

WHAT KIND OF EQUALITY CAN WE EXPECT FROM THE *FAIR WORK ACT*?

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[Drawing on the equality scholarship of Nancy Fraser and Sandra Fredman, the first question I explore in this paper is whether the historical separation of anti-discrimination laws from the regulation of wages and conditions of work through labour laws has undermined progress in achieving substantive gender equality in Australia. I look at the goals and operation of these two regulatory regimes in terms of equality and tease out constraints imposed on each regime by the separation. Finally, I ask whether the Fair Work Act 2009 (Cth) represents a significant blurring of this separation and what transformative potential this could herald.]

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I INTRODUCTION

Is it merely a coincidence that the ranks of poorly paid and precarious workers in Australia are replete with women and ethnic minorities? Can we identify a regulatory defect to explain why after more than a quarter century of anti-discrimination laws such economic inequality is still experienced by these ‘protected’ groups? Or do these laws just need time to weed out prejudice and allow merit to operate in our labour markets? Will anti-discrimination laws eventually enable the groups that have historically been excluded from good jobs to take up a proportional share?

These questions hint at the complexity of the notion of inequality and the use of law to address it. A law may seek to address one form of inequality, such as

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socioeconomic disadvantage, yet ignore or deny other aspects, such as racial prejudice. One question this raises is whether these different aspects of equality are truly separable and thereby able to be addressed separately or whether they are so intertwined that separation of one initiative from another can undermine the whole endeavour.

Sandra Fredman has noted that countries have traditionally addressed socioeconomic inequalities in society separately to status-based inequalities, such as gender and race.¹ Underpinning this characterisation of two forms of inequality is Nancy Fraser's analytical framework of dual conceptions of injustice:

The first is socioeconomic injustice, which is rooted in the political-economic structure of society. Examples include exploitation (having the fruits of one's labor appropriated for the benefit of others); economic marginalization (being confined to undesirable or poorly paid work or being denied access to income-generating labor altogether), and deprivation (being denied an adequate material standard of living).²

The second of Fraser's conceptions of injustice is 'cultural or symbolic' injustice:

Here injustice is rooted in social patterns of representation, interpretation, and communication. Examples include cultural domination (being subjected to patterns of interpretation and communication that are associated with another culture and are alien and/or hostile to one's own); nonrecognition (being rendered invisible by means of the authoritative representational, communicative, and interpretative practices of one's culture); and disrespect (being routinely maligned or disparaged in stereotypic public cultural representations and/or in everyday life interactions).³

Fraser labels the group of remedies for economic injustice as 'redistribution' involving 'political-economic restructuring of some sort.'⁴ She describes the remedies for cultural injustice as 'recognition' involving 'some sort of cultural or symbolic change' such as the revaluing of disrespected identities or positive valorisation of cultural diversity.⁵

Having noted these two alternative approaches to different kinds of inequality in society, Fredman argues that neither kind of inequality can be addressed effectively without recognition of the connection between the two. She argues:

Constructing a concept of socio-economic equality without considering the implications for status-based inequality can be damaging and ineffective. Conversely, status-based measures are limited by their inability to mobilise the

¹ See Sandra Fredman, 'Redistribution and Recognition: Reconciling Inequalities' (2007) 23 *South African Journal on Human Rights* 214.

² Nancy Fraser, *Justice Interruptus — Critical Reflections on the 'Postsocialist' Condition* (Routledge, 1997) 13.

³ *Ibid* 14.

⁴ *Ibid* 15.

⁵ *Ibid*.

redistributive measures necessary to make real equality of opportunity and genuine choice possible.⁶

This conclusion is consistent with Nancy Fraser's argument that the dichotomy between struggles for economic redistribution and recognition of diverse identities is a false one. The distinction is merely analytical while in reality 'the two are intertwined' and '[t]he result is often a vicious circle of cultural and economic subordination.'⁷ The truth of this is clearly illustrated by the fact that those who are poor or economically marginalised in our society are disproportionately members of traditionally denigrated status groups including women, immigrants of non-English speaking background, and people with a disability.⁸

In this paper I demonstrate first that Fredman's insight that nations seek to address socioeconomic and status-based inequalities separately is an accurate description of the Australian government's historical approach to inequality. The duality is reflected in Australia's separation of labour law, with its industrial relations machinery for establishing wages and conditions generally, and anti-discrimination laws that are designed to provide rights to freedom from discrimination based on specific grounds. To some extent, this separation is paralleled in international law by International Labour Organization conventions establishing worker rights and United Nations' conventions dealing with human rights.⁹

In respect of socioeconomic inequality, Fredman in the United Kingdom was referring primarily to social security systems providing income support or other positive state intervention.¹⁰ However, labour laws too constitute a key state intervention to address socioeconomic inequality, especially in a country like Australia that was once characterised as the 'wage earners' welfare state'.¹¹ Anti-discrimination laws and affirmative action laws designed to address status-based inequalities were established in Australia as a separate system of regulation.

In the second part of the paper I identify how this dual system of workplace and anti-discrimination regulation maintains a separation between the struggles for redistribution and recognition. This in turn frustrates progress in Australia towards substantive equality, which is part of the 'decent work' agenda.¹² Within the labour law regime, allegations of gender bias have been marginalised and stifled by assertions of neutrality and of merit in the setting of wages and

⁶ Fredman, 'Redistribution and Recognition', above n 1, 215.

⁷ Fraser, above n 2, 15.

⁸ Fredman, 'Redistribution and Recognition', above n 1, 218.

⁹ Philip Alston, 'Labour Rights as Human Rights: The Not So Happy State of the Art' in Philip Alston (ed), *Labour Rights as Human Rights* (Oxford University Press, 2005) 1, 2–3. Compare *Universal Declaration of Human Rights*, GA Res 217A(III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) arts 5, 7, 20, 22–4 and *International Labour Organization Declaration on Fundamental Principles and Rights at Work*, adopted 18 June 1998, 37 ILM 1233 (1998).

¹⁰ Fredman, 'Redistribution and Recognition', above n 1, 221–4.

¹¹ Francis G Castles, 'The Wage Earners' Welfare State Revisited: Refurbishing the Established Model of Australian Social Protection, 1983–93' (1994) 29 *Australian Journal of Social Issues* 120. See generally Rosemary Owens and Joellen Riley, *The Law of Work* (Oxford University Press, 2007) 78–132.

¹² See International Labour Organization, *Report of the Director-General: Decent Work* (1999) <<http://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm>>.

conditions of work. On the other side, anti-discrimination laws have been set up to uncover and address blatant status-based exclusions and prejudice, but given little scope to question fundamental distributive systems of industrial awards and agreements. To illustrate the separation, I explore how these two systems set up to address socioeconomic and status inequality each struggles to deal with the alternative kind of equality demand. I do this by looking at four current issues in Australia in respect of work that have gender equality components: pay equity, parental leave, casual employment status and inflexible working arrangements.

Each of these issues represents a case of gender inequality that has a socioeconomic dimension. Consequently, each demands more than a recognition or formal equality response yet cannot be addressed without acknowledgement of the gender dimension. They reflect complex social problems because each case requires fundamental distribution criteria and mechanisms to be challenged but not purely because of socioeconomic inequality. They require a redistributive remedy that challenges the gender bias of the socioeconomic distribution regime. From this analysis it becomes clear that these two dimensions — redistribution and recognition — give meaning to the notion of substantive equality as opposed to formal equality and that the ongoing separation of labour and discrimination laws limits the equality-promoting goals of both systems.

In the final part of the paper I turn to consider whether the *Fair Work Act 2009* (Cth) (*'Fair Work Act'*) reflects some blurring of the separate approaches to labour rights and human rights, and between regulation of socioeconomic inequality and status-based inequality. The inclusion of general protections against discrimination in the *Fair Work Act* suggests a merging of the two different systems. The development at an international level of the International Labour Organization's 'decent work' agenda, formally declaring status-based equality as a worker's right, is consistent with this approach.¹³ Anti-discrimination provisions were inserted into labour laws almost two decades ago, so the question is whether the new provisions are sufficiently different to make them more effective or at least represent a tipping point in the integration of human rights and labour regulation. Can they be used to challenge effectively the gender bias of apparently neutral distributive mechanisms that underpin the labour law framework itself? To be significant, these rights need to enable something more than a formal equality challenge to industrial rules.

A common feature of complex gender equality cases is the connection between gender and the unpaid work of social reproduction. Women continue to undertake a disproportionate share of (unpaid) domestic and caring work in our society.¹⁴ As long as this is the case in the home, a formal equality understanding of justice in work will allow women into the workplace yet deny them equal

¹³ Ibid; International Labour Organization, *Report of the Director-General: Reducing the Decent Work Deficit — A Global Challenge* (2001) <<http://www.ilo.org/public/english/standards/relm/ilc/ilc89/rep-i-a.htm>>. See also Rosemary Owens, 'Decent Work for the Contingent Workforce in the New Economy' (2002) 15 *Australian Journal of Labour Law* 209, 212–14.

¹⁴ Human Rights and Equal Opportunity Commission, 'Striking the Balance — Women, Men, Work and Family' (Discussion Paper, 2005) 25–39; Human Rights and Equal Opportunity Commission, 'It's About Time — Women, Men, Work and Family' (Final Paper, 2007) 35–45.

economic rights. Household work both constrains and enables participation in the labour market. Those who undertake unpaid work in the home have limited hours and energy available to also participate in paid work. Conversely, those who have housework and caring work performed for them, mostly men, present as ‘ideal workers’, unencumbered by domestic or caring responsibilities and available to work long (and unpredictable) hours.¹⁵

The rules and structures in place to distribute income through work have often been built using measures of value such as tenure, hours of work, availability and mobility — measures that reflect male bodies and masculine gender roles in respect of paid and unpaid work.¹⁶ Unless the labour market and workplace conditions are transformed to enable men and women to participate in both paid and caring work, gender inequality will persist. This transformation would require a challenge to the concept of the ‘ideal worker’ as being unencumbered and always available. Therefore a question to be asked is whether new provisions in the *Fair Work Act* enable such a challenge and expansion of the concept of the ‘ideal worker’ to include workers with family responsibilities.

