, approved from 30 June 1988.
\textsuperscript{78} Ibid, \textit{Code of Practice for Workplaces} cl 20–31, 32–42, 62.
\textsuperscript{79} Victorian WorkCover Authority, no 25, 20 April 2000.
\textsuperscript{80} Occupational Health and Safety Authority, no 18, 1 June 1995.
\textsuperscript{81} Jones, above n 11, 22.
\textsuperscript{82} \textit{Prostitution Control Act 1994} (Vic) s 4(g).
\textsuperscript{83} Ibid ss 19(1), 20(1).
applicant to be licensed as a prostitution service provider is whether they have adequate arrangements in place to ensure the safety of people working in the business.\textsuperscript{84} As discussed in chapter two, it appears that generally women working in the legal sex industry in Victoria follow safe sex practices and undertake regular blood and swab tests to detect the presence of sexually transmitted diseases.\textsuperscript{85}

**Regulations under the *Prostitution Control Act 1994* and the *Health Act 1958*\textsuperscript{86}**

A range of occupational health and safety issues are contained in the *Prostitution Control Regulations 1995* (Vic) and the *Health (Brothel) Regulations 1990* (Vic). The former apply to brothels and escort agencies and the latter apply only to brothels. The relevant health and safety provisions in the *Prostitution Control Regulations 1995* (Vic) are contained in regulation 19. These provide that licensees and approved managers:

- must not dispute a prostitutes’ decision not to provide or to cease to provide sexual services because he or she believes the situation is unsafe;\textsuperscript{86}
- must ensure that persons acting as receptionists do not misrepresent the qualities of any prostitute or negotiate sexual services to be provided by him or her;\textsuperscript{87}
- must ensure that all rooms in a brothel used for prostitution have a concealed alarm or communication device and sufficient lighting to enable a worker to check for signs

\textsuperscript{84} Ibid s 38(1)(c).
\textsuperscript{85} Interview with S, brothel worker (Melbourne, 27 March 2000); interview with L2, private worker (Melbourne, 29 March 1999); Pyett, Haste and Snow, above n 38.
\textsuperscript{86} *Prostitution Control Regulations 1995* (Vic) r 19(1).
\textsuperscript{87} Ibid r 19(2).
of a sexually transmissible disease\textsuperscript{88} and

- must ensure that escort workers are provided with a two-way communication device so that the worker can be contacted at all times.\textsuperscript{89}

Sullivan states that the \textit{Prostitution Control Regulations 1995 (Vic)} "appear to be of significant benefit to workers in the (legal) industry".\textsuperscript{90} However, women interviewed as part of this study identified numerous breaches of the Regulations, including the misrepresentation of workers' appearance and experience, the failure to provide communication devices and the failure to ensure that rooms in brothels were equipped with adequate security systems.\textsuperscript{91}

The \textit{Health (Brothel) Regulations 1990 (Vic)} impose obligations on proprietors of brothels in relation to a range of matters, including:

- ensuring a free supply of condoms and lubricant which is accessible to sex workers and clients;

- taking reasonable steps to ensure that clients and prostitutes use condoms in any encounter involving penetration;

- providing information to prostitutes about sexually transmissible diseases; and

\textsuperscript{88} Ibid r 19(3)(a), (b).
\textsuperscript{89} Ibid r 19(6).
\textsuperscript{91} Interview with A, private worker (Melbourne, 29 March 2000); interview with L2, private worker (Melbourne, 29 March 2000); interview with S, brothel worker (Melbourne, 27 March 2000).
• providing clean linen and towels for the use of each client.\textsuperscript{92}

There appears that, in general, venue proprietors comply with the Regulations relating to the provision of condoms and encouraging the use of safe sex practices.\textsuperscript{93} It is less clear that proprietors comply with the Regulation relating to the provision of clean towels and linen. There is some evidence that some venue managers charge workers for the use of towels, which acts as a disincentive for workers to use clean towels with each client.\textsuperscript{94}

Conclusion

Evidence suggests that the nature of work in the legal sex industry presents considerable risks to the health and safety of women workers. The obligations imposed on employers in the legal sex industry by the OHSA and the \textit{Prostitution Control Act 1994}, associated regulations and codes of conduct have considerable potential to improve the health and safety of women working in the industry. The general duties contained in sections 21 and 22 of the OHSA in particular require employers to ensure that, in so far as it is practicable, their workplaces and systems of work are safe and do not present risks to health. However, as different duties are owed to workers depending upon whether they are independent contractors or employees, and an employer’s obligation to a worker is qualified by the concept of ‘practicability’, it is difficult to generalise about the application of occupational health and safety laws to women

\textsuperscript{92} \textit{Health (Brothel) Regulations 1990} (Vic) rr 5(1), 6, 9, 10(1). These regulations are sunsetting on 15 May 2001 and are currently being remade by the Department of Human Services. It is anticipated that their ambit will be extended to include escort and private work, which was legalised after the regulations were made.

\textsuperscript{93} Interview with S, brothel worker (Melbourne, 27 March 2000).

\textsuperscript{94} Information in the possession of the author obtained in her capacity as a Policy Officer with Consumer and Business Affairs Victoria.
working in the legal sex industry. Escort workers have particularly pressing needs, especially in relation to the premises in which they work and exposure to the risk of physical violence. Yet, the application of occupational health and safety laws to women working in escort work is unclear. By importing notions of management’s ability to ‘manage and control’ a workplace, the OHSA limits the responsibility of managers to ensure that the health and safety of escort workers is assured. It also appears that the general duties in the OHSA, and regulations and codes of conduct made under it, are not well observed in the legal sex industry. Possible explanations for why this might have occurred are discussed in chapter six.

**EQUAL OPPORTUNITY AND ANTI-DISCRIMINATION LAW**

Equal opportunity and anti-discrimination protections for workers in paid work relationships exist in both the *Workplace Relations Act 1996* (Cwlth) (the WRA), the *Equal Opportunity Act 1995* (Vic) and federal anti-discrimination statutes. The anti-discrimination protections contained in the WRA are discussed above in the context of award-making, certified agreements and AWAs. These provisions only apply to employees, although a discriminatory clause in a contract for services could be subject to review by the Federal Court in exercising its unfair contracts jurisdiction, discussed above. Equal opportunity and anti-discrimination statutes at a state and federal level make discrimination in employment unlawful. Unlike the protections contained in the WRA these statutory protections are available to women working in the legal sex

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95 Racial Discrimination Act 1975 (Cwlth); Sex Discrimination Act 1984 (Cwlth); Disability Discrimination Act 1992 (Cwlth). See also Human Rights and Equal Opportunity Commission Act 1986 (Cwlth).
industry regardless of whether they are employees or independent contractors.\textsuperscript{97} This includes prohibitions on sexual harassment in the workplace. The ability of women working in the legal sex industry to use state and federal anti-discrimination and equal opportunity laws to improve their working conditions is considered in this part of the chapter.

**Anti-Discrimination and Equal Opportunity Laws**

The *Equal Opportunity Act 1995* (Vic) and three federal statutes, the *Racial Discrimination Act 1975* (Cwth), the *Sex Discrimination Act 1984* (Cwth) and the *Disability Discrimination Act 1992* (Cwth), make discrimination in employment unlawful.\textsuperscript{98} The federal and state legislation, with the exception of the *Racial Discrimination Act 1975* (Cwth), define discrimination in terms of direct and indirect discrimination.\textsuperscript{99} In the *Equal Opportunity Act 1995* (Vic), for example, "discrimination" is defined as "direct or indirect discrimination on the basis of an attribute".\textsuperscript{100} This includes discrimination on the basis:

- that a person has that attribute or had it any time, whether or not at the time of the discrimination;\textsuperscript{101}

\textsuperscript{97} *Equal Opportunity Act 1995* (Vic) s 4; *Racial Discrimination Act 1975* (Cwth) s 4; *Sex Discrimination Act 1984* (Cwth) s 4; *Disability Discrimination Act 1992* (Cwth) s 4.


\textsuperscript{99} *Equal Opportunity Act 1995* (Vic) s 7; *Sex Discrimination Act 1984* ss 5, 6, 7; *Disability Discrimination Act 1992* (Cwth) ss 5–9. The *Racial Discrimination Act 1975* (Cwth) has no general definition of discrimination.

\textsuperscript{100} *Equal Opportunity Act 1995* (Vic) s 7.

\textsuperscript{101} ibid s 7(2)(a); *Sex Discrimination Act 1984* (Cwth) ss 5(1)(a), 6(1)(a), 7(1)(a), 7A(1)(a); *Disability Discrimination Act 1992* (Cwth) s 5, 7–9. See also *Racial Discrimination Act 1975* (Cwth) s 9(1).
of a characteristic that a person with that attribute generally has;\textsuperscript{102}

of a characteristic that is generally imputed to a person with that attribute;\textsuperscript{103} and

that a person is presumed to have that attribute or had it at any time.\textsuperscript{104}

Direct discrimination occurs when a person “treats or proposes to treat a person with an attribute less favourably than they would treat someone without that attribute in the same or similar circumstances”.\textsuperscript{105} Indirect discrimination occurs if a person imposes, or proposes to impose, a requirement, condition or practice that someone with an attribute does not or cannot comply with, and that a higher proportion of people without that attribute can comply with, and that is unreasonable.\textsuperscript{106} Ronalds observes that most complaints and cases throughout Australia use the definition of direct discrimination, meaning that the principles of indirect discrimination are relatively unexplored.\textsuperscript{107}

Grounds of Discrimination

State and federal equal opportunity and anti-discrimination legislation identifies a range of attributes on the basis of which discrimination is prohibited.\textsuperscript{108} Many attributes may be relevant in challenging discrimination against sex workers, including race, parental status, age, lawful sexual activity and physical features. As the list of attributes at state

\begin{footnotes}
\item[102] Equal Opportunity Act 1995 (Vic) s 7(2)(b); Sex Discrimination Act 1984 (Cth) ss 5(1)(b), 6(1)(b), 7(1)(b), 7A(1)(b).
\item[103] Equal Opportunity Act 1995 (Vic) s 7(2)(c); Sex Discrimination Act 1984 (Cth) s 5(1)(c).
\item[104] Equal Opportunity Act 1995 (Vic) s 7(2)(d).
\item[105] Ibid s 8(1); Sex Discrimination Act 1984 (Cth) ss 5(1), 6(1), 7(1), 7A(1); Disability Discrimination Act 1992 (Cth) ss 5(1), 7(1), 8(1), 9(1).
\item[106] Equal Opportunity Act 1995 (Vic) s 9(1); Racial Discrimination Act 1975 (Cth) s 9(1A); Sex Discrimination Act 1984 (Cth) ss 5(2), 6(2), 7(2), 7A(2); Disability Discrimination Act 1992 (Cth) s 6.
\end{footnotes}
level is more comprehensive than those at a federal level, this part of the chapter will primarily examine physical features and age discrimination under the Equal Opportunity Act 1995 (Vic) and how they apply to women working in the legal sex industry in Victoria. It also considers the effect of exemptions under the Equal Opportunity Act 1995 (Vic) on sex workers’ ability to obtain redress against discriminatory behaviour in the workplace.