To explore this question, two new provisions in the *Fair Work Act* will be examined: the right to request flexible working arrangements,¹⁷ and general protections against discrimination in work.¹⁸ These provisions appear to have transformative potential, increasing the scope for workers to challenge gender-biased structures of distribution. However, the historically separate treatment of socioeconomic inequality and gender equality, which has shaped norms of ‘fairness’ and ‘reasonableness’, is likely to constrain the operation of these new provisions. The complex nature of the provisions and their enforcement may also limit their effect.

II SEPARATE REGULATORY REGIMES

The first step is to explore how Australian labour laws and anti-discrimination laws developed as separate regulatory regimes and reflect Fraser’s two different axes of socioeconomic and status-based inequalities.

A Labour Law, Socioeconomic Inequality and Redistribution

Australian labour law, dating back to Federation, with its extensive industrial relations machinery for establishing wages and conditions, has largely focused on the traditional goals of labour laws of ameliorating conflict between capital and labour to promote industrial harmony and ensuring workers receive an adequate reward for their labour.¹⁹ In this way, the primary question of distribu-

¹⁵ Sandra Berns, *Women Going Backwards — Law and Change in a Family Unfriendly Society* (Ashgate, 2002) 2–3; Joan Williams, *Unbending Gender — Why Family and Work Conflict and What to Do about It* (Oxford University Press, 2000) 69–72.

¹⁶ Williams, above n 15, 69.

¹⁷ *Fair Work Act* s 65.

¹⁸ *Ibid* pt 3-1.

¹⁹ The emergence of competing goals in recent times is outlined in Owens and Riley, above n 11, 78–132.

tion in determining wages and conditions for workers has been between employers and employees (or capital and labour). For almost a century the Conciliation and Arbitration Commission (in its different incarnations)²⁰ had extensive powers to arbitrate industrial disputes and to set awards that covered whole industries across the nation,²¹ thereby promoting equality and social cohesion.²² In exercising these powers, it also developed wage-fixing principles primarily through test cases brought by trade unions.²³

In resolving industrial disputes and setting wages, the Commission took into account the 'public interest'²⁴ and, importantly, established 'need' as a fundamental principle in setting wages. In the historic case of *Ex parte McKay* (commonly referred to as '*Harvester*'),²⁵ the Commission (at that time, a court) even took evidence to determine the likely expenses of a typical worker and used this as a reflection of need in articulating what were 'fair and reasonable' conditions of work.²⁶ Importantly, this notion of need was a relative concept, an amount adjusted over the years that enabled workers to live at a frugal but acceptable level.²⁷ The use of a relative rather than absolute conception of the fair wage reflected an understanding that workers should share in increases in productivity and national prosperity.²⁸

What is also notable about the wage-fixing principles commencing with *Harvester* is that the calculation of worker expenses attempted to include the costs of social reproduction undertaken by dependents. It did this by assuming the (male) worker had a dependent wife and children to support, so the 'fair and reasonable' wage was originally a 'family wage', at least for men.²⁹

There were, of course, scales of wages designed to reflect differences between workers. These wage relativities were seen as legitimate differences because they were to reflect accepted margins for skill and experience.³⁰ Additional pay differentiations were established using allowances and penalty rates that were

²⁰ The Commission has held numerous titles: Commonwealth Court of Conciliation and Arbitration (1904–56); Commonwealth Conciliation and Arbitration Commission (1956–73); Australian Conciliation and Arbitration Commission (1973–88); Australian Industrial Relations Commission (1988–2009); Fair Work Australia (2009–present).

²¹ The coverage of federal awards was limited to named respondents when created under the conciliation and arbitration head of power in s 51(xxxv) of the *Constitution*, but by including employer groups as respondents and roping in additional employers over time, coverage extended across industries.

²² Owens and Riley, above n 11, 82–3.

²³ See *ibid* 90–3.

²⁴ *Ibid* 90.

²⁵ (1907) 2 CAR 1.

²⁶ *Ibid* 5–6 (Higgins J).

²⁷ *Ibid* 4.

²⁸ For a fuller history of wage-setting and the 'public interest' element, see Owens and Riley, above n 11, 78–132, 275–345.

²⁹ Gillian Whitehouse, 'From Family Wage to Parental Leave: The Changing Relationship between Arbitration and the Family' (2004) 64 *Journal of Industrial Relations* 400, 405.

³⁰ Gillian Whitehouse, 'Justice and Equity: Women and Indigenous Workers' in Joe Isaac and Stuart Macintyre (eds), *The New Province for Law and Order — 100 Years of Australian Industrial Conciliation and Arbitration* (Cambridge University Press, 2004) 207, 207–8.

developed to further compensate for what the Commission determined was particularly dirty or dangerous work, or unsociable hours.

While the regulatory system for labour law in Australia has changed over time, it has always reflected a clear commitment by the state to intervene in private employment relationships. The original goal was primarily to ensure industrial harmony, with a more recent emphasis on productivity and efficiency, but the industrial commission's power generally extended to setting or at least ensuring a process for establishing decent wages. Decent working conditions were also established over time, regulating hours of work and safety. The setting of awards by an industrial commission or, more recently, the establishment of a national minimum wage³¹ represents state intervention that has a profound redistributive effect moderating the labour market. The establishment of clear and enforceable minimum conditions articulates a public interest in socioeconomic equality by providing for economic and social rights for workers vis-a-vis employers. Work was to be fairly rewarded and, for citizens who were unable to participate in the labour market, the general revenue-based social security system provided income support as a further safety net to ameliorate or prevent poverty.³²

Many commentators have noted the reluctance or incapacity of this system of industrial relations to deal with the needs of certain groups of workers, such as women or migrants, because it characterises their needs as special rather than as those of normal workers.³³ To the extent that the work of women was regulated at all, in the beginning their work was at times characterised as marginal or optional, with the Commission playing a significant role in reinforcing the 'male breadwinner' model of the family.³⁴ In conjunction with the 'family wage' being set for men, with an assumption that they had dependents, women were formally granted only a proportion of the male wage.³⁵ Women were seen to be working merely for 'pin money', not to support dependents, and hence simply did not need a wage equivalent to that men.³⁶ There were also formal and informal restrictions on the work women were permitted to do, justified on the basis of

³¹ *Fair Work Act* ss 285–7.

³² Castles, above n 11, 124.

³³ See, eg, Edna Ryan and Anne Conlon, *Gentle Invaders: Australian Women at Work 1788–1974* (Thomas Nelson, 1975); Carol O'Donnell and Philippa Hall, *Getting Equal: Labour Market Regulation and Women's Work* (Allen & Unwin, 1988) 5–6, 75–7; Whitehouse, 'From Family Wage to Parental Leave', above n 29, 410; Owens, 'Decent Work for the Contingent Workforce', above n 13, 217–18.

³⁴ See, eg, Ryan and Conlon, above n 33, 77; O'Donnell and Hall, above n 33, 2–5.

³⁵ Up until the first *Equal Pay Case* in 1969, which established the principle of equal pay for equal work: see *Australasian Meat Industry Employees Union v Meat and Allied Trades Federation of Australia* (1969) 127 CAR 1142 ('*Equal Pay Case*'). See also *National Wage and Equal Pay Cases 1972* (1972) 147 CAR 172; Meg Smith and Andrew Stewart, 'A New Dawn for Pay Equity? Developing an Equal Remuneration Principle under the *Fair Work Act*' (2010) 23 *Australian Journal of Labour Law* 152; Rosemary Owens, 'Reproducing Law's Worker: Regulatory Tensions in the Pursuit of "Population, Participation and Productivity"' in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation — Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Federation Press, 2006) 410, 412–13.

³⁶ Owens, 'Reproducing Law's Worker', above n 35, 412–13.

protecting the ‘gentler sex’ while also protecting male employment.³⁷ Similarly, special provisions were made for disabled, junior and migrant workers, allowing employers to provide lesser conditions or pay. Various rationales were put forward as justification for lower conditions for these workers: junior rates were to encourage employment of less experienced workers,³⁸ and subsidised wages for workers with disability were to offset any perceived lower productivity.

The worker who was entitled to full pay and the best conditions — the ‘ideal worker’ — was a (non-indigenous)³⁹ male citizen who worked full-time and was assumed to be supporting himself and a family.⁴⁰ To the extent that the notion of equality factored into wage-setting between workers, it was the malleable formal or Aristotelian notion of equality: likes should be treated alike, but the question of who was like whom was determined by the industrial commission and the unions and employers who appeared before it. Women were not like men, for instance, because it was assumed that they had no dependents to support and thus had less need for full wages. Women and other categories of workers were identified as different and treated as exceptions. By recognising these workers as exceptions, the conception of what was normal or the ‘ideal worker’ was constructed and reinforced. As explored below, it was not until fairly recently that this construct and the marginalisation of such workers was even questioned.