Physical features

‘Physical features’ is defined to mean a person’s “height, weight, size or other bodily characteristics.” Chapman observes that the Second Reading Speech and the Explanatory Memorandum for the Equal Opportunity Bill make it clear that that this does not cover physical features that a person might choose to acquire, such as body piercings. On this basis, it is unlikely that the sex worker who was stood down from her employment because she had shaved her head would be able to successfully allege discrimination against her employer, as her choice of hairstyle was a ‘self imposed physical feature’. Less clear is whether physical features such as body hair are protected under this ground, as people do not have control over whether their body produces hair, although they can control whether the hair remains. This is an important issue for women working in the legal sex industry who do not wish to conform

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108 Chapman, ibid. Note that tattoos have been found to be “visible and distinctive attributes of the body” and are physical features within the meaning of section 4 of the Equal Opportunity Act 1995 (Vic) (see Allan Jamieson v Benalla Golf Club Inc (2000) EOC ¶¶83-106).

109 Interview with S, brothel worker (Melbourne, 27 March 2000).

110 Chapman, above n 110, 11.

111 Ibid.
to gendered stereotypes of femininity. One worker, who does not wax her pubic area or shave her underarms, told of being summoned by the venue management for a discussion of ways in which her appearance could be improved.115 In discussing this issue the worker stated that “they can’t really fire me because of who I am with my regulars”. This suggests that her ongoing employment may have been in jeopardy if she was not a ‘good earner’ because of her refusal to remove her body hair.116

Some venue operators appear to be less likely to agree to employ workers who do not conform to an idealised body type, such as those workers who may be considered overweight or who have small breasts.117 Weight and other bodily characteristics are specifically referred to in section 4 of the Equal Opportunity Act 1995 (Vic) and employers who treat sex workers with these attributes differently from other sex workers will be engaging in discriminatory behaviour.

Age

It is unlawful to discriminate on the basis of age.118 As discussed in the previous chapter, many owners and managers of brothels, escort agencies and tabletop dancing venues have a policy of hiring younger workers.119 Older sex workers also appear to be at risk of having their employment terminated because of their age. As one worker asked “what does a girl do when she’s past 28, when she’s no longer wanted?”120

115 Interview with G, brothel worker (Melbourne, 23 August 1999).
116 Ibid.
117 Ibid; interview with M, union organiser (Melbourne, 23 August 1999).
118 Equal Opportunity Act 1995 (Vic) s 6(a).
119 Interview with G, brothel worker (Melbourne, 23 August 1999); interview with M, union organiser (Melbourne, 4 March 2000); interview with K, ex tabletop dancer and brothel worker (Melbourne, 4 May 2000); interview with L1, private worker (Melbourne, 16 August 1999).
120 Interview with G, ibid.
Refusing workers employment on the basis of age or terminating their employment because they are considered 'too old' would be unlawful under the *Equal Opportunity Act 1995* (Vic). Unlike the anti-discrimination provisions in the WRA, the *Equal Opportunity Act 1995* (Vic) does not include the 'inherent requirements of the position' as an exemption to discriminatory behaviour based on age.

**Exemptions to Discrimination in Employment in the Equal Opportunity Act 1995 (Vic)**

A number of exceptions exist under the *Equal Opportunity Act 1995* (Vic) where discriminatory behaviour is permissible. These are permit employers to set standards of dress, appearance and behaviour; allow employers in small businesses to discriminate in offering employment, and allow discrimination on the basis of physical features where the work is a dramatic or artistic performance, or modelling work.

**Standards of dress, appearance and behaviour**

Employers are permitted to set and enforce standards of dress, appearance and behaviour for employees that are reasonable, having regard to the nature and circumstances of the employment.121 Chapman observes that this provision is potentially problematic, in that the rights given to an employer under this section may be wider than the implied common law right of an employer to issue instructions to employees.122 The provision conceivably allows venue managers to issue directions to workers regarding their costume and appearance and their demeanour while working. Although the standards set by an employer have to be reasonable in the circumstances of
employment, it has been noted that the concept of ‘reasonableness’ has been criticised from many quarters, including through feminist legal analysis. If the concept of ‘reasonableness’ is interpreted in the context of male standards of behaviour, it may legitimise the issuing of directions to women workers that they must demonstrate deference to their customers and cannot engage in behaviour that looks “cheap”, such as smoking while walking.

**Small businesses**

Additionally, an employer may discriminate in determining who should be offered employment if he or she employs no more than the equivalent of five people on a full-time basis. For the purposes of the exception, “full time work” is thirty hours per week. This exemption may be particularly relevant to women working in smaller brothels. Larger brothels (those with more than six rooms used for prostitution) usually need to employ a number of approved managers and are therefore likely to be employing five people on a full time basis. Tabletop dancing venues also employ house mothers and bar and security staff, making it likely that they will also be employing more than five people on a full time basis. Smaller brothels, escort agencies (which are not required to employ approved managers) and peep shows may not

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122 Chapman, above n 110, 16.
123 *Ibid* 17.
124 Dancers guidelines used in some tabletop dancing venues state that workers should avoid walking around the room while smoking as it looks “cheap” — dancer guidelines, Prostitution Control Act Ministerial Advisory Committee, *Final Report* (1997) appendix 3. Note that this provision may be incorporated as an express term of the workers’ contract of employment as a work rule.
125 Note the criticism of this exemption by the (then) Anti-Discrimination Tribunal in *Lowen v Ivanov & Anor* (1986) EOC ¶192-169, although the Tribunal appeared to distinguish between discrimination in offering employment and discrimination once a person has been employed.
127 Interview with R, brothel manager (Melbourne, 4 March 2000); *Prostitution Control Act 1994* (Vic) s 49.
employ the same number of non-sex work staff. Unless a number of sex workers at these venues are working 30 hours a week — representing approximately three shifts per week — then such venues would not be employing five or more staff on a full time basis. The exemption contained in section 21 of the Equal Opportunity Act 1995 (Vic) would therefore seem to be potentially important for operators of smaller brothels, escort agencies and peep shows.

**Dramatic or artistic performances or modelling work**

If employment is being offered in relation to a dramatic or artistic performance, photographic or modelling work or similar employment, an employer may discriminate on the basis of physical features.\(^{129}\) According to the Equal Opportunity Commission Victoria “it is lawful to select an employee on ‘looks’ alone in these circumstances.”\(^{130}\) If employment is being offered in relation to such work, an employer may also limit the offering of employment to people of a particular age, if necessary to do so for reasons of authenticity or credibility.\(^{131}\) If tabletop dancing is considered to fall within the ambit of an ‘artistic performance’ or ‘similar employment’ to an artistic performance, managers of venues who do not wish to employ workers because of their physical appearance could also potentially rely upon this exemption. Venue managers who do not wish to hire older workers could also rely on this exemption if they could maintain that it is necessary to do so for the purposes of credibility.

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\(^{129}\) Interview with K, ex tabletop dancer and brothel worker (Melbourne, 4 May 2000).

\(^{129}\) *Equal Opportunity Act 1995* (Vic) s 17(4).

\(^{130}\) *Equal Opportunity Commission Victoria, Physical Features Discrimination*, Information sheet, 3 February 2001 (copy on file with author).

\(^{131}\) *Equal Opportunity Act 1995* (Vic) s 17(3).
Conclusion

The *Equal Opportunity Act 1995* (Vic) could be relied upon by women working in the legal sex industry in Victoria to seek redress against discriminatory treatment in employment. Although women working in the sex industry may experience discrimination on the basis of a wide range of attributes, venue managers and proprietors appear to discriminate against women sex workers on the basis of their physical features and age with some frequency. The effectiveness of the *Equal Opportunity Act 1995* (Vic) in redressing discrimination against sex workers is significantly compromised by a range of exemptions. These have the effect of rendering otherwise discriminatory behaviour lawful. Women working in the legal sex industry in Victoria, particularly those working in smaller brothels and escort agencies, are likely to experience considerable difficulty in using the provisions of the *Equal Opportunity Act 1995* (Vic) to address discriminatory behaviour in hiring decisions because of these exemptions.

Sexual Harassment

This part of the chapter considers sexual harassment in the legal sex industry in Victoria. It first considers the meaning of sexual harassment. Next, it considers the incidence of sexual harassment in the legal sex industry in Victoria. Finally, it considers the application of statutory provisions to the legal sex industry.

What is Sexual Harassment?

Sexual harassment in employment is unlawful under the Federal *Sex Discrimination Act 1984* (Cth) and the *Equal Opportunity Act 1995* (Vic). Ronalds states that "the changes
in recognition of sexual harassment and the method of dealing with complaints represents one of the most significant improvements to the working conditions of Australian women achieved over the last fifteen years.\textsuperscript{132}

Section 28A of the Sex Discrimination Act 1984 (Cth) and section 85 of the Equal Opportunity Act 1995 (Vic) state that one person sexually harasses another if:

\begin{enumerate}[a)]
  \item he or she makes an unwelcome sexual advance or unwelcome request for sexual favours or engages in other unwelcome conduct of a sexual nature; and
  \item the harassment occurs in a situation in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.
\end{enumerate}

There are two main types of harassment: behaviour that is accompanied by a direct or implied threat or benefit and behaviour that creates a sexually permeated or hostile work environment.\textsuperscript{133} In relation to the second ground, harassment may occur where “there is relentless and continuing unwelcome sexual conduct in the workplace that interferes with the employee’s work performance or that creates an intimidating, hostile, abusive or offensive work environment.”\textsuperscript{134} A general environment of hostility and unfriendliness towards women, including snide comments and sexist jokes, has been held to constitute a hostile work environment.\textsuperscript{135}

\textsuperscript{132} Ronalds, above n 107, 139.
\textsuperscript{134} CCH, Australian and New Zealand Equal Opportunity Law and Practice, vol 1 (at 94-5-98) ¶58-560. See also discussion of the concept of hostile work environment in Hall v A&A Sheiban Pty Ltd (1989) EOC ¶92-250.
\textsuperscript{135} McKenna v State of Victoria & Ors (1998) EOC ¶92-927. This decision was upheld on appeal — see State of Victoria & Ors v McKenna (2000) EOC ¶93-680.
According to Ronalds, “sexual harassment can take many forms and it is impossible to precisely define what may come within the definition.”¹³⁶ In O’Callaghan v Loader & Anor, the New South Wales Equal Opportunity identified a range of behaviours that might constitute sexual harassment. These include attempts at sexual intercourse or some other overt sexual connection, kissing, touching or pinching, sexual propositions or gender based insults or taunting.¹³⁷ The prohibition on sexual harassment has been described as “not intending to change the tide of human affairs” but “only striking at conduct that is an abuse of power or influence that an employer has over the career prospects or working conditions of an employee.”¹³⁸

Sexual Harassment in the Legal Sex Work Industry in Victoria

It is unclear how widespread sexual harassment is in the legal sex industry or even what sexual harassment might mean, given the highly sexualised environment in which women work.¹³⁹ In Victoria, proceedings have been initiated by at least one tabletop dancer for sexual harassment.¹⁴⁰ In this case Monique Meenks, a worker in a tabletop dancing venue, commenced proceedings against the venue manager, Raymond Bartlett, for sexual harassment. She alleged that Mr Bartlett grabbed her legs, her side and her buttocks. She also claimed that Mr Bartlett hit her across her jaw, smacked her on the

¹³⁶ Ronalds, above n 107, 142.
¹³⁷ O’Callaghan v Loader & Anor (1994) EOC ¶92-023. Note also that the The Sexual Harassment Code of Practice issued by the Human Rights and Equal Opportunity Commission identifies specific examples of conduct amounting to sexual harassment. These include uninvited physical contact or gestures, unwelcome requests for sex, sexual comments, jokes and innuendo, and sex-based insults or taunts — HREOC, above n 133, 7.
mouth and threw her on the floor, kicking her until she passed out. The parties reached
settlement before the case went to a full hearing.

Women interviewed as part of this study identified a range of practices that they had
either experienced personally or were aware of that could constitute sexual
harassment.\textsuperscript{141} One woman participating in the study discussed the practice of 'couch
testing' in legal brothels, where venue managers demand to have sex with women
applying to work at the venue as sex workers in order to test their suitability for providing
sexual services to clients.\textsuperscript{142} This would amount to harassment accompanied by a
threat, the threat being that workers would not be employed unless they acceded to the
venue manager’s demand. Both statute and case law recognise that harassment in
employment can occur during a pre-employment interview.\textsuperscript{143}

One woman with experience of working in a legal brothel also stated that some venue
managers (including approved managers) refer to workers in derogatory and insulting
terms.\textsuperscript{144} This issue was identified by a worker with experience in the tabletop dancing
industry, who observed another worker being verbally abused as a 'slut' by a house
mother. The worker also stated that some clients at tabletop dancing venues hurl insults
at workers during their podium dances, call workers 'sluts' and 'fucking whores' and
subject workers to unwanted and persistent touching.\textsuperscript{145}

\textsuperscript{141} This is assuming that the conduct complained of was unwelcome and that it was reasonable for the harasser to
anticipate that the conduct would cause offence, humiliation or intimidation. These issues are discussed later in this
part of the chapter.
\textsuperscript{142} Interview with J, STD adviser (Melbourne, 29 July 1999).
\textsuperscript{143} Equal Opportunity Act 1995 (Vic) s 86(1)(a); Hall & Ors v A & A Sheiban Pty Ltd (1989) EOC ¶92-250; 'B' 'C' & 'D'
\textsuperscript{144} Interview with L2, private worker (Melbourne, 29 March 2000).
\textsuperscript{145} Interview with K, ex tabletop dancer and brothel worker (Melbourne, 4 May 2000). This worker also identified an
extremely serious example of sexual harassment of a worker by a customer, where a tabletop dancer was digitally
Application of Anti-Sexual Harassment Laws to the Sex Work Industry in Victoria

In order for a claim of sexual harassment to be successful, the conduct complained of must be unwelcome. If the complainant did not tell the harasser that his or her behaviour was unwelcome, there will need to be some evidence from the complainant’s reaction or the surrounding circumstances that the conduct was unwelcome.\textsuperscript{146} Ambivalence or resigned tolerance of the harasser’s conduct does not necessarily defeat a claim of sexual harassment.\textsuperscript{147} Workers who tolerate ‘groping’ by venue managers or clients because they fear they could lose their jobs if they complain, or who agree to have sex with a putative employer because they are anxious to obtain employment, could potentially maintain an action for sexual harassment.\textsuperscript{148} The Code of Practice identifies a range of reasons why someone might be unable to confront their harasser about their conduct, including the youth and inexperience of the complainant, fear of reprisal and the nature of the power relationship between the parties.\textsuperscript{149} All of these factors may be present in the legal sex industry.

Additionally, both the \textit{Sex Discrimination Act} (Cwth) and the \textit{Equal Opportunity Act 1995} (Vic) both rely upon a notion of reasonableness as a test for sexual harassment. Sexual harassment only occurs where a reasonable person would have anticipated that the victim of the harassment would have been offended, humiliated or intimidated by the harasser’s conduct. Morgan argues that notions of reasonableness, when linked to the requirement of the victim being humiliated or offended, introduce an unnecessary

\footnotesize{penetrated by a customer during a performance without her consent. This would also be an offence under the \textit{Crimes Act 1958} (Vic). The issue of an employer’s vicarious liability for the conduct of clients is discussed below.\textsuperscript{146} HREOC, above n 133, 20.\textsuperscript{147} Aldridge v Booth & Others (1986) EOC ¶92-177.\textsuperscript{148} Ibid; Elliot v Nanda & Anor (1999) EOC ¶92-988.\textsuperscript{149} HREOC, above n 133, 20. See also Dolphin v Longa & Anor (1994) EOC ¶92-641; Elliot v Nanda & Anor ibid.}
element of morality into the inquiry.\footnote{Jenny Morgan, ‘Sexual Harassment and the Public/Private Dichotomy: Equality, Morality and Manners’ in Margaret Thornton (ed) \textit{Public and Private: Feminist Legal Debates} (1995) 89–110.} Morgan also identifies the language of ‘offence’ as promoting an understanding that sexual harassment is about morality rather than being about equality.\footnote{Ibid 92.} Decisions such as \textit{R v Hakopian} illustrate that some members of the judiciary consider sex workers to be less sensitive than other women to the effects of violent, degrading and humiliating acts.\footnote{Unreported, County Court of Victoria, Jones J, 8 August 1991. See comment in Michelle Fisher and Fanea Ammett, ‘Sentencing of Sexual Offenders When Their Victims are Prostitutes and Other Issues Arising Out of \textit{Hakopian} (1992) 18 \textit{Melbourne University Law Review} 683; Jocelyne Scott, ‘Judicial Vision: Rape, Prostitution and the “Chaste Woman”’ in Australian Institute of Criminology, \textit{Without Consent: Confronting Adult Sexual Violence} (1993) 173; Keith Gilbert ‘Rape and the Sex Industry’ (1992) 3 \textit{Criminology Australia} 14; Graeme Coss, ‘Oh Chastity! What Crimes Are Committed in Thy Name: Contemporary Comment’ (1992) 16 \textit{Criminal Law Journal} 160.} This type of reasoning could also conceivably be imported into the notion of ‘reasonableness’, whereby a reasonable person could be considered less likely to anticipate that a sex worker would suffer offence, humiliation or intimidation through the harasser’s conduct because they have been desensitised by the nature of their work.

\textit{Vicarious liability of employers}

The \textit{Sex Discrimination Act 1984 (Cwth)}\footnote{Equal Opportunity Act 1995 (Vic) s 106.} and the \textit{Equal Opportunity Act 1995 (Vic)}\footnote{Ibid ss 112, 113.} make it clear that an employer or principal may be vicariously liable for acts of sexual harassment committed by an employee or agent.\footnote{For a recent example of vicarious liability of an employer when an employee has sexually harassed a fellow employee see \textit{Williams v Robinson} (2000) EOC ¶93-112.} The licensee of a brothel may therefore be liable for actions committed by approved managers or consultants.

Proprietors of escort agencies, tabletop dancing venue and peep shows may also be
vicariously liable for the actions of other staff members, such as security staff and drivers.\textsuperscript{156}

Significantly, at least one decision has recognised that an employer may be liable for harassment caused by non-employees, meaning that the operator of a brothel, escort agency, tabletop dancing venue or peep show may be liable for harassment caused by customers.\textsuperscript{157} The use of derogatory and insulting comments and unwanted physical contact, whether committed by the employer, an agent of the employer or by customers could constitute the creation of a hostile work environment, in which the working environment for sex workers has been affected in an offensive or intimidating way. It is important to note that arguments that sexually suggestive comments or sexual banter are part of the culture of a workplace has been rejected on at least two occasions.\textsuperscript{158} An employer may have difficulty successfully asserting that making derogatory sexual comments to workers is part of the culture of the legal sex work industry and the making of such comments, either by an employer, an agent of an employer or a client, does not constitute sexual harassment.

However, if an employer or principal can prove that, on the balance of probabilities, he or she took all reasonable steps to prevent contravention of the legislation, he or she will

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\textsuperscript{156} An escort worker interviewed as part of this study told of how a driver for an escort agency used to make unwelcome sexually suggestive comments to workers and steal their clothes (interview with A, private worker, Melbourne, 29 March 2000).

\textsuperscript{157} See Hawkins v Malnet Pty Ltd (via Class 4 Cars) & Anor (1995) EOC ¶92-767, in which Malnet Pty Ltd was held responsible for sexual harassment committed by the company’s sales manager and the sales manager’s cousin, even though the cousin was not an employee of the business. Note that New Zealand anti-discrimination legislation contains a specific procedure where sexual harassment is perpetrated by a customer or client of an employer. If a formal complaint is made about sexual harassment and the harassment continues after the complaint has been made, the employee is deemed to have a personal grievance as if the sexual harassment was that of the employer. The relevant procedure for the settlement of a personal grievance then applies — see Human Rights Act 1993 (NZ) ss 62(3), 68.