B *Anti-Discrimination Laws, Status-Based Inequality and Recognition*

In contrast to the long history of labour law in Australia, a legal response to status-based inequality emerged more recently and separately. Anti-discrimination laws were first introduced in the 1970s and reflected the emergence of human rights in international law and the civil rights movement primarily in the United States.⁴¹ In contrast to the collectivist nature of labour laws, these laws used an individual rights strategy: discrimination on the basis of specific grounds such as race or sex was prohibited and victims of such discrimination were granted an individual tort-like right to sue for compensatory remedies to be adjudicated by a tribunal or court. In this way, discrimination based on status was characterised as a wrong, starting with the ground of race under the *Racial Discrimination Act 1975* (Cth) and followed each decade since then with prohibitions federally in respect of other grounds including sex and related attributes in 1984,⁴² disability in 1992⁴³ and age in 2004.⁴⁴

³⁷ Whitehouse, ‘From Family Wage to Parental Leave’, above n 29, 406.

³⁸ For a summary of these arguments in respect of juniors, see Australian Industrial Relations Commission, *Junior Rates Inquiry — Report of the Full Bench Inquiring under Section 120B of the Workplace Relations Act 1996* (1999).

³⁹ Whitehouse, ‘Justice and Equity’, above n 30, 209.

⁴⁰ *Ibid* 209–14.

⁴¹ Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (Federation Press, 2008) 3.

⁴² *Sex Discrimination Act 1984* (Cth).

⁴³ *Disability Discrimination Act 1992* (Cth).

⁴⁴ *Age Discrimination Act 2004* (Cth).

Rather than build on existing regulatory frameworks covering workplace relations, anti-discrimination laws were developed to stand alone. Discrimination was prohibited across various fields and complaints were to be taken to specialist equality agencies, such as the Human Rights and Equal Opportunity Commission ('HREOC') (now the Australian Human Rights Commission).⁴⁵

It is clear from many accounts that when it was introduced the *Sex Discrimination Act 1984* (Cth) ('*Sex Discrimination Act*') was considered radical and was highly controversial.⁴⁶ Advocates for gender equality held high hopes that the Act would be used to challenge the undervaluing and social exclusion of women and that this in turn would have distributive consequences in respect of access to good jobs and pay equity.

Most commentators conclude that the *Sex Discrimination Act* has had a significant impact.⁴⁷ It provided a means of challenging status-based exclusion, and certainly helped to remove some blatant barriers to good jobs, including blanket exclusions from positions such as pilots⁴⁸ and miners.⁴⁹ Some of the more demeaning questions directed at female job applicants about marriage intentions and contraception have also largely disappeared from the recruitment process. This reflected at least a formal notion of equality, with human resource managers adopting sameness or consistency as a key principle of practice, thereby opening doors for those women and minorities who had the required qualifications but had previously been excluded as a matter of course.⁵⁰

Though considered radical by many, it is very clear that anti-discrimination laws were not designed to upset rules or structures that were set by either the legislature or industrial machinery. First, while anti-discrimination laws like the *Sex Discrimination Act* applied to both private business and government action, they only applied to government action that was akin to private action; that is, when the government acted as an employer or provider of education, but not as a government per se.⁵¹ So, unlike a bill of rights, the *Sex Discrimination Act* does not apply to parliamentary functions and thus cannot be used to challenge discriminatory laws. In fact, compliance with a law is a full defence to a charge of discrimination under the *Sex Discrimination Act*,⁵² which quarantines from challenge the distributive rules contained in legislation governing, for example,

⁴⁵ See *Australian Human Rights Commission Act 1986* (Cth) s 11.

⁴⁶ See, eg, Chris Ronalds, 'Opening Address III' in Margaret Thornton (ed), *Sex Discrimination in Uncertain Times* (Australian National University E Press, 2010) 17, 17–22; Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990) 24–33.

⁴⁷ See, eg, Ronalds, above n 46.

⁴⁸ *Ansett Transport Industries (Operations) Pty Ltd v Wardley* [1984] EOC ¶92-003.

⁴⁹ *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165.

⁵⁰ See, eg, Sara Charlesworth, 'The *Sex Discrimination Act*: Advancing Gender Equality and Decent Work?' in Margaret Thornton (ed), *Sex Discrimination in Uncertain Times* (Australian National University E Press, 2010) 133, 136–7.

⁵¹ *Sex Discrimination Act 1984* (Cth) s 12(1) provides that '[t]his Act binds the Crown', but the substantive provisions of the Act only place prohibitions on actors who are 'employers', 'education providers' or 'goods and service providers' and thus the prohibition on discrimination does not extend to the Crown functioning as a legislator or adjudicator, for instance.

⁵² *Ibid* s 40 exempts '[a]cts done under statutory authority'.

taxation and social security. Further, this exemption extended to the ‘statutory authority’ of industrial instruments made under labour laws, including determinations or orders of the federal industrial relations commission, awards or other industrial instruments.⁵³ Similar provisions were replicated in state legislation.⁵⁴

The exclusion of laws, including industrial awards and ultimately industrial agreements, from challenge under the anti-discrimination regime makes clear that the anti-discrimination laws were not designed to challenge the socioeconomic redistributive mechanisms in any fundamental way. The rules determined by industrial commissions and industrial parties were accepted as the standard of fairness and industrial logic. Anti-discrimination laws could be used to challenge blatant sexist or racist comments in the workplace and to argue for a fair or consistent application of industrial rules, but there was no effective mechanism for challenging inherent bias in the setting of the rules. In response to criticism regarding this limitation, a statutory concession was made in 1992 enabling the Sex Discrimination Commissioner to refer apparently discriminatory awards to the industrial commission,⁵⁵ discussed further below.⁵⁶ This provision appears not to have been used formally,⁵⁷ although it may have empowered the Commissioner to become more proactive in advocating for workplace equality.

This conclusion that anti-discrimination regulation has very limited redistributive power is further reinforced by the nature of the remedies available for discrimination. Remedies under anti-discrimination laws are limited to compensation for the victim,⁵⁸ which means that the remedies are backward-focused and individualistic rather than preventative and systemic.⁵⁹

III EQUALITY STRUGGLES — MAINTAINING SEPARATION; DENYING CONNECTION

The separation of the two regimes of labour law and anti-discrimination obscures the connection between socioeconomic and status-based inequalities. The conceptual and regulatory separation means that each system has difficulty dealing with the other kind of equality demand: labour law facing the challenge

⁵³ This provision persists in *ibid* s 40(1). For discussion of the exemption see Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work* (Oxford University Press, 2nd ed, 2011) 442.

⁵⁴ For example, until 1994, *Anti-Discrimination Act 1977* (NSW) s 54 provided an exemption for compliance with New South Wales industrial awards and conditions. Cf *Anti-Discrimination (Amendment) Act 1994* (NSW) sch 4 s 23, amending *Anti-Discrimination Act 1977* (NSW) s 54.

⁵⁵ See *Sex Discrimination and Other Legislation Amendment Act 1992* (Cth), inserting *Sex Discrimination Act 1984* (Cth) s 50A and *Industrial Relations Act 1988* (Cth) ss 111A, 113(2A), 113(2C), 113(5).

⁵⁶ See below Part III(B)(1).

⁵⁷ Deidre O’Connor, ‘Equity in the Workplace: The Implications of the *Industrial Relations Reform Act 1993*’ (1995) 37 *Journal of Industrial Relations* 63, 70; Ronnit Redman and Karen O’Connell, ‘Achieving Pay Equity through Human Rights Law in Australia’ (2000) 6 *Australian Journal of Human Rights* 107, 108–9.

⁵⁸ *Australian Human Rights Commission Act 1986* (Cth) s 46PO(4).

⁵⁹ Belinda Smith, ‘A Regulatory Analysis of the *Sex Discrimination Act 1984* (Cth): Can It Effect Equality or Only Redress Harm?’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation — Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Federation Press, 2006) 105, 112–13.

of recognising diversity and the bias of apparently neutral worker norms; and anti-discrimination laws being wielded unsuccessfully to enforce socioeconomic demands for redistribution. To illustrate these struggles I will use four current Australian workplace issues that have gender equality components.

A Labour Law — Provides Redistribution but Not on Status Grounds

Looking first at labour laws, the issues of pay equity and parental leave demonstrate that formal equality has opened doors to allow greater workplace participation by women; but the industrial regulatory system has shown little capacity to deal with gender claims that require more than the ‘same treatment’.

The quest for gender pay equity demonstrates the usefulness of the formal conception of equality to bring about same treatment *and* the inherent difficulties it then lays for achieving more. Arguments for equal pay for equal work formally succeeded in the 1969 *Equal Pay Case*,⁶⁰ removing the practice of setting female pay rates as a proportion of male pay rates.⁶¹ This was a major breakthrough for gender equality, ensuring that women who worked alongside men were paid the same as their male counterparts. Importantly, this meant that women were able to benefit more from the significant gains that men had won in the collective system of conciliation and arbitration. It is well-recognised that systems of centralised wage-fixing like Australia had for almost a century produced relatively high wage levels for women.⁶² This was not necessarily because of specific attention to women but attention to workers collectively, specifically the low paid; it may be trite to acknowledge that the safety net benefits the marginalised the most.

However, the move to ‘equal pay’ also had serious limitations and implications. First, this move marked a shift from a family wage to an individual wage whereby some responsibility for financing social reproduction was removed from employers, leaving this more to government in its role as social welfare provider. In establishing an individual rather than family wage, the costs of dependents and the costs of social reproduction were mostly removed from the calculation of workers’ wages. With such costs externalised, labour is commodified: employers are required to pay for the labour power of each worker but not necessarily the costs of the care and education that contributed to each person becoming an employable labourer. In this way, the care needs of families are also separated out, allowing a conceptualisation of work and family as being in separate spheres, and the ‘ideal worker’ as one who can operate effectively, free of the family sphere.

Second, the formal equality case won women equal pay for equal work, but said little about how the pay level was determined for any particular job. The workforce was highly segregated into ‘women’s jobs’ and ‘men’s jobs’. Being

⁶⁰ (1969) 127 CAR 1142.