\textsuperscript{158} McLaren v Zucco (1986) EOC ¶92-650; Daniels v Hunter Water Board (1986) EOC ¶92-626. See also Hawkins v Malnet Pty Ltd (via Class 4 Cars) ibid.
\end{flushleft}
have a valid defence to a claim of sexual harassment.\textsuperscript{159} Reasonable precautions do not, however, have to be absolute and the nature of the action required by the employer depends on the circumstances.\textsuperscript{160} In smaller workplaces like brothels and tabletop dancing venues, it appears that there needs to at least be a clear policy statement that sexual harassment will not be tolerated.\textsuperscript{161}

The dancer guidelines of two tabletop dancing venues and materials used in one legal brothel contain limited reference to sexual harassment. Dancer guidelines used in one venue state that “it is unacceptable for a customer to harass or touch you” and advise workers to warn customers if they are touched and, if the touching continues, to terminate the dance.\textsuperscript{162} It appears that customers are advised on the prohibition on touching workers during dances, although the effect of this would appear to be undermined by permitting clients to take workers to private rooms.\textsuperscript{163} The ‘terms and conditions applying to entry and services rendered’ used in one Melbourne brothel make no specific reference to sexual harassment. They state that management reserves the right to refuse to admit or allow a person to remain on the premises if their behaviour or conduct is such that the proprietor believes the safety of any person is at risk.\textsuperscript{164} It appears unlikely that proprietors of brothels, escort agencies, tabletop dancing venues and peep shows would provide training to sex work staff on sexual harassment as the

\textsuperscript{159} Equal Opportunity Act 1995 (Vic) s 103.
\textsuperscript{160} Aldridge v Booth & Others (1986) EOC ¶92-177; Gray v State of Victoria & Anor (1999) EOC ¶92-996.
\textsuperscript{161} Bevacqua v Klinkert & Ors (No 1) (1993) EOC ¶92-515.
\textsuperscript{163} Interview with K, ex tabletop dancer and brothel worker (Melbourne, 4 May 2000).
\textsuperscript{164} ‘Terms and conditions applying to entry and services rendered’ supplied by R, brothel manager (copy on file with author).
provision of such training might suggest that sex workers are employees, not independent contractors.\textsuperscript{165}

These measures fall considerably short of preventive measures identified in the HREOC Code of Practice. Some of the steps recommended by HREOC include:

- developing a written policy which prohibits sexual harassment in consultation with staff and relevant unions;\textsuperscript{166}

- regular distribution and promotion of the policy at all levels of the organisation;

- displaying anti sexual harassment posters on notice boards in common work areas and distribute relevant brochures;

- ensuring that line managers maintain appropriate standards of professional conduct at all times; and

- conducting awareness raising sessions for general staff on sexual harassment issues.\textsuperscript{167}

Although what constitutes ‘reasonable steps’ varies depending upon the nature of the workplace, it is contended that the nature of the work undertaken by sex workers makes them extremely vulnerable to sexual harassment from venue managers, other employees and clients. The gender imbalance between workers, management and

\textsuperscript{165} Interview with R, brothel manager (Melbourne, 4 March 2000).

\textsuperscript{166} The Victorian Equal Opportunity Commission produces a 44 page publication to assist employers to prevent sexual harassment occurring in the workplace. It includes a 10-step sexual harassment prevention action plan and a sample sexual harassment prevention policy (copy on file with author).

\textsuperscript{167} HREOC, above n 133, 11–13.
Clients, the fact that workers are required to wear sexually suggestive clothing, and the

culture of the sex work industry are also factors which suggests that venue managers

have an obligation to implement comprehensive precautionary measures to prevent

sexual harassment.\textsuperscript{168} In this context, the mere inclusion of a term to the effect that

'harassment is prohibited' in dancers' guidelines and reservation of a general right to

exclude customers would not constitute reasonable steps. Venue managers who took

no other action would leave themselves vulnerable to being vicariously liable for sexual

harassment.

CONCLUSION

Occupational health and safety and anti-discrimination and equal opportunity laws

provide an avenue for women working in the legal sex industry in Victoria to obtain

significant improvements in their working conditions. The fact that these protections are

broadly available to women workers regardless of whether they are engaged pursuant to

a contract of services or a contract for service is particularly important, as it avoids the

necessity of workers having to establish that they are employees before they can obtain

the benefit of legal protections. However, evidence suggests that there has been little

improvement in standards of health and safety in the legal sex industry since 1992,

when a sex industry investigation and compliance project was conducted. Similarly, sex

workers appear to be subject to discriminatory behaviour by venue managers and

proprietors, and may also be sexually harassed by venue operators and proprietors and

clients. Legal remedies to obtain redress for discriminatory behaviour and procedures to

address sexual harassment appear to have had limited impact on the incidence of

\textsuperscript{168} For a discussion of factors that may influence what level of preventative action is reasonable see ibid 11.
discrimination and sexual harassment in the legal sex industry in Victoria. The following chapter discusses why these protective legal mechanisms appear to have been under-utilised.
CHAPTER SIX

THEMES TO EXPLAIN THE LAW IN ACTION

INTRODUCTION

The previous two chapters identified a variety of protective legal mechanisms and considered their possible application to the legal sex work industry. The chapters concluded that women working in the legal sex industry do not often use these mechanisms to improve their working conditions or to seek redress where an employer has behaved unjustly or unfairly. This chapter attempts to explain why this has occurred. In doing so, four themes are identified: the role of the public/private distinction, the stigmatisation of sex work and the women who perform it, confusion regarding the employment status of sex workers, and the effect of a masculinist industrial culture. In discussing these themes, it is important to recognise that they are all interrelated. The public/private distinction, conceived of as the separation between the home and marketplace, particularly permeates the other three themes mentioned above. Also important to note is that the discussion in this chapter is not intended to be an exhaustive examination of why women working in the legal sex industry do not appear to use protective legal mechanisms. Rather, the chapter considers those themes that have emerged most consistently through a review of the relevant literature and analysis of empirical data. Lastly, it should be acknowledged that many of the themes identified in this chapter have application to most women engaged in paid labour. However, the chapter considers some specific features of sex work that
impedes the access of women workers to protective legal mechanisms. The stigmatisation of women engaged in sex work is particularly significant in this regard.

THE PUBLIC/PRIVATE DICHOTOMY

The distinction between the public and private spheres, manifested in the separation of the family and the marketplace, is "central to almost two centuries of feminist writing and political struggle." As Pateman observes, the focus of criticism of the dichotomy has been on the separation of the public and private spheres in Western liberal theory and practice. Theorists such as Thornton assert that the association of men and women with the public and private spheres respectively is one of the few assertions that can categorically be made about the nature of the dualism. Thornton contends that, within Western liberalism, men have been associated with the public sphere, in the character of government and civil society, whereas women have been indelibly associated with the private sphere, in the character of the family. Both the public and the private spheres are inscribed with values, which are in turn essentially gendered. Thus, "[p]ublic is opposed to private, in parallel with ethics and morality, and factual is opposed to valued

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2 Pateman ibid.


4 'The Public/Private Dichotomy: Gendered and Discriminatory' ibid.
determinations...these distinctions are gender based: female is private, moral, valued, subjective; male is public, ethical, factual, objective.\textsuperscript{5}

This part of the chapter discusses how the public/private distinction has impacted upon sex workers’ ability to use protective legal mechanisms to improve their working conditions. In doing so, it considers how the gendered stratification of labour may have affected the way that sex workers view their work and influenced their perception of how protective legal mechanisms might apply to sex work. It also considers how the public/private distinction has informed the character of protective legal mechanisms and the way in which the law reflects and reproduces gendered power differences. This in turn creates barriers in the law that prevents sex workers from successfully using protective legal mechanisms to improve their working conditions.

**Barriers for Sex Workers**

The public/private paradigm may partly explain why sex workers themselves do not seek award coverage, attempt to negotiate collective or individual agreements with their employers, or use other legal processes which might be of assistance to them. Paid work is an activity that is undertaken in the public sphere and the meaning of work is informed by the values of that sphere. The construction of paid work is therefore highly gendered. The public/private distinction, predicated upon binary opposition between home and market, “adopts able-bodied adult male working patterns as the norm.”\textsuperscript{6}

\textsuperscript{6} Laura Bennett, 'Women, Exploitation and the Child Care Industry: Breaking the Vicious Circle' (1991) 33 *The Journal of Industrial Relations* 20, 24.
"Work" is therefore understood as a continuous, full time activity.\(^7\) As Owens observes however "[w]omen do not conform to the established norm of the worker who, having someone else to provide domestic support, works in the paid workforce full-time, on a regular and permanent basis, without break for the entirety of a working lifetime...[t]hat norm is male".\(^8\) This lack of conformity is true of many women working in the legal sex industry in Victoria. Sex workers tend to enter the industry in order to make as much money as quickly as possible,\(^9\) or to meet immediate financial commitments,\(^10\) often as a result of family responsibilities.\(^11\) Their workforce participation is therefore discontinuous and characterised by multiple entries and exits. As Owens states "the place of thought in the construction of the world recognises that the meaning of the ‘thing’ of work is always contingent upon thought."\(^12\) The difference between sex workers’ patterns of engagement with paid work and the gendered construction of what ‘real’ work is may therefore mean that sex workers, either consciously or unconsciously, view protective legal mechanisms as having little application to the work they engage in.

An example of this can be found in the reluctance of some sex workers to claim sex work as their ‘job’. One worker interviewed as part of this study, in discussing why sex workers tend not to join trade unions, observed that “they don’t (join) because they don’t

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\(^8\) ‘Women, ‘Atypical’ Work Relationships and the Law’ ibid 400.

\(^9\) Interview with L1, private worker (Melbourne, 16 August 1999).

\(^10\) Respondents to Snow’s study identified the ability to finance studies, having enough money and food and getting out of debt as positive aspects of working in the sex work industry – see Jocelyn Snow, Female Sex Workers in Victoria (Masters thesis, University of Melbourne) 81.

\(^11\) Snow found that 53% of sex workers interviewed had one or more children (ibid 48). Perkins found a higher ratio of children among sex workers than health workers or students (Roberta Perkins, Working Girls: Prostitutes, their Life and Social Control (1991) 176)). A number of workers interviewed for this study said that they began working in the sex industry in order to financially provide for their children.

see themselves in a job."13 Even women workers who do consider sex work to be a job may not view it in terms of a 'career'.14 In fact, working in the sex industry for a long period of time may actually be viewed as a non-achievement. One worker interviewed for this study observed that "if you've worked for ten years as I have, you're looked upon as a failure because you should have made your money and got out".15 As another worker interviewed as part of this study commented "[t]hey don't look at it as a career, they don't look at it as a full-time job, they can't see themselves doing this for the next ten years. So therefore why do anything about it [improving workplace conditions]?"16

The public/private distinction maintains an "absolute separation between work and family",17 where 'productive' labour is performed and rewarded in the public marketplace and reproductive labour is performed (and not financially rewarded) in the home.18 The meaning of "work" is therefore strongly associated with labour that is performed outside the home.19 Yet, the work performed by women in the legal sex industry contests the separation of home and workplace. Although women working in the legal sex industry in Victoria go 'out' to work, not least because it is illegal for workers to see clients in their homes,20 in the case of escort workers this means going to work in a home, hotel or other private place. Some brothels have also cultured a 'home' environment. For

13 Interview with G, brothel worker (Melbourne, 23 August 1999).
14 Ibid.
15 Interview with L1, private worker (Melbourne, 16 August 1999).
16 Interview with S, brothel worker (Melbourne, 27 March 2000).
19 Note that Hunter states that "the home/out distinction is a gender distinction", meaning that the stronger the association of paid labour with the private sphere, the less value it is accorded - see Rosemary Hunter, 'The Regulation of Independent Contractors' (1992) 5 Corporate and Business Law Journal 165, 173.
20 Prostitution Control Act 1994 (Vic) s 23. Note also that the s 57 of the Equal Opportunity Act 1995 (Vic) states that a person may refuse to provide accommodation to another person if the other person intends to use the accommodation for, or in connection with, a lawful sexual activity on a commercial basis.
example, one worker interviewed for this study said that at one brothel where she worked "I used to sew, I'd have a sewing machine and make clothes, cut them out between clients. I used to take my dog...and he used to sit outside the door when I was with clients. So it was really homey."\textsuperscript{21} Brothels possess many physical features of a home, in that they have a kitchen, lounge area, bathrooms and bedrooms, and some are in fact conducted from ex-residential premises.\textsuperscript{22} Many brothels and tabletop dancing venues use house mothers, some of whom provide advice and support to workers in much the same way that a family member or friend would, rather than as a supervisor or manager.\textsuperscript{23} Bennett noted that, in a study of home-based family day care workers, women carers were reluctant to express negative feelings about their poor working conditions because these were seen as the 'lot' of women at home.\textsuperscript{24} The fact that the workplaces of many women working in the legal sex industry in Victoria have a number of similarities with, or are, private homes may militate against sex workers use of public mechanisms like contracts, awards and agreements, and occupational health and safety and anti-discrimination laws. This is because sex workers may themselves view their work as something that does not truly take place in the public world and so does not attract the legal rights associated with that sphere.

**Barriers in the Form of the Law**

The law is a public institution that regulates relationships between parties, including their work relationships. Theorists such as Owens maintain that the law has taken a positive

\textsuperscript{21} Interview with M, union organiser (Melbourne, 27 August 1999).
\textsuperscript{22} For example, 'Manhattan Terrace' and 'Utopia' are legal brothels in Carlton that operate from terrace houses.
\textsuperscript{23} Interview with S, brothel worker (Melbourne, 27 March 2000).
\textsuperscript{24} Bennett, above n 6, 25.
role in defining the person with whom it is concerned and, in doing so, draws a
distinction between the home and marketplace and between paid and unpaid work.25
The law is solely concerned with work that is performed in the public sphere. As
discussed, this is work that is performed according to ‘male’ patterns. The form of law
itself privileges work that conforms with male patterns of participation in the paid
workforce. These mechanisms, as public instruments, also reflect the values of the
public sphere, such as neutrality and objectivity. As the public sphere is associated with
men, the law therefore serves to perpetuate the ideological divide between the public
and private and entrenches the gendered power disparities associated with the
maintenance of the public/private dichotomy.

The public/private dichotomy therefore creates barriers for women sex workers’ effective
use of protective legal mechanisms in three ways. Firstly, the law conflates ‘work’ with
men’s work and in doing so constructs work that deviates from the male norm as
atypical, such as independent contracting and casual work. The tendency to categorise
sex workers as ‘atypical’ workers has consequent effects on their ability to use contracts
of employment, and individual and collective agreements, to obtain redress for unfair
dismissal, and to use anti-discrimination statutes. Secondly, values associated with the
public sphere, such as neutrality and equality, are incorporated into public processes,
including protective legal mechanisms. The rhetoric of ‘functional equality’ between
employers and employees, which underpins the Workplace Relations Act 1996 (Cwth),
obscribes the reality of relationships between workers and employers in the legal sex
industry, and in doing so perpetuates power disparities. Thirdly, fixed and objective

notions of equality and unfairness, which are embodied in equal opportunity law and unfair contracts legislation, require comparisons that are not easily made in the Victorian legal sex industry.

Owens states that "gender constructs work and law, and work and law in turn construct gender." The way in which the law constructs the 'thing' of work is therefore gendered. According to Owens, "despite the disappearance of the 'male breadwinner' from the rhetoric of the law, the worker with his characteristics is still singled out for reward." The law therefore privileges full-time, permanent work performed by men. The type of task performed by the 'worker' and how that task is valued in law is also relevant to the public/private dichotomy. The traditional male work task has tended to be either manual labour or a professional position. Much of the work performed by women, such as garment manufacture and the provision of personal services to children or older people, has what Owens describes as a "transformative" association with the private sphere. Work performed by women is constructed as unskilled and unproductive activity, in the sense that it is merely an extension of women's 'natural' abilities. Similarly, sex workers' work task is the provision of an intimate, sexual service, quintessentially associated with the private sphere in the character of reproductive, rather than productive, labour. This also contributes to the perception that the work that

26 Owens, 'Women, 'Atypical' Work Relationships and the Law', above n 7, 426.
27 Ibid 428.
29 Ibid.
32 The Public/Private Dichotomy: Gendered above n 3, 57.

Ibid.
women sex workers do is not the type of work deserving the same degree of legal protection as that performed by men.

The more that work patterns deviate from the legal, male standard – as they do in the Victorian legal sex industry - the more likely it is that workers will be categorised as 'atypical workers', such as independent contractors or casuals. Women are therefore more likely than men to be categorised in law as 'atypical workers'. This has a consequent effect on the ability of women sex workers to use protective legal mechanisms. If the law holds that a woman working in the legal sex industry in Victoria is an independent contractor, she will be excluded from the protections afforded by the express and implied terms of a contract of employment. She will also be unable to receive the benefits of award protection or make agreements under the Workplace Relations Act 1996 (Cwth), as independent contractors are assumed to have chosen the risks and benefits of being self-employed.33 Sex workers who are categorised as casual workers under the Workplace Relations Regulations 1996 (Cwth) are excluded from access to unfair dismissal and unlawful termination proceedings. The decision in Claudia v Allmen demonstrates that this exclusion has already operated as an effective barrier for a sex worker obtaining redress for unfair dismissal. The fact that women working in the legal sex industry in Victoria tend not to work in the industry for continuous periods also reduces the notice period for the purposes of unlawful

termination proceedings and reduces awards of compensation in lieu of notice, reducing the effectiveness of such procedures.\textsuperscript{34}

The way in which the law reproduces the gendered effects of the public/private distinction and thereby creates barriers for sex workers in accessing protective legal mechanisms can also be observed in anti-discrimination and equal opportunity law. According to Hunter "[t]he working out of the public/private distinction has...limited the scope of sex discrimination legislation" through exemptions which "preserve the sanctity of 'private' activities."\textsuperscript{35} As discussed in chapter four, an employer may discriminate in determining who should be offered employment if he or she employs no more than the equivalent of five people on a full-time basis.\textsuperscript{36} This is likely to exclude many women working in small brothels, and in escort agencies and peep shows, from obtaining redress for discrimination in hiring decisions. As discussed previously, many brothels, escort agencies, and peep shows are likely to fall within the definition of a 'small business' for the purpose of the exemption. Morgan theorises that this exemption sends a clear message that employment in a small business is really 'private' employment "and one may happily discriminate in private."\textsuperscript{37} The small business exemption therefore has the effect of relegating many businesses operating in the sex industry to the 'private' realm, meaning that public mechanisms to address industrial disadvantage are out of reach of women who work in such businesses.

As public processes, protective legal mechanisms reflect and reproduce the values associated with the public sphere, such as neutrality and objectivity. The imposition of

\textsuperscript{34} Owens, 'Women, 'Atypical' Work Relationships and the Law', above n 7, 411-12.
\textsuperscript{35} Hunter, above n 33.
Chapter Six – Themes to Explain the Law in Action

ostensibly ‘neutral’ mechanisms on relationships that are fundamentally unequal, such as those which often exist between sex workers and their employers, may have the effect of perpetuating this inequality when negotiating the work contract. These mechanisms may therefore be of limited benefit to women working in the sex industry who are seeking to improve their working conditions. Chapter four discussed the emphasis in the Workplace Relations Act 1996 (Cwth) on enterprise bargaining, manifested through the primacy of agreements made at an individual and workplace level over awards.38 In discussing the effect of a process that relies on individually negotiated contracts on women engaged in home-based work, Owens states that:

[I]he argument for the supremacy of regulation by contractual arrangement between the parties – that it is a private arrangement within the public sphere – derives its force from the values associated with the public/private divide. Contracting and sub-contracting become associated with the values of freedom, individual striving and an associated free-enterprise philosophy that suggests competition is the most appropriate way to achieve order in the marketplace.39

Owens’ observations can also be made about enterprise bargaining, which is similarly predicated on the centrality of individual negotiation to establish terms and conditions of

38 Equal Opportunity Act 1995 (Vic) s 21(2).
37 Greycar and Morgan, above n 18.
work. Systems that promote enterprise bargaining as the primary means of establishing terms and conditions of employment are predicated on the assumption that there is no undesirable bargaining power between employers and employees, and that each party to the contract freely agrees to its terms and conditions. Such systems assume functional equality between workers and employers. Relationships between sex workers and managers and proprietors are not, in general, characterised by equality of bargaining power. As one worker observed about the process of negotiating contracts between workers and managers in the sex industry "[a] lot of girls are very uneducated. They're doing it for whatever reason. They don't listen to the As, Bs and Cs and they're easily intimidated as well. This is where these people [managers] have got it over them." The ability of sex workers to enter into meaningful negotiations with their employers on an equal footing is likely to be further undermined by workers' previous unfavourable experience of contracts and agreements. According to a union organiser, women working in the sex industry "get really terrified" by any form of written agreement with venue managers. Workers who are intimidated by formal contracts and agreements are unlikely to be confident in asserting their rights in negotiating Division 2 and 3 certified agreements or Australian Workplace Agreements under the Workplace Relations Act 1996 (Cwth). The reality of power disparities in the sex work industry in Victoria belies the rhetoric of equality and neutrality that underlies the enterprise bargaining process.