⁶¹ See Smith and Stewart, above n 35, 152; Whitehouse, ‘From Family Wage to Parental Leave’, above n 29, 408–9.

⁶² Gillian Whitehouse, ‘Legislation and Labour Market Gender Inequality: An Analysis of OECD Countries’ (1992) 6 *Work, Employment and Society* 65, 79.

paid the ‘male’ wage did not help those female workers who had no male counterparts. Wages were said to reflect merit, but there was little opportunity to interrogate the subjectivity of this notion.⁶³ The fact that garbage collectors were paid more than child care workers was explained as a matter of merit, a question of how the skills and responsibility of each were valued. These concerns altered the struggle and the rallying cry gradually changed from one of equal pay to one of ‘equal pay for work of equal value’ or ‘comparable worth’. The 1972 *National Wage and Equal Pay Cases*⁶⁴ saw some movement in this direction and a host of feminist advocates, such as Clare Burton, set about revealing the bias inherent in job evaluations and the consequential undervaluation of jobs and tasks traditionally performed by women.⁶⁵ In conjunction with these battles, efforts were made to challenge the entrenched gender segregation of the workforce to allow women access to better paid male occupations.

With limited progress being made on equal pay, but the call for comparable worth gaining some traction, the federal government took action in 1993. Drawing on the International Labour Organization’s *Equal Remuneration Convention 1951*,⁶⁶ a power for the Australian Industrial Relations Commission (‘AIRC’) to make orders in respect of ‘equal remuneration for work of equal value’ was inserted into the *Fair Work Act*’s predecessor, the *Industrial Relations Act 1988* (Cth) (‘*IR Act*’).⁶⁷ This power was fundamentally limited, however, by the requirement that the Commission find a discriminatory cause for any gender pay disparity before it could make a corrective order.⁶⁸ This limitation reflects a strong and persistent antipathy towards the suggestion that gender bias is pervasive in society.⁶⁹ Unlike other claims for wage changes that were cast along lines of need and ‘fairness’ in terms of socioeconomic equality, adjustments for gender inequality required bias and even intentional bias to be proven first. The gender pay gap was not in itself accepted as a sufficient basis for action — intention akin to fault needed to be shown. Unsurprisingly, no equal remuneration orders were made under these burdensome provisions. In this way, the labour law system demonstrated an inherent difficulty in dealing with status-based claims.

⁶³ Clare Burton, *Redefining Merit* (Australian Government Publishing Service, 1988) 2.

⁶⁴ (1972) 147 CAR 172. See also Rosemary Hunter, *The Beauty Therapist, the Mechanic, the Geoscientist and the Librarian: Addressing Undervaluation of Women’s Work* (ATN WEXDEV, 2000).

⁶⁵ See, eg, Clare Burton, *The Promise and the Price: The Struggle for Equal Opportunity in Women’s Employment* (Allen & Unwin, 1991) 93–105; Clare Burton, Raven Hag and Gay Thompson, *Women’s Worth: Pay Equity and Job Evaluation in Australia* (Australian Government Publishing Service, 1987) 27–36; Clare Burton, *Gender Bias in Job Evaluation* (Australian Government Publishing Service, 1988) 2–4; Burton, *Redefining Merit*, above n 63, 14.

⁶⁶ *Convention (No 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*, opened for signature 29 June 1951, 165 UNTS 303 (entered into force 23 May 1953).

⁶⁷ *Industrial Relations Reform Act 1993* (Cth) s 21, inserting *Industrial Relations Act 1988* (Cth) pt VIA div 2.

⁶⁸ Smith and Stewart, above n 35, 154.

⁶⁹ Hunyor comments on a similar antipathy to recognise the pervasiveness of racism in Jonathon Hunyor, ‘Skin-Deep: Proof and Inferences of Racial Discrimination in Employment’ (2003) 25 *Sydney Law Review* 535, 537–9.

It was hard for the industrial system to deal not only with women's work but also with women's bodies. Workers and male dominated unions had successfully fought for annual leave entitlements and long service leave to promote and reward long tenure, but it was not until the 1970s that attention was given to the kinds of leave needed by women to both participate in work, and bear and care for children. Notably the struggle for *paid* parental leave took another three decades to get results.⁷⁰

The right to (unpaid) parental leave, for example, was developed slowly and incrementally, with significant limitations. The right originated as a test case brought before the Conciliation and Arbitration Commission to establish a model award provision for unpaid maternity leave in 1979.⁷¹ This was not extended to adoptive mothers until 1985⁷² and not extended to fathers until the *Parental Leave Case* in 1990.⁷³ The model parental leave clause was then picked up and inserted as a legislative entitlement by the *Industrial Relations Reform Act 1993* (Cth)⁷⁴ and was retained with little change up until the *Fair Work Act* in 2009.

The fact that leave for child bearing and rearing did not make it onto the industrial relations agenda until 1979, and even then was only grudgingly granted as an unpaid entitlement to workers, demonstrates that women were not considered mainstream workers or not able to mobilise enough majority support from unions to get their needs prioritised. Eligibility, even for this limited unpaid leave, reflected a fairly atypical work pattern for women — it required employment on a permanent basis for 12 months with the same employer.⁷⁵ This reinforces the conclusion that the industrial relations system struggled to see women, with their biological needs and caring responsibilities, as real workers entitled to rights as workers. Parental leave was granted but arguably only to those who had 'earned' the right to this benefit by demonstrating that they were seriously attached to the labour market and could perform like a 'normal' worker. The irony is that the leave designed to benefit women most still adopted a male mode of working as the eligibility measure. Women disproportionately worked casually and thus were largely excluded from the benefit, despite some limited acknowledgement of this in the *Parental Leave — Casual Employees Test Case*.⁷⁶

⁷⁰ See *Paid Parental Leave Act 2010* (Cth) s 19, which applies to births or adoptions from 1 January 2011.

⁷¹ *Maternity Leave Case* (1979) 218 CAR 120.

⁷² *Adoption Leave Case* (1985) 298 CAR 321.

⁷³ (1990) 36 IR 1.

⁷⁴ *Industrial Relations Reform Act 1993* (Cth) s 21, inserting *Industrial Relations Act 1988* (Cth) pt VIA div 5. See Luke Raffin, 'Baby Steps in the Right Direction: Does the New Maternity Payment Realise the Aims of Paid Maternity Leave?' (2005) 18 *Australian Journal of Labour Law* 270, 272–3.

⁷⁵ *Maternity Leave Case* (1979) 218 CAR 120, 127 (Coldham and Gaudron JJ, Taylor DP and Commissioners Matthews and Cohen).

⁷⁶ [2001] EOC ¶93-144, [23]–[27] (Giudice J, Watson and Acton SDP and Commissioners Bacon and Cribb). Further limited changes were introduced through the *Family Provisions Case [No 2]* (2005) 152 IR 367, 378–80 (Wright P, Sams DP, Staff J and Commissioner Ritchie). See also Sue Williamson and Marian Baird, 'Family Provisions and *WorkChoices*: Testing Times' (2007) 20 *Australian Journal of Labour Law* 53.

Rosemary Owens has also noted how the granting of leave for women to do 'women's work' of caring simultaneously reinforces their outsider status as workers.⁷⁷ She argues that although significant, granting leave has been the primary way in which our labour law system has been able to deal with women with family responsibilities — allowing them to step out of the workplace to deal with their other responsibilities and return when, and only when, they can perform again as ideal workers. By granting leave, employers were relieved of the need to accommodate such workers more generally in terms of setting hours of work, allowing flexible work arrangements and providing the worker with the autonomy needed to effectively manage work and family responsibilities.

The delayed establishment of maternity rights and the traditionally male pattern of work used to establish eligibility illuminates the gendered nature of the apparently gender-neutral individual worker regulated by labour law. As noted above, industrial regulation commenced with the notion of a 'family wage', which reinforced gender roles within the male breadwinner model of the family. While it gradually moved towards an individualised notion of workers, the gender of the ideal worker was not completely erased. Rather, gender became an implicit rather than explicit factor in the setting of wages and conditions because it continued to shape the division of caring and domestic work in the home and thereby the availability of men and women to participate in the workforce. While some rights — like the right to safety — are recognised immediately upon commencement of employment, others — like the right to parental leave — were and still are seen as entitlements that have to be earned, and the length of service or time is used as the measure of the employee's deservedness. As long as time is used as a way to earn entitlements, those who have less time to devote to paid work will remain marginalised.⁷⁸ Put another way, while the division of unpaid work in the home is gendered, the application of apparently neutral rules that use hours of work or tenure as a measure of value in the workplace will have a gendered impact.

A formal equality approach simply asks whether the rules are applied consistently. The dominance of such an approach allows attention to focus on whether all workers are treated the same, rather than prompting an inquiry about the gendered underpinnings of the rules that consequently impact men and women differently. This echoes a wider critique that formal equality is purely procedural rather than substantive, and is not able to differentiate between treating all workers consistently well and consistently badly.⁷⁹

As these examples of pay equity and parental leave demonstrate, Australian labour law has not been completely immune to status-based challenges. Over the 19th century, challenges to exclusionary rules were increasingly channelled through the award test case mechanism (for equal pay and later maternity rights).

⁷⁷ Rosemary J Owens, 'Taking Leave: Work and Family in Australian Law and Policy' in Joanne Conaghan and Kerry Rittich (eds), *Labour Law, Work, and Family: Critical and Comparative Perspectives* (Oxford University Press, 2005) 237, 248.

⁷⁸ Belinda M Smith, 'Time Norms in the Workplace: Their Exclusionary Effect and Potential for Change' (2002) 11 *Columbia Journal of Gender and Law* 271, 287–8.