40 Bennett, above n 30, 114. On the issue of the exercise of choice in contractual relations see Ian Hunt, 'Are Choices Always Liberating? Dilemmas of "Freeing Up" the Australian Labour Market' in Hunt and Provis, above n 7, 127–149.
41 Ibid.
42 Interview with A, private worker (Melbourne, 29 August 2000).
43 Interview with M, union organiser (Melbourne, 27 August 1999).
Notions of equality and unfairness are also embodied in anti-discrimination statutes and unfair contract provisions. The meaning of these values is informed by the public/private dichotomy. Thornton maintains that women's association with the private sphere has constituted "a fundamental impediment to both the theory and practice of equality because equality discourse is comprehensible only in relation to a society of equals within the public realm."\(^{44}\) 'Equality' and 'disadvantage' in the context of unfair contracts legislation and equal opportunity law therefore require objective comparisons that are not easily made in the legal sex industry in Victoria. Owens has observed that unfair contract provisions contemplate a measure of 'unfairness' which is external; judged according to a comparison of the object of the exchange with the conditions of like exchange in the marketplace.\(^{45}\) Accordingly, "where there is no identical work in the regulated section of the marketplace, or where the work has always been conducted in conditions of exploitation...there is no norm against which the relative unfairness can be established."\(^{46}\) Both of these considerations apply to women's work in the legal sex industry in Victoria, as it is difficult to contemplate another regulated industry that would serve as a comparison with sex work for the purposes of establishing 'unfairness'. Additionally, working conditions for women in the legal sex work industry in Victoria have always been universally poor, similarly creating barriers for workers in identifying segments of the sex industry in Victoria with more favourable working conditions with which to compare their own.

\(^{44}\) Thornton, 'The Public/Private Dichotomy: Gendered and Discriminatory', above n 3, 450.
\(^{46}\) Ibid 55.
Anti-discrimination and equal opportunity statutes also require the complainant to establish that they have been treated less favourably than another person in the terms and conditions of their employment. Anti-discrimination laws therefore "limit the scope of the inquiry to contexts where men and women are similarly situated."\(^{47}\) This presents an obstacle for women working in the Victorian legal sex industry, as male and female sex workers are located in different industry segments. For example, there are no all male brothels in Victoria, whereas brothel work is very prevalent amongst women sex workers. There are also no male tabletop dancing venues or peep shows, which reduces the ability of women workers to make direct comparisons with the conditions of male sex workers. As has been discussed throughout this study, the working conditions of all women in the Victorian legal sex industry tend to be disadvantageous to workers. The concept of 'less favourable treatment' therefore has limited utility in the sex work industry, as all women workers are, in general, poorly treated. Owens observes that "[f]airness or unfairness, equality or inequality, contract or no contract, is a judgement that can only be made in a context."\(^{48}\) The importation of the concept of 'objective' comparisons inhibits examination of questions of power and institutionalised disadvantage, such as those which are features of the legal sex industry in Victoria.

The public/private dichotomy, used in the sense of the distinction between the family and the market and the gendered values that are ascribed to each sphere of activity, impacts upon the ability of sex workers to use protective legal mechanisms to improve their working conditions. This can be observed in the barriers that exist for sex workers in

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\(^{47}\) Graycar and Morgan, above n 18, 96.

conceiving of sex work as the type of industrial activity likely to attract the protection of legal mechanisms and in the barriers that exist in the law itself, which inhibits sex workers’ ability to successfully use these measures to improve their working conditions. The conflation of paid ‘work’ with men’s work, the way in which processes for making agreements under the Workplace Relations Act 1996 (Cwth) obscure and therefore reinforce inequality between sex workers and their employers, and the need to ‘objectively’ establish unfairness or inequality in the context of unfair contracts and equal opportunity law all present considerable obstacles to sex workers’ effective use of protective legal mechanisms to enhance their working lives.

STIGMatisation OF SEX WORKers

Commentators on prostitution have stated that "a good argument can be made that prostitutes are the most isolated and stigmatised of any group of women within patriarchal societies." 49 ‘Whore’, ‘harlot’ or other euphemisms for sex workers are used as synonyms for shame and disgrace and corruption associated with being unchaste, particularly with multiple partners. 50 Neave, for example, observes that prostitutes are characterised as deviant because they do not conform to the idealised image of women as passive, monogamous and faithful. 51 The use of agency and volition by women who have actively chosen to work in prostitution or table top dancing marks them as particularly worthy of condemnation. One commentator has suggested that self

employed sex workers working in legal brothels and escort agencies are the very women who are "most likely to be treated with disdain and loathing"\textsuperscript{52} because they have chosen a career in prostitution, whereas street sex workers are more likely to be perceived as victims.\textsuperscript{53}

Stigmatisation of sex workers can take the form of abusive comments from clients, venue managers and members of the community. One worker who used to work in tabletop dancing venues stated that:

There's been many cases where you look to the side and you see a girl hopping off podium and she's in tears...usually it's a case where she's on a podium and a customer's come up who's just abusive, who's a fuckwit, who sits there and says "show us your tits", "you love this, don't you, you're such a whore."...[T]his happens a lot.\textsuperscript{54}

Stigmatisation can also take the form of creating an expectation (and reality) of less favourable treatment from banks, potential employers and others if women are identified as sex workers. One worker stated that she would never be hired in a non-sex work position if she was 'outed' as a sex worker.\textsuperscript{55} Workers also risk being ostracised by family and friends if their occupation is revealed.\textsuperscript{56} Many workers therefore go to considerable lengths to protect their identities, including working under a false name, creating a false identity and not socialising with other sex workers.\textsuperscript{57}

\textsuperscript{52} Frances M. Shaver, 'The Regulation of Prostitution: Avoiding the Morality Traps' (1995) 9 Canadian Journal of Law and Society 123, 141.
\textsuperscript{53} Ibid.
\textsuperscript{54} Interview with K, ex tabletop dancer and brothel worker (Melbourne, 4 May 2000).
\textsuperscript{55} Ibid.
\textsuperscript{56} Interview with M, union organiser (Melbourne, 27 August 1999).
\textsuperscript{57} Interview with L1, private worker (Melbourne, 16 August 1999).
The fear of being stigmatised as a sex worker appears to be a significant reason why workers do not initiate legal proceedings to create or enforce legal rights. In discussing the lack of industrial regulation in the tabletop dancing industry, a worker said:

[t]here is no WorkCover, there is none of that stuff. And the price we have to pay if we are to get that is extremely high in a society that still does not accept sex workers as equal. Because the price to pay to get that stuff is revealing our true identity. And most of the girls don't want to do that. The reason we don't want to do that is basically because none of us want to be tagged in broader society as hookers.

Another worker is pessimistic about any industrial improvements being made in the legal sex industry until the public perception of sex work changes. She states:

[T]here can't be any unionism, there can't be anything changing until women can say "I'm really proud of what I'm doing". How are they going to be able to stand up because they don't want to be known, they don't want their names to be released, they're too ashamed to say "this is what I do" because all our environmental, psychological [and] social factors come in to play.

The view of sex work as debasing and corrupting is also manifested by industrial actors such as adjudicators, members of the judiciary, government agencies, and trade union officials. Some industrial arbiters evidence a view of prostitution that equates it less with a form of work and more with avarice, corruption and debasement. For example, in an application before the Australian Industrial Relations Commission, Munro J stated that, if

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58 Interview with L1, ibid; interview with G, brothel worker (Melbourne, 23 August 1999); interview with M, union organiser (Melbourne, 4 March 2000); interview with S, brothel worker (Melbourne, 27 March 2000); interview with K, ex tabletop dancer and brothel worker (Melbourne, 4 May 2000).
59 Interview with K, ibid.
60 Interview with G, brothel worker (Melbourne, 23 August 1999).
successful, the application would ‘prostitute’ the principles of the AIRC. In another case, Commissioner Caesar similarly described a statutory right being abused by another party as a right ‘being prostituted’. Trade union officials have also demonstrated a tendency to treat sex workers differently from other potential union members because of the work that they do. A union organiser involved in an attempt to industrially organise the Victorian legal sex industry stated:

I approached a number of unions and they all kind of were not really interested. I nearly had the (name of union) interested but I went in to meet with the right people and they suddenly said no, no, no, we can’t do this, what if our other members find out that sex workers are part of this union? They’ll leave, resign.

It has also been reported that one trade unionist, upon hearing that his union might include sex workers in its membership, said “[w]e don’t want to be known as the best ‘fucking’ union in the country.” As a union organiser observed, the trade union movement would be relatively accepting of sex workers “if it meant masses of members”. According to the organiser however, the sex industry remains “a bit icky” for the trade union movement, suggesting that trade union officials and members continue to have difficulty accepting that the sex industry is a legitimate site for industrial reform.

63 Interview with M, union organiser (Melbourne, 27 August 1999).
65 Interview with M, union organiser (Melbourne, 27 August 1999).
Fear of being identified as a sex worker also reduces the likelihood that workers will utilise protective mechanisms under the *Prostitution Control Act 1994 (Vic)* and *Prostitution Control Regulations 1995 (Vic)*. Thompson maintains that the legalisation of prostitution through a system of licensing and registration stigmatises prostitutes as a group of women in need of regulation and control.\(^{66}\) In particular, legalisation regulating sex work “perpetuates the ideology of the whore/madonna dichotomy by emphasising that whores are the source of diseases and licensing is the only way to control their behaviour.”\(^{67}\) The discourse of morality that surrounds sex work is manifested in the *Prostitution Control Act 1994 (Vic)*. The Act embodies the representation of sex workers as a form of moral contagion in its objects, which include “lessening the impact on the community and community amenities of the carrying on of prostitution” and “seeking to ensure that brothels are not located in residential areas or areas frequented by children”.\(^{68}\) The language invoked by the then Attorney-General, the Hon. Jan Wade MP, is consistent with the characterisation of sex workers as a threat to the health and moral wellbeing of society. In the space of one paragraph, the Attorney-General stated that a “tough” system of regulation will “protect our communities against the uncontrolled spread of brothels” and “guard our children from the effects of prostitution.”\(^{69}\)

This characterisation of sex workers may not directly inform workers’ decisions about whether to use the protective mechanisms contained in the Act. It does however appear to have coloured some workers’ perception of how government agencies view

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\(^{67}\) Ibid.

\(^{68}\) *Prostitution Control Act 1994 (Vic)* ss 4(b), (d).

the sex industry. One worker stated "government as I view it is the pimp now...they've created this environment and have...said okay to the brothel owners [but] they're not doing anything to help the women's self esteem or to boost the profession."\(^{70}\) The perception that government, through regulation, is perpetuating a negative view of sex workers reduces the likelihood that workers will complain to government agencies such as Consumer and Business Affairs Victoria or the Department of Human Services about a breach of the Act or Regulations.