⁷⁹ Sandra Fredman, *Discrimination Law* (Oxford University Press, 2002) 7–11.

Women argued for status recognition and redistribution as a matter of industrial fairness.⁸⁰ As the notion of human rights gained support through the 1980s and the external affairs power was recognised as a constitutionally sound basis for implementing international conventions federally,⁸¹ there emerged a sense that the regulation of workplace conditions was not necessarily limited by the *Constitution's* conciliation and arbitration power. Utilising the external affairs power and relying upon ratification of various International Labour Organization conventions,⁸² in 1993 the federal government introduced a number of new provisions into the *IR Act*.⁸³ These included legislative objectives of eliminating discrimination and promoting work–family balance, the equal remuneration and parental leave provisions noted above, unfair dismissal provisions and a prohibition on terminating employment for a discriminatory reason (including, sex, race and family responsibilities).⁸⁴

While these amendments reflect a significant step towards recognising status-based categories in labour laws, the changes only partially challenged the separation of labour laws and human rights laws. Some of the provisions, like the power to make equal remuneration orders outlined above, were constrained by their wording and proved ineffective. Others, like the unlawful termination provisions, were little used because of alternative rights of action and procedural difficulties.

The 1993 reform that appears to have wrought the greatest change to industrial awards was located in s 150A of the *IR Act*, which provided that all awards were to be reviewed by the Commission for, among other things, discriminatory terms. Significantly, in contrast to the limited and weak complaints-based mechanism provided for under anti-discrimination legislation, s 150A directed the Commission to systematically review all awards for discrimination in form or effect.⁸⁵ The Commission identified key awards and undertook a pilot review, consulting extensively with the parties to those awards. Importantly, HREOC was invited to join a working party and was to review the pilot awards for discrimination.⁸⁶ In its reports, HREOC identified provisions that were clearly discriminatory, such as those that imposed blanket work restrictions specifically on women and

⁸⁰ Jill Murray, 'The AIRC's Test Case on Work and Family Provisions: The End of Dynamic Regulatory Change at the Federal Level?' (2005) 18 *Australian Journal of Labour Law* 325.

⁸¹ See *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Commonwealth v Tasmania* (1983) 158 CLR 1.

⁸² See, eg. *Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities*, opened for signature 23 June 1981, 1331 UNTS 295 (entered into force 11 August 1983).

⁸³ See *Industrial Relations Reform Act 1993* (Cth).

⁸⁴ See generally Owens and Riley, above n 11, chs 7–8.

⁸⁵ O'Connor, above n 57, 65; Redman and O'Connell, above n 57, 119–22; Therese MacDermott, 'The Changing Role of the Safety Net: The Australian Industrial Relations Commission's s 150A Review' in Paul Ronfeldt and Ron McCallum (eds), *Enterprise Bargaining, Trade Unions and the Law* (Federation Press, 1995) 110.

⁸⁶ HREOC, 'Report on Review of Awards: Direct Discrimination' (Report, December 1994); HREOC, 'Indirect Discrimination: Discussion Paper and Analysis of Awards — Pilot Program' (Discussion Paper, 20 March 1995).

juniors or granted lesser benefits⁸⁷ and others that raised issues of indirect discrimination, such as using hours of work and continuity of service as the basis for determining eligibility for benefits.⁸⁸ This process is a notable example of the human rights system *talking* to the industrial relations system, or what Redman and O'Connell called a 'cross-over point'.⁸⁹ The mechanism of s 150A enabled HREOC to step into the industrial realm and gave it a limited opportunity to apply human rights concepts of status equality and non-discrimination to otherwise protected workplace rules. Ultimately, however, the industrial commission had the power to vary the awards. While the more obvious provisions of direct discrimination and gendered language were addressed and a model anti-discrimination clause was developed for awards and agreements,⁹⁰ many of the more difficult issues of indirect discrimination were not taken up.

It is also notable that while the gendered rules in awards were being removed, the role and significance of awards was diminishing. From the late 1980s the focus of workplace regulation began shifting away from the common conditions of arbitrated awards towards enterprise agreements.⁹¹ Improvements in wages and conditions were to be achieved through workplace bargaining, using industrial muscle (which women often lacked) and promises of productivity increases, which were hard to show in the caring professions dominated by women.

The introduction of *WorkChoices*⁹² in 2005 reflected a particularly extreme step towards a system of enterprise and even individual bargaining, with the arbitration role of the Commission stripped away and awards removed as the safety net for bargaining.⁹³ Many researchers have documented the way in which this shift towards bargaining detrimentally affected women's work conditions.⁹⁴ What is striking in the debates leading up to and supporting this shift towards bargaining is the focus on economic efficiency and the market, and the lack of discussion about human rights and social inclusion.

B *Anti-Discrimination Laws*

In contrast to labour law the focus of anti-discrimination laws has been human rights and status equality. These laws have had success in challenging some

⁸⁷ For example, blanket restrictions on women working on particular machines or working shifts or overtime. See HREOC, 'Direct Discrimination', above n 86, 8.

⁸⁸ HREOC, 'Indirect Discrimination', above n 86, 25–8.

⁸⁹ Redman and O'Connell, above n 57, 107.

⁹⁰ Susan Halliday, Sex Discrimination Commissioner, 'Discrimination Law and the Industrial Relations Agenda — Model Anti-Discrimination Clauses in Awards and Agreements: Are They Worth the Paper They Are Written On?' (Speech delivered at the Australian Mines and Minerals Association National Conference, Hobart, 26 March 1999) <http://www.hreoc.gov.au/about/media/speeches/sex_discrim/discrim_law_industrial_relations.html>.

⁹¹ *Ibid.*

⁹² *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

⁹³ See generally the editorial and articles in the special edition of (2006) 19 *Australian Journal of Labour Law* 95.

⁹⁴ See, eg, Jude Elton et al, *Women and WorkChoices: Impacts on the Low Pay Sector* (Centre for Work + Life, University of South Australia, 2007) 8–10.

exclusionary workplace behaviour including sexual harassment, blanket bans and racial epithets, but have been much less effective at fundamentally challenging the structures that determine income (and wealth) distribution in society and the ideal worker norm. The rules about wages and conditions of employment that structure access, participation and rewards in the workforce are set in the labour law arena. The ways in which workers are categorised — as casual or permanent, full-time or part-time, skilled or unskilled — and the significance of these categories for both pay and conditions are determined as industrial issues.

Anti-discrimination laws ostensibly cover the field of work, prohibiting discrimination at all stages of employment.⁹⁵ However, as noted above,⁹⁶ there are numerous ways in which the capacity of these laws to challenge industrial rules has been fundamentally limited: the establishment of anti-discrimination laws as a separate system of regulation; exemption for compliance with laws and industrial determinations; and the individual, compensatory nature of the remedies available.

1 *Institutional Support*

A further significant factor limiting the effectiveness of anti-discrimination laws is the lack of powerful institutional support for these laws in comparison to labour laws. In the industrial arena, the role of resolving fundamental disputes about economic rights was given originally to the Commonwealth Court of Conciliation and Arbitration in 1904.⁹⁷ Following the landmark 1956 case *R v Kirby; Ex parte Boilermakers' Society of Australia* ('*Boilermakers' Case*'),⁹⁸ however, the role of arbitrating wages and conditions of work was separated from the judicial role of determining conflicts over existing rights. From that point onwards, two institutions operated in the industrial arena: a specialist industrial commission conciliating and arbitrating disputes, creating, clarifying and varying awards and later certifying enterprise agreements and arbitrating unfair dismissal claims; and the courts dealing with disputes characterised as ones of legal interpretation. In this way, questions of economic justice, industrial fairness and socioeconomic equality were examined and decided by commission members, who were drawn from union, employer and legal backgrounds. The members sat as a tribunal, but operated as an agency directed by goals of industrial harmony and the public interest rather than as a court restricted by rules of evidence and constraints imposed by constitutional principles of the separation of powers.⁹⁹

⁹⁵ See, eg, *Sex Discrimination Act* s 14, which prohibits sex discrimination in hiring, firing and setting terms and conditions in employment.

⁹⁶ See above Part II(B).

⁹⁷ *Conciliation and Arbitration Act 1904* (Cth) s 2(II).

⁹⁸ (1956) 94 CLR 254.

⁹⁹ For a discussion of such constraints on courts, see Judy Fudge, 'Substantive Equality, the Supreme Court of Canada, and the Limits to Redistribution' (2007) 23 *South African Journal on Human Rights* 235.

In contrast, the institutions established to promote and enforce status-based equality in Australia are marked by regulatory weakness.¹⁰⁰ HREOC originally had some power to determine individual disputes under anti-discrimination laws, but even in this role it could only order compensatory remedies to the individual victims and never had the capacity to make general awards across workplaces, occupations or industries. Ultimately, even this limited power was removed from the specialist commission¹⁰¹ leaving it only with the capacity to conciliate disputes, conduct general public inquiries, and provide human rights education. While questions of socioeconomic inequality and redistribution were seen in the industrial arena to be policy issues that could be arbitrated by an executive agency, the regulatory approach to status-based equality disputes was different. As with industrial regulation, judicial power was taken away from the executive agency, but in the case of human rights the agency that remained was never given a power to arbitrate and develop general principles to apply in the labour market.

HREOC was given some soft regulatory tools and it used them effectively to translate legal rights into a public norm of fairness, to inform and influence industrial debates, and to promote the development of best practice compliance programs for employers.¹⁰² As noted above, in 1992 HREOC was given a limited power to refer apparently discriminatory awards to the industrial commission which in turn was required to review the awards and remove discriminatory terms.¹⁰³ This provision was not formally used but might have supported a range of other HREOC initiatives directed at challenging workplace inequality.

HREOC participated in numerous industrial proceedings, directly and indirectly. In addition to its participation in the *IR Act* s 150A working party that reviewed awards, it was also an intervener in some matters being arbitrated by the industrial commission, particularly test cases.¹⁰⁴ Additionally, in an even greater number of cases, it played an important role in providing research materials and arguments that could be used by the parties to build a case for better and fairer working conditions.¹⁰⁵ HREOC undertook major inquiries and provided reports on a range of workplace conditions including sexual harassment, pregnancy discrimination, parental leave, equal pay and work–family

¹⁰⁰ Smith, 'Regulatory Analysis', above n 59, 111–12; Peter Grabosky and John Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (Oxford University Press, 1986) 140–1.

¹⁰¹ See *Human Rights Legislation Amendment Act (No 1) 1999* (Cth) sch 1, inserting *Human Rights and Equal Opportunity Commission Act 1986* (Cth) pt IIB. The amendment was passed in response to *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

¹⁰² Smith, 'Regulatory Analysis', above n 59, 117–23; Belinda Smith, 'The Human Rights and Equal Opportunity Commission: A New Role for Equality Advocate?' in Grant Michelson, Suzanne Jamieson and John Burgess (eds), *New Employment Actors: Developments from Australia* (Peter Lang, 2008) 95, 97–8.

¹⁰³ See above n 55 and accompanying text.

¹⁰⁴ See, eg, *Family Provisions Case [No 2]* (2005) 152 IR 364, where HREOC gave submissions on the gender and carers' equality aspects of the failure to provide workplace accommodation for employees with family responsibilities.

¹⁰⁵ Smith, 'The Human Rights and Equal Opportunity Commission', above n 102, 100–3.

balance.¹⁰⁶ Often based on extensive survey work and public consultation, as well as exploration of alternative international approaches, this research was made publicly available through reports and in some cases was supplemented with materials designed specifically for employers to enable them to improve workplace systems.¹⁰⁷

While it was not empowered to change the workplace rules, it seems clear that the human rights commission has played at least an indirect and incremental role in shaping debates in Australia about parental leave, equal pay, sexual harassment and work–family balance. The separation of human rights regulation from labour regulation might even have enabled human rights arguments to be articulated more clearly in human rights terms, undiluted by competing industrial considerations.

2 Courts

While HREOC was granted soft regulatory tools, only the courts could make binding determinations, and only within the cultural and legal constraints that shape judicial practice and outcomes. Apart from a few initial progressive judgments,¹⁰⁸ the courts have struggled to give anti-discrimination laws the wide and generous interpretation supposedly granted to beneficial legislation.¹⁰⁹ In 2006 Kirby J, having noted that the courts originally gave anti-discrimination laws ‘meaning that rendered them effective’,¹¹⁰ went on to lament:

The wheel has turned. In no decision of this Court in the past decade concerned with anti-discrimination laws, federal or State, has a party claiming relief on a ground of discrimination succeeded. If the decision in the courts below was unfavourable to the claimants, it was affirmed. If it was favourable, it was reversed.¹¹¹

Arguably this is because the Australian judiciary is constrained by a very narrow public mandate in respect of economic and social rights (in contrast to the industrial commission). The courts have also been constrained by highly prescriptive and complicated drafting of anti-discrimination laws. The drafting

¹⁰⁶ See Australian Human Rights Commission, *Publications* <<http://www.humanrights.gov.au/about/publications/index.html>>, which lists reports from the Commission.

¹⁰⁷ See, eg. Australian Human Rights Commission, *Effectively Preventing and Responding to Sexual Harassment: A Quick Guide* (2008) <<http://www.humanrights.gov.au/sexualharassment/quickguide/index.html>>.

¹⁰⁸ See, eg. *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165 (*‘Banovic’*); *Waters v Public Transport Corporation* (1991) 173 CLR 349 (*‘Waters’*). In *Banovic* (1989) 168 CLR 165, 177 (Deane and Gaudron JJ), 184–5 (Dawson J), the High Court found that the appellant’s practice of recruiting male employees promptly while subjecting female applicants to extended delays constituted unlawful discriminatory conduct. Further, retrenchment on a ‘last on, first off’ principle amounted to unlawful sex discrimination under *Anti-Discrimination Act 1977* (NSW) s 24(3). In *Waters* (1991) 173 CLR 349, 359–60 (Mason CJ and Gaudron J, Deane J agreeing), it was held that indirect discrimination under *Equal Opportunity Act 1984* (Vic) s 17(1) did not require an intention or motive to discriminate.

¹⁰⁹ See Beth Gaze, ‘Context and Interpretation in Anti-Discrimination Law’ (2002) 26 *Melbourne University Law Review* 325, 340–53; Margaret Thornton, ‘Disabling Discrimination Legislation: The High Court and Judicial Activism’ (2009) 15 *Australian Journal of Human Rights* 1, 6.

¹¹⁰ *New South Wales v Amery* (2006) 230 CLR 174, 200 [87].

¹¹¹ *Ibid* 200–1 [88] (citations omitted).

arguably both reflects *and reinforces* a limited judicial role in promoting real change.¹¹² This judicial stance is not peculiar to Australian judges; Fredman notes '[w]hen faced with claims with genuine redistributive consequences, judges quickly show their reluctance to enter into redistributive decision-making.'¹¹³ Judges are often seen to lack both the capacity and the legitimacy for engaging in questions of work value and relativities. It is highly likely that in Australia this view has been reinforced by the long history of workplace conditions being set by an independent industrial tribunal.

A number of cases clearly demonstrate how the anti-discrimination regulatory framework struggles to deal with claims that seek to challenge industrial rules and categories. The first is *New South Wales v Amery* ('*Amery*'),¹¹⁴ in which the lower wages awarded to casual workers was questioned. In summary, eight female casual teachers claimed indirect sex discrimination under anti-discrimination law in New South Wales. The legislation governing teachers referred to two categories of teachers (effectively permanent and supply casuals), and then the industrial relations system (through an award and then an agreement) used this categorisation and established two separate minimum pay scales. Under these scales the pay of casuals, even long-term (supply) casuals, was capped at about two thirds of the highest rate for permanents.¹¹⁵ Women were disproportionately casual. This was mostly because they lost their permanent status by taking extended parental leave. Upon return from leave, in order to qualify for permanent status they had to be prepared to transfer to anywhere in the State. Faced with this requirement, they opted instead for casual postings. It is important to note that these 'supply' casuals were long-term casuals working as replacements for teachers on maternity leave, for instance, and for periods of even more than 12 months in some cases.¹¹⁶ This meant they did the full range of teaching work including curriculum development and assessment, but could not move beyond the equivalent of level 8 of 13 in the permanent pay scale regardless of experience or skills.

This very kind of difference in conditions for permanents and casuals was flagged as being potentially indirect sex discrimination by HREOC in its 1995 review of federal awards.¹¹⁷ HREOC had emphasised that whether a condition or requirement is discriminatory depends on whether it is 'reasonable' and that a host of factors should be balanced in the evaluation.¹¹⁸ Casualisation has intensified over time and there is little evidence that employers, the industrial commission or the courts conceptualise casual employment status as potentially discriminatory.

¹¹² Belinda Smith, 'Rethinking the *Sex Discrimination Act*: Does Canada's Experience Suggest We Should Give Our Judges a Greater Role?' in Margaret Thornton (ed), *Sex Discrimination in Uncertain Times* (Australian National University E Press, 2010) 235.

¹¹³ Fredman, 'Redistribution and Recognition', above n 1, 219.

¹¹⁴ (2006) 230 CLR 174.

¹¹⁵ *Ibid* 189–90 [38]–[41] (Gummow, Hayne and Crennan JJ).

¹¹⁶ *Ibid* 188 [35].

¹¹⁷ HREOC, 'Indirect Discrimination', above n 86, 23–4.

¹¹⁸ *Ibid*.

The courts in *Amery*, including ultimately the High Court of Australia, engaged in legal contortions to avoid having to deal with the fundamental question that the case posed — whether it was legitimate or reasonable for employers to pay less to workers who could not conform with the male norm (of being transferrable around the State). The case in a sense was also about the legitimacy of the ‘casual’ status of employment, another question the courts avoided. Women, who had to give up their permanent status in order to take parental leave, were disproportionately less able to comply with this transferability requirement because of their disproportionate likelihood of bearing family responsibilities and not being the primary family breadwinner. As casuals they were not able to get the same recognition of their skills and experience that was afforded to permanent teachers.

The Industrial Relations Commission of New South Wales (‘IRC’), by award and subsequently registered agreement, had approved the practice of paying casuals less.¹¹⁹ Although compliance with awards or agreements was no longer an official exemption under s 54(1)(d) of the *Anti-Discrimination Act 1977* (NSW), the imprimatur of the IRC on the practice was significant. In the *Amery* case the High Court was, in effect, being asked to interrogate the process of determining wages. However, in reaching their conclusion the majority judges noted that legislation establishing the teaching service was the origin of the distinction between permanents and casuals, and then gave little weight to the discretion the department had in choosing to use that distinction to establish two different pay structures.¹²⁰ The majority took an extraordinarily narrow and technical approach, rejecting the claim on the basis that casual teachers and permanent teachers held different positions and thus the permanency stipulations were not ‘requirements’ imposed upon ‘teachers’ as a whole and certainly not upon the casual teacher claimants.¹²¹ In adopting this position the Court thereby avoided the substantive question that it clearly felt ill-equipped to answer.