Although liberal theory holds that public institutions and processes operate autonomously and neutrally, these institutions and processes, and the people that interact with them, are informed by cultural and social values.\(^{71}\) One of those pervading values is that sex workers are immoral and are tainted by the profession in which they work. Not only do regulatory systems such as that contained in the Prostitution Control Act 1994 (Vic) reinforce sex workers' sense of 'otherness', but industrial actors such as trade union and adjudicators, who are informed by cultural constructions of sex work, evidence a level of hostility towards sex workers. It is therefore not surprising that the fear of being identified as a sex worker acts as a powerful disincentive for sex workers to use protective legal mechanisms to improve working conditions.

\(^{70}\) Interview with G, brothel worker (Melbourne, 23 August 1999).
CONFUSION REGARDING THE EMPLOYMENT STATUS OF SEX WORKERS

The issue of whether sex workers are employees or engaged in another form of work relationship was discussed in chapter three. The lack of certainty about the relationship between sex workers and proprietors appears to have impacted upon the extent to which women working in the legal sex industry in Victoria utilise legal processes to protect and enforce their rights in the workplace. This has occurred in a number of ways. Firstly, some venue proprietors appear to have misinformed sex workers about the benefits of independent contracting and the consequence of taking action to improve workplace conditions.\(^{72}\) Secondly, like many other workers, some sex workers do not appear to possess a good understanding of the difference between employees and independent contractors. This means that some sex workers are reluctant to challenge management’s categorisation of their status as self-employed workers and obtain the benefits available to them as employees. Thirdly, this lack of certainty is exacerbated by the judiciary, which has tended to favour common law approaches which emphasise the appearance of independence over the reality of dependence. Finally, trade unions also appear to be reluctant to seek coverage from awards and certified agreements on behalf of sex workers because of the lack of certainty regarding their employment status.

According to a union organiser, venue proprietors responded to the Liquor, Hospitality and Miscellaneous Workers Union’s (LHMWU) proposal to industrially organise the legal sex industry in Victoria by misinforming workers of the consequence of taking such

\(^{72}\) Interview with M, union organiser (Melbourne, 27 August 1999, 4 March 2000); interview with G, brothel worker (Melbourne, 18 August 1999).
action. She maintains that “the biggest scare” for venue proprietors was that, organising industrially, sex workers would establish that they were employees. This would in turn make venue proprietors liable for payroll tax and superannuation contributions, in addition to having a responsibility to workers for other employment related benefits. Accordingly, some venue managers attempted to convince workers that businesses would not continue to be viable if proprietors were required to make WorkCover, superannuation and payroll tax contributions. Some venue managers appear to have resorted to actual intimidation of workers, including threatening them with dismissal or circulating rumours that they were troublemakers, making it difficult to obtain work in the industry. A woman working in the industry at the time reported that “to actually come in and start unionising a brothel, women would be sacked and then that owner would talk to that owner at the brothel owners association and she won’t be able to work around town.” Another approach adopted by proprietors, noted in chapter three, was to restructure work systems to avoid the appearance of an employment relationship. A union organiser reports that:

> when we initially started to organise the industry, the owners undertook a very vigilant campaign of convincing workers that they were sub-contractors. They almost immediately stopped taking any sort of tax...and they invented and created all of these obscure contracts whereby workers were told that the client was renting the room...I mean they even changed the whole system of how the client pays the money.

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73 Interview with M, union organiser (Melbourne, 27 August 1999).
74 Interview with M, union organiser (Melbourne, 4 March 2000). M notes that this is a common tactic amongst employers and is not unique to the legal sex industry. See also Heidi Machen ‘Women’s Work: Attitudes, Regulation and Lack of Power Within the Sex Industry’ (1996) 7 Hastings Women’s Law Journal 177, 183.
75 Interview with G, brothel worker (Melbourne, 23 August 1999).
76 Ibid.
Venue proprietors appear to have been relatively successful in convincing sex workers that there is little benefit to be had from taking action to obtain employment related benefits. Despite the ability of employees to set their own hours of work, some women working in the legal sex industry in Victoria appear to believe that flexible working hours are more consistent with an independent contracting relationship than with a relationship of employment.77 This is a particularly important issue for women working in the sex industry. Snow, in her study of women working in the Victorian sex industry, found that ‘flexible working hours’ was the second most common reason cited by women for becoming a sex worker.78 There is also a perception amongst some sex workers that being classified as an employee will provide them with some benefits but will also have a negative impact on their earnings. One worker stated “[w]hat ends up being a problem is that in order to get all that stuff [WorkCover, leave benefits] we will end up working for an average wage. And we don’t do an average job.”79

The ability of venue managers to unilaterally classify women working in the sex industry as independent contractors while exercising a degree of control over their work consistent with an employment relationship is in part a product of a lack of clarity in the common law over the difference between employees and non-employees. As discussed in chapter three, some more recent decisions have focussed on the externalities of working relationships, such as the provision of tools and equipment80 and leave entitlements, and the way the parties themselves classify the relationship,81 rather than

77 Interview with K, ex tabletop dancer and brothel worker (Melbourne, 11 May 2000). For a discussion of this issue in the context of the North American sex industry see Machen, above n 74, 181.
78 Snow, above n 10, 48.
79 Interview with K, ex tabletop dancer and brothel worker (Melbourne, 11 May 2000).
81 Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16; Building Workers Industrial Union & Ors v Odco Pty
on the level of economic dependence of one party upon another. This tendency is also evident in recent decisions regarding the meaning of casual employment for the purposes of unfair dismissal proceedings, where the classification of a worker as casual appeared to be determinative despite evidence of regular, ongoing and systematic work.  

This approach tends to avoid examination of questions of power and control, which are important issues affecting the working relationship between sex workers and managers and proprietors. It also demonstrates a disturbing tendency by the judiciary to reward employers who have denied workers access to employment benefits, by finding that this is evidence that workers are in fact independent contractors. This reasoning, described by Brooks as “circuitous”  

was a feature of the judgement in Phillipa v Carmel. In that case, Ritter JR found that the lack of provision of holiday and sick leave by a brothel manager to a sex worker was consistent with an independent contracting relationship. The suggestion that the failure to provide sex workers with paid and unpaid leave is an indicator of an independent contracting arrangement, negotiated by sex workers acting from a strong bargaining position, ignores the asymmetry in power between venue proprietors and sex workers. Owens observed in another context, the suggestion that there is a “special confusion” about the employment status of particular groups of women workers is “an exercise of power in which the law is appropriated by one side of the work relationship.”

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82 See Blue Suits Pty Ltd v Toongabbie Hotel (2000) 47 AILR ¶5-044; Ross v Court Recording Services (NSW) Pty Ltd (2000) 47 AILR ¶4-188.
Confusion about the employment relationship between venue proprietors and sex workers has also influenced the LHMWU’s willingness to pursue unfair dismissal applications on behalf of some sex workers. The LHMWU assisted approximately 13 sex workers in unfair dismissal applications in the mid-1990s. The union representative assisting the sex workers stated that the issue of whether workers were employees or independent contractors did not need to be established in any of the cases. In the case of *Brooke v Coppin Café*, for example, the respondent to the application conceded that he had an employment relationship with the applicant during the course of the hearing. The remainder of the matters were settled during conciliation. The LHMWU has not assisted a sex worker with an unfair dismissal application since the commencement of the *Workplace Relations Act 1996* (Cth). A union organiser maintains that such an application would be more difficult, not only in terms of differentiating between an employee and an independent contractor but also because certain casual workers are excluded from unfair dismissal proceedings. As discussed in chapter three, *Claudia v Allmen* is one case in which a sex worker was found to be a casual employee for the purposes of unfair dismissal proceedings. The organiser stated that “it would have to be a pretty good case” in order for the LHMWU to assist a sex worker with unfair dismissal proceedings under the *Workplace Relations Act 1996* (Cth). This might mean that there would need to be a clear termination within the meaning of the Act, a demonstrable regularity in shifts worked and income earned, and ideally a concession by the venue proprietor that the worker was an ongoing employee.

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85 Interview with M, union organiser (Melbourne, 27 August 1999).
87 Interview with M, union organiser, (Melbourne, 27 August 1999).
The lack of certainty surrounding the employment status of escort workers was also cited as a reason why there was little attempt to include them in unfair dismissal proceedings. According to a union organiser, the LHMU “weren’t 100% sure whether they [escort workers] were employees….and I think if it was ever contested it might not be successful.”

The lack of clarity surrounding the relationship between sex workers and venue managers has been successfully exploited by some venue managers to deny workers access to employment related benefits and to discourage them from taking action to obtain these entitlements. In this, venue managers have been assisted by the lack of certainty provided by the common law tests used to distinguish employment and non-employment relationships, and in particular the apparent succour given by adjudicators to employers who actively deny workers entitlements such as paid leave. It also appears that, until there is more certainty surrounding the characterisation of the employment relationship between venue managers and sex workers, trade unions will have limited involvement in assisting sex workers to utilise protective legal mechanisms such as regulation through awards and certified agreements, and unfair dismissal applications.

**MASCU LINIST INDUSTRIAL CULTURE**

The first part of this chapter discussed the ways in which the public/private distinction created barriers for sex workers in utilising protective legal mechanisms to improve their

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89 Interview with M, union organiser, (Melbourne, 27 August 1999).
90 Interview with M, union organiser (Melbourne, 4 March 2000).
91 Ibid.
working conditions. One of the barriers presented to sex workers is through the cultural construction of ‘the worker’ as “tough, confrontationist” and inevitably male.\textsuperscript{92} The corollary of this is that women are generally excluded as subjects within the arena of labour relations.\textsuperscript{93} The development of an industrial culture that is focussed on the needs of male workers impacts upon the ability of women working in the legal sex industry in Victoria to obtain the assistance of protective legal mechanisms. This is because issues for women sex workers are not appropriately identified and responded to in a way that accommodates the needs of this group of workers. Two examples of this are found in the application of occupational health and safety laws to women working in the legal sex industry in Victoria, and in the practices adopted by the LHMWU in seeking to improve working conditions for sex workers.