Three cases further demonstrate how anti-discrimination laws are best suited for challenging blatant and categorical exclusion, but struggle to deal with distinctions that are apparently supported by industrial practices or assumptions about employee value. The first case is *Evans v National Crime Authority* in 2003.¹²² Evans, who was employed by the National Crime Authority on a fixed term contract, used her leave entitlements to care for her sick son. But anti-discrimination legislation did not then prevent her employer from taking this use into account when deciding whether to renew her contract or engage someone else (who used less leave). The formal notion of equality that underpinned anti-discrimination laws allowed the Court to find that it was lawful and even legitimate for an employer to choose the candidate who, on past performance, did not use his or her entitlements to sick or carers leave.¹²³ The ideal or model

¹¹⁹ *Amery* (2006) 230 CLR 174, 189–90 [40]–[41] (Gummow, Hayne and Crennan JJ).

¹²⁰ *Ibid* 197–9 [73]–[81].

¹²¹ *Ibid* 198 [78].

¹²² [2003] EOC ¶93-298.

¹²³ *Ibid* [93] (Raphael FM), *affd Commonwealth v Evans* (2004) 81 ALD 402.

employee is clearly the one who does not have caring responsibilities that compete for the employee's time and attention, even to this limited extent of using earned leave entitlements.

Similarly, in the case of *Thompson v Orica Australia Pty Ltd* ('Orica')¹²⁴ the Federal Court ruled that upon return from maternity leave the employee (Thompson) was only entitled to be treated the same as other (non-ideal) workers who took such extended leave. Sex discrimination laws protected Thompson against different treatment but in characterising who was like whom for the determination of whether there was any different treatment the fact that Thompson's leave was for the gendered reasons of birth and child rearing was irrelevant. In a perverse way, it is the formal equality arguments of like treatment that allowed Orica to ignore the fact that Thompson took the leave for maternity reasons. The law granted no special treatment or accommodation for birth and child rearing, only a guarantee of consistent treatment with other employees who took a similar length of leave.¹²⁵ Being unpaid leave, the essence of maternity leave for Thompson and most Australian women is simply the right to take time off work for the birth of a child and return to the same or equivalent position afterwards. In essence, the right is one of job security — the right to get your old job back at the end of the leave, as one does after sick leave, annual leave and long service leave, for example. While this seems obvious, it was clear in *Orica* that the starting point in the reasoning was that an employee who takes 12 months' leave causes disruption to the workplace and an employee cannot expect the employer to guarantee the employee's position on return¹²⁶ — but this can only be the starting point if taking maternity leave is not seen as the need of a normal worker.

Finally, the case of Deborah Schou¹²⁷ has been well analysed¹²⁸ and similarly documents the difficulties courts have in exercising power to challenge or change workplace conditions. Schou's request to be able to work at home via a modem so as to manage some unusual and temporary needs of her child was refused.¹²⁹ In considering whether this refusal constituted discrimination, the Court refused to accept that the anti-discrimination legislation could have intended to moderate managerial prerogative and contractual terms.¹³⁰ It repeatedly characterised Schou's request for accommodation as a request for special treatment or privileges and failed to see in the legislation an obligation to

¹²⁴ [2002] EOC ¶93-227.

¹²⁵ Belinda Smith, 'Maternity Leave: Still Unpaid and Still Uncertain' (2002) 15 *Australian Journal of Labour Law* 1, 4–5.

¹²⁶ *Orica* [2002] EOC ¶93-227, [121]–[122] (Allsop J).

¹²⁷ *Victoria v Schou [No 2]* (2004) 8 VR 120.

¹²⁸ See, eg, K Lee Adams, 'Indirect Discrimination and the Worker–Carer: It's Just Not Working' in Jill Murray (ed), *Work, Family and the Law* (Federation Press, 2005) 18, 22–5; Belinda Smith and Joellen Riley, 'Family-Friendly Work Practices and the Law' (2004) 26 *Sydney Law Review* 395, 425.

¹²⁹ *Victoria v Schou [No 2]* (2004) 8 VR 120, 127 [19] (Phillips JA).

¹³⁰ *Ibid* 135 [38]–[39]. See also Adams, above n 128, 23.

provide such accommodation that would enable her to continue working on an equal footing as her colleagues.¹³¹

The anti-discrimination regulatory framework of requiring victims alone to prosecute breaches and ultimately granting judges the function of determining claims clearly reflects Fredman's assertion that 'status-based measures are limited by their inability to mobilise the redistributive measures necessary to make real equality of opportunity and genuine choice possible.'¹³²

IV THE *FAIR WORK ACT* — A BLURRING OF THE DISTINCTION?

As Fraser has been at pains to point out, and as the decent work agenda acknowledges, the distinction between socioeconomic and status-based inequalities is merely an analytical one and the reality is that these different kinds of inequality are actually fundamentally intertwined.¹³³ So too we see that even though two different systems of regulation can be identified with each reflecting one of these notions of equality, the distinction is not absolute. And it has certainly become more blurred over time with increasing references within labour law to status categories, and some limited recognition within anti-discrimination laws that industrial awards and agreements should also be interrogated for discriminatory content.

The *Fair Work Act* appears to represent a further step towards recognising the connection between status groups and socioeconomic disadvantage. There are numerous provisions changing or expanding older provisions that allow for claims of discrimination or inequality in industrial rules. Older provisions that have been reformed include the equal remuneration provisions,¹³⁴ while others have simply been maintained, including the prohibition on unlawful termination.¹³⁵ The inclusion of objectives of equality and freedom from discrimination throughout the *Fair Work Act*¹³⁶ also suggests at least an acknowledgement that these are industrial issues. The parental leave provisions have been expanded and included in the new National Employment Standards,¹³⁷ as have entitlements to carer's leave.¹³⁸

Two new provisions that will be examined here are the right to request flexible working arrangements¹³⁹ and the new 'general protections'.¹⁴⁰ The question posed is whether these provisions represent a significant step towards recognising the connection between status groups and socioeconomic disadvantage, and thereby enable both kinds of inequality to be addressed. As explored above,

¹³¹ *Victoria v Schou [No 2]* (2004) 8 VR 120, 128–30 [23]–[27] (Phillips JA).

¹³² Fredman, 'Redistribution and Recognition', above n 1, 215.

¹³³ Fraser, above n 2, 15.

¹³⁴ See *Fair Work Act* s 302.

¹³⁵ *Ibid* s 772.

¹³⁶ *Ibid* ss 3, 336, 578(c).

¹³⁷ See *ibid* pt 2-2.

¹³⁸ *Ibid* ss 70, 96.

¹³⁹ *Ibid* s 65.

¹⁴⁰ *Ibid* pt 3-1.

gender is more than a status because in a very fundamental, biological way it will determine a person's role in reproduction and it also continues to play a significant role in social reproduction or the division of labour within the home. These two factors impact the availability of women and men for paid work.

Nancy Folbre, a leading international economist, has argued that to promote gender equality and support high quality care of dependents in society we need to reconceptualise the ideal worker.¹⁴¹ This transformation would be from the existing idealisation of workers being unencumbered or free of family responsibilities and able to work 24/7 and at call, to one in which workers are connected with family and community and bear both work and family responsibilities. While the unencumbered worker constitutes the norm and thereby gets the better pay, conditions and other workplace benefits because time and tenure are treated as proxies of value or merit, those who bear caring responsibilities will be marginalised and thereby economically and socially penalised for carrying out the unpaid reproductive work.¹⁴² The ideal worker norm manifests itself in the allocation of good jobs or working conditions to those who can perform work in the traditional male work pattern of full-time, long hours and unbroken tenure.¹⁴³ In this way, the ideal worker model reflects the dominant norm.

Martha Minow has argued that norms become norms when they effectively disappear so that their characteristics are accepted as natural or neutral and those who do not fit the norm are seen as different or abnormal.¹⁴⁴ The norm reflects the dominant group's values and practices, yet it is seen as merely the status quo, while those who fall outside this norm face two problematic options: trying to conform or assimilate by denying or erasing their difference; or trying to change the norm by acknowledging their difference but thereby running the risk of reinforcing this characterisation as an outsider.¹⁴⁵ While buildings, patterns of work, and incentive and performance systems (among other things) continue to reflect a narrow category of human experience or values, they marginalise those who do not fit this norm. To gain access, those who are marginalised are often faced with the choice of conforming or pleading for 'special treatment' because of their 'difference'.¹⁴⁶

Folbre and Minow, using different methods, advocate as a way out of this dilemma a reconceptualisation of the norm to accommodate a greater array of human experience — a widening of the norm from its narrow, androcentric form. Regulatory mechanisms, such as rights and duties, can be used to enable norms to be challenged and transformed, but they can often have unintended effects such as reinforcing existing norms. To test whether the *Fair Work Act* provisions are capable of achieving more for gender equality than their predecessors, I will

¹⁴¹ See Nancy Folbre, *Who Pays for the Kids? Gender and the Structures of Constraint* (Routledge, 1994); Nancy Folbre, *The Invisible Heart: Economics and Family Values* (The New Press, 2001).

¹⁴² Folbre, *The Invisible Heart*, above n 141, 210.

¹⁴³ *Ibid* 42–3.

¹⁴⁴ Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Cornell University Press, 1990) 50–3.

¹⁴⁵ *Ibid* 70–4.

¹⁴⁶ *Ibid* 50–60.

focus on whether they are able to challenge the norm of the ‘ideal worker’ as being one unencumbered by family responsibilities. To the extent that the *Fair Work Act* enables this, it may allow for a widening of the norm to acknowledge workers with family responsibilities, not merely as an exception that should be accommodated, but as ‘normal’ workers.

A Right to Request Flexible Work Arrangements

The first provision to be considered is the ‘right to request’ a change in working arrangements,¹⁴⁷ which was inserted as one of the National Employment Standards and came into effect on 1 January 2010.¹⁴⁸ It allows parents (or carers) of preschool children or children with disability to request such a change and provides that employers must not refuse such a request other than on ‘reasonable business grounds’.

The ‘right to request’ mechanism is not unfamiliar in Australia; it reflects the right established in federal awards by the Australian Industrial Relations Commission in the *Family Provisions Case 2005*,¹⁴⁹ which in turn was modelled to some extent on a similar right found in the United Kingdom,¹⁵⁰ Germany and the Netherlands.¹⁵¹

This provision appears to represent a direct challenge to the separation of work and family and the capacity of employers to ignore caring responsibilities in making work arrangements. However, the provision has some significant limitations, some of which have already been documented.¹⁵² First, eligibility is limited to workers who have been employed permanently for 12 months with the same employer.¹⁵³ As with parental leave, the entitlement is characterised as one that needs to be ‘earned’ and the way to earn the entitlement is through unbroken tenure. Ironically, this means that although the provision could be a gender

¹⁴⁷ *Fair Work Act* s 65.

¹⁴⁸ *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) s 2.

¹⁴⁹ (2005) 143 IR 245. See Williamson and Baird, above n 76 for commentary on the limited implementation of this test case.

¹⁵⁰ *Employment Rights Act 1996* (UK) c 18, s 80F(1) provides ‘qualifying’ employees with a statutory right to request flexible work arrangements for the purpose of accommodating carers’ responsibilities. Furthermore, s 80G(1)(b) specifies the grounds upon which an employer may refuse such a request.

¹⁵¹ In the Netherlands, employees may seek to adapt their working hours by asking for a greater or lesser number of hours, or a redistribution of existing hours. An employer may only refuse an application to adapt working time if there are specified reasons based on the ‘serious interests of the enterprise or service’: see *Wet op de Aanpassing van de Arbeidsduur 2001* [Adaptation of Working Time Act 2001] (Netherlands) 19 February 2000, Staatsblad 2000/144, art 2. In Germany, an employee request for adaptation of working hours must be granted except for ‘business reasons’: see *Gesetz über Teilzeitarbeit und befristete Arbeitsverträge* [Law on Part-Time Work and Fixed Term Contracts] (Germany) 21 December 2000, BGBI I, 2000/1, art 14. See also Jill Murray, ‘Work and Care: New Legal Mechanisms for Adaptation’ (2005) 15(3) *Labour and Industry* 67, 76–7.

¹⁵² See Sara Charlesworth and Iain Campbell, ‘Right to Request Regulation: Two New Australian Models’ (2008) 2 *Australian Journal of Labour Law* 116, 122–3; Sue Himmelweit, ‘The Right to Request Flexible Working: A “Very British” Approach to Gender (In)Equality?’ (2007) 33 *Australian Bulletin of Labour* 246.

¹⁵³ *Fair Work Act* s 65(2).

equality measure, the eligibility test reflects a traditional male worker model, thereby excluding many female workers who are more likely to need flexible work arrangements.

A second limitation is that eligibility is further limited to those who provide care for preschool aged or disabled children,¹⁵⁴ thereby ignoring the ongoing accommodation needs of carers of other children, adults with disability and elderly dependents. In this way the parent of a young or special needs child is seen as the quintessential carer, and the only category of carer who is deserving of accommodation. As Minow has pointed out, this identification of a group of workers who do not fit the norm and warrant special treatment might assist that group of workers, but could also reinforce their abnormal status and thereby reinforce the existing norms.¹⁵⁵ These workers are not normalised, because they are now the ones with the special rights. There might also be some backlash if the flexible arrangements are seen as privileges offered selectively, especially if they leave (or appear to leave) those without children to bear more of the workload.¹⁵⁶

Extending the 'right to request' to all forms of caring responsibilities would at least expand this group, but would not necessarily address the problem of identifying such workers as the different workers. The Netherlands, which has the highest OECD rate of both men and women working flexibly, has avoided this problem by making the right to request flexible work arrangements a universal one available to all workers, including those with caring responsibilities.¹⁵⁷ By considering requests for flexible working arrangements from all workers, regardless of their reasons, the individual accommodation for workers with caring responsibilities is built into the design of accommodation afforded to all workers and the risk of marginalisation and resentment is minimised. On the other hand, there is of course a chance that such a universal right would be disproportionately used by workers with caring responsibilities, and the risk then is that it could become stigmatised as a 'mommy-track' option, just as part-time work has been in Australia. This risk is intensified by the gender pay gap, because women with male partners might be more likely to be the ones who reduce their hours to manage family responsibilities partly because they are paid less.

A third limitation is that some workers with family responsibilities might actually need *less* flexibility and more predictability. While the right to request provision is not explicitly limited to requests for more 'flexibility', this term is used in the section title.¹⁵⁸ Arguably, a request for fixed hours of work (rather than rotating or casual shifts) would not constitute 'flexible working arrange-

¹⁵⁴ *Ibid* s 65(1).

¹⁵⁵ Minow, above n 144, 70–4.

¹⁵⁶ This reflects the debate about whether accommodation for those with caring responsibilities should be advocated for as work–family balance or work–*life* balance: see Charlesworth and Campbell, above n 152, 129.

¹⁵⁷ *Wet op de Aanpassing van de Arbeidsduur 2001* [Adaptation of Working Time Act 2001] (Netherlands) 19 February 2000, Staatsblad 2000/144, art 2. See also *ibid* 125.

¹⁵⁸ *Fair Work Act* s 65.

ments' if the provision was interpreted narrowly. Further, only requests made for the purpose of 'assist[ing] the employee to care for the child'¹⁵⁹ are covered and thus requests for *more* hours of work would not necessarily come within the provision. This means that workers who change to part-time hours to balance a particularly demanding period of caring responsibilities appear to have no right to transfer back to full-time if this period comes to an end.

Finally, and very importantly, the 'right' to request flexible work arrangements is not directly enforceable, leading many to legitimately question how it can be called a right at all. While the *Fair Work Act* provides that employers must not refuse such a request other than on 'reasonable business grounds', a refusal is not reviewable by a third party such as Fair Work Australia or a court.¹⁶⁰ While the enactment of the standard and the rights terminology might have some normative effect, the capacity of this provision to bring about change will be limited to those employers who already have a commitment to equality or improving the work–family balance of their employees — the best practice employers and the ones who might be amenable to this extra nudge of persuasion. It does little to shift the laggards, those who do not have or cannot see the moral or business case for family-friendly workplace practices and gender equality. Guidelines produced to explain the standards might help committed employers to implement flexible work arrangements, but there is nothing in the regulatory framework to ensure or even test this.

As limited as it is, the National Employment Standards right to request provision might still be valuable if it is an incremental first step towards a more universal right for all. It might get some employers to start considering some requests that they had ignored or simply rejected in the past. It might empower some employees to ask for different arrangements that they might not have considered in the past. Best practice organisations are also likely to go beyond the legislation, wanting to be seen by employees and other stakeholders to be doing more than the legislated minimum, especially if they anticipate the scope of the right expanding in the future. In these ways, the 'right' could challenge the existing ways of doing things even if only for a limited group of workers.

The United Kingdom provision, upon which the Australian right was modelled, certainly started out in a more limited form and has been expanded gradually over the years¹⁶¹ as employers were able to adapt to the new obligations and develop practices and procedures to manage requests. It appears that the norm has shifted in the United Kingdom as a result of the right to request,

¹⁵⁹ *Ibid* s 65(1).

¹⁶⁰ *Ibid* s 65(5).

¹⁶¹ The United Kingdom right applied initially for workers who had children under school age or disabled children up to 18 years: Charlesworth and Campbell, above n 152, 117. The right was extended in 2007 and again in 2009 to cover more caring relationships: see *Employment Act 2002* (UK) c 22, inserting *Employment Rights Act 1996* (UK) c 18, ss 47E, 80F–80I, 104C; *Flexible Working (Procedural Requirements) Regulations 2002* (UK) SI 2002/3207; *Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002* (UK) SI 2002/3236. See also Local Government Employers, *Flexible Working* (25 August 2011) <<http://www.lge.gov.uk/core/page.do?pageId=119703>>.

although that right was implemented as merely one part of a host of changes to better support the balancing of work and family.¹⁶²

B General Protections

The second change in labour law to be examined here is the inclusion in the *Fair Work Act* of a general prohibition on discrimination in employment on 13 different grounds.¹⁶³ Looking specifically at s 351, what is prohibited is ‘adverse action’ on the specified grounds, subject to some exceptions. The section, entitled ‘Discrimination’ and located in pt 3-1 (General Protections) provides (in part):

An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person’s race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin.¹⁶⁴

Adverse action is defined to cover a broad range of circumstances, including refusing to hire a prospective employee, discriminating with respect to terms and conditions of employment offered, dismissing an employee, injuring them in their employment, and altering their position detrimentally.¹⁶⁵ It also includes threatening or organising to take such action.¹⁶⁶

This provision, which came into effect on 1 July 2009, represents a regulatory shift in labour law.¹⁶⁷ It introduces into labour law rights against discrimination in all stages of work, no longer limiting this protection to termination of employment of existing employees. Individual claims of adverse action can be brought to Fair Work Australia by employees against their employers.¹⁶⁸ Very significantly, the capacity to allege such a breach by an employer is not limited to victims; the Fair Work Ombudsman can also investigate and prosecute breaches.¹⁶⁹ This enforcement regime is not unusual for labour rights, but is unprecedented in Australia in respect of discrimination claims. Further, these sections are civil penalty provisions so compensatory remedies such as damages and reinstatement can be awarded to the victim, and punitive penalty orders can also be made.¹⁷⁰ What