Quinlan states that many “significant and insidious” occupational health and safety problems of particular importance to female workers have been neglected, due to a historical tendency of health and safety authorities to focus on more overt hazards involving severe traumatic injuries.\textsuperscript{94} Such injuries more often sustained by male workers. According to the International Labour Organisation, health hazards experienced by women workers have been traditionally under-estimated because occupational safety and health standards and exposure limits to hazardous substances are based on male populations.\textsuperscript{95} Quinlan also maintains that workers compensation

\textsuperscript{93} See the comments of Higgins J in \textit{Ex parte HV McKay} (1907) 2 CAR 1; \textit{Rural Workers’ Union v Mildura Branch of the Australian Dried Fruits Association} (1912) 6 CAR 62 in ibid.
claims remain the source of most occupational injury and disease statistics and that
gaps and biases in coverage affect our knowledge of the incidence and pattern of
occupational illness in ways that may not be gender neutral. 96

The lack of WorkCover claims made by women working in tabletop dancing venues was
identified as the basis for the Chief Executive of the Victorian WorkCover Authority
refusing a request to discuss occupational health and safety issues with the author of
this study. The Chief Executive explained that “as only one workplace complaint has
been received, and no claims data was identified” about the tabletop dancing industry,
there would be little value in discussing occupational issues for workers in this industry
with WorkCover staff. 97 The reluctance of women working in the legal sex industry to
make WorkCover claims, which may be related to their eligibility, fear of stigmatisation,
weak union representation, and concerns about jeopardising their ongoing employment,
is therefore used as the basis upon which to deny the existence and importance of
occupational health and safety issues in the legal sex industry. This entrenches the
invisibility of sex workers in the arena of labour relations and locates the concern of
occupational health and safety law with occupations and industries which have a high
level of reported injury. These tend to be historically male industries. 98

Another example of the exclusion of women sex workers due to a masculinist industrial
culture is found in trade union practices. Pocock describes the union movement’s

96 Quintan, above n 94, 412.
97 Correspondence received from Andrew Lindberg, Chief Executive, Victorian WorkCover Authority, 3 August 1999
(copy on file with author).
98 Quintan, above n 94, 410.
sacrifice to the collective good of workers. In this account, the worker invariably bears a masculine face.\textsuperscript{99} Franzaway similarly observes that unionism is shaped by the dominance of a certain kind of working class masculinity which in Australia is understood as the province of Anglo-Celtic men.\textsuperscript{100} In the context of the sex work industry it is encouraging to note that the LHMWU employed a female industrial organiser with experience of working in the sex work industry. However, the benefits accruing from the appointment of a sympathetic organiser with a strong level of identification with women workers appears to have been undermined by the attitude of male union officers and members to sex work and sex workers. As discussed earlier, there was considerable resistance from the trade union movement to including sex workers as members because of the impact it might have on particular unions' reputation and membership levels. It also appears that the LHMWU did not treat the industrial regulation of the sex work industry particularly seriously. One example is the lack of adequate training and support for the worker appointed to industrially organise the legal sex industry. According to the union organiser "I was employed and I did the week's delegates course and then it was kind of "off you go and sign up members and tell them we're going to get an award for them and see how many members you get."\textsuperscript{101} A woman working in the industry at the time recollects that the union organiser was given six months to prove that it was worthwhile for the union to assist women working in the sex industry. This was clearly inadequate.\textsuperscript{102}

\textsuperscript{100} Suzanne Franzway 'Sexual Politics in Trade Unions' in ibid 134.
\textsuperscript{101} Interview with M, union organiser (Melbourne, 27 August 1999).
\textsuperscript{102} Interview with G, brothel worker (Melbourne, 23 August 1999).
The failure of the LHMWU to modify its practices to accommodate the needs of women sex workers also appears to have militated against the achievement of industrial reform in the legal sex industry in Victoria. One commentator asserts that there is a ‘servicing culture’ within the trade union movement where predominantly male union officials ‘look after’ a passive female membership.\textsuperscript{103} This model, which was to some extent present in the organising strategy used by the LHMWU, does not appear to have been well received by some sex workers. One worker stated:

\begin{quote}
[...] to recruit successfully you have to do it at a grass roots level... I was going to volunteer and I had twenty other women coming in ready to help. But why should we work from our homes? Why can't they give us the space for us to work within this union? Why couldn't the union say “look, if you get some volunteers we'll teach them industrial relations so they can be out there on the floors?” Nothing like that happened from them.\textsuperscript{104}
\end{quote}

The seeming lack of familiarity with work practices in the legal sex industry was also a source of concern to sex workers. One worker asked “how are you going to implement anything when the work practices aren’t being studied in the workplace with the women? Those things have got to be studied first before the union builds any strategy.” Workers were also discouraged from joining the union because the LHMWU’s union dues were calculated on the assumption that members were engaged in traditionally male patterns of work – full time and continuous. Sex work tends to be intermittent and spasmodic, meaning that some workers could see little value in paying up-front dues when the

\textsuperscript{103} Sally McManus, ‘Gender and Union Organising in Australia’ in Pocock, above n 99, 30–2.
\textsuperscript{104} Interview with G, brothel worker (Melbourne, 23 August 1999).
likelihood of them remaining in the industry long enough to enjoy the benefits of industrial reform was seen as remote.\textsuperscript{105}

**CONCLUSION**

Women working in the legal sex industry in Victoria work in a largely unregulated environment where they are denied access to a range of employment-related entitlements. Although there has been some attempt by sex workers or advocates to use protective legal mechanisms in the context of unfair dismissal applications, there appear to have been few concerted attempts to obtain more systematic improvements in working conditions. This can be attributed in part to the effect of the public/private distinction, which appears to have impeded sex workers' identification of their work as the type of paid labour likely to attract the assistance of protective legal mechanisms. The ideology of separate spheres has also created significant legal barriers to sex workers successfully using protective legal mechanisms such as awards and agreements, unfair dismissal proceedings and anti-discrimination provisions. Fear of being identified as a sex worker also acts as a powerful disincentive for workers to take action to improve their industrial conditions. The ability of some venue managers to manipulate information about the implications of workers challenging management's classification of them as independent contractors and the associated lack of clarity surrounding the relationship between sex workers and venue proprietors has also contributed to the lack of industrial activity in the legal sex industry. Finally, the operation of a masculinist industrial culture that focuses on the needs of male workers to

\textsuperscript{105} Ibid.
the exclusion of women has also impeded the achievement of industrial reform in the legal sex industry in Victoria.
CONCLUSION

This study has been concerned with labour regulation in the legal sex industry in Victoria. In particular, it has considered the range of protective legal mechanisms that potentially apply to sex workers and secondly, why women working in the legal sex industry have had limited recourse to such mechanisms. The forms of legal regulation investigated include contracts of employment, awards and industrial agreements, occupational health and safety law and anti discrimination and equal opportunity statutes. Empirical research, relevant literature and case law were all used in assessing why protective legal mechanisms have had limited application to the legal sex industry in Victoria.

Chapter one discussed the way that the legal sex industry is constructed and organised in Victoria. It considered how the Prostitution Control Act 1994 (Vic), the Prostitution Control Regulations 1995 (Vic) and the Health (Brothel) Regulations 1990 (Vic) maintain a distinction between legal and illegal sex work. This distinction is important because this study is only concerned with women working in the legal sex industry in Victoria. It was seen that the line between legal and illegal sex work in Victoria is not always clear, especially after the 1999 amendments to the Prostitution Control Act 1994 (Vic).

Chapter two discussed whether sex work is primarily a form of work or whether sex work is a form of male sexual violence against women. This is an important issue because consideration of the role of protective legal mechanisms in the legal sex industry in Victoria can only proceed if sex work can be theorised as waged labour. If sex work is a form of male sexual violence, the appropriate response is to seek its abolition, not to reform the conditions under which it is practiced. Chapter two identified three key
themes through which to discuss whether the provision of sexual services is work. Firstly, it considered consent and choice in sex work. Secondly, it considered what is exchanged in sex work. Thirdly, it discussed the role of skill in the legal sex work industry in Victoria. Chapter two concluded that sex work can be legitimately and appropriately theorised as a form of waged labour engaged in by women workers.

Chapter three discussed how the common law distinction between employees and other forms of work relationships, such as independent contracting, apply to women working in the legal sex industry in Victoria. The issue of whether sex workers are employees or not has considerable bearing on their ability to have access to protective legal mechanisms. Chapter three identified the various legal approaches that have been used to assess whether workers are employees at common law. It then considered how these legal approaches could be applied to the Victorian legal sex industry. Chapter three concluded that the weight of evidence suggests that many, and probably most, women working in the legal sex industry in Victoria are employees.

Chapters four and five were concerned with the application of protective legal mechanisms to women working in the legal sex industry in Victoria. Using the analysis contained in chapter three, chapters four and five focussed on protective mechanisms available to women who are engaged in employment relationships with proprietors of brothels, escort agencies, tabletop dancing venues and peepshows. However, both chapters also considered the position of sex workers who are engaged as independent contractors. This is because it is likely that there are some women who are working in the legal sex industry in Victoria as independent contractors.
Chapter four specifically considered the role of contracts of employment, awards, certified agreements, Australian Workplace Agreements and minimum wage orders under the *Workplace Relations Act 1996* (Cwth). Chapter four also considered the availability of other rights under the *Workplace Relations Act 1996* (Cwth), namely proceedings for redress for unfair dismissal and unlawful termination, and unfair contracts provisions. Chapter four concluded that all these processes have the potential to improve working conditions in the legal sex industry in Victoria.

Chapter five discussed occupational health and safety provisions in the *Occupational Health and Safety Act 1985* (Vic) and the *Prostitution Control Act 1994* (Vic), and in regulations and codes of practice. It also considered federal and state equal opportunity and anti-discrimination statutes. It recognised that the application of these protective legal mechanisms to women working in the legal sex industry in Victoria is potentially valuable, regardless of whether they are employees or independent contractors.

Chapter six discussed why women working in the legal sex industry in Victoria have, in general, had limited recourse to legal action to assert their rights as workers. It identified four possible reasons for this. Firstly, the impact of the public/private distinction on the way that women working in the legal sex industry might view their work was considered. The way the public/private distinction has shaped the form of protective legal mechanisms was also discussed. It is concluded that the separation of home and marketplace in Western liberalism appears to have had a significant impact on sex workers' perception of the availability of protective legal mechanisms to them and on how these mechanisms might operate to exclude sex workers in practice. Secondly, chapter six discussed the stigmatisation that sex workers experience because of the
work they do. It concluded that the very real fear of being identified as a sex worker acts as a powerful disincentive for workers to use protective mechanisms. Thirdly, it considered how apparent confusion about the nature of work relationships in the legal sex industry in Victoria has contributed to the under-utilisation of relevant legal processes. Finally, chapter six considered how the development of a masculinist industrial culture impeded sex workers' access to protective legal mechanisms.
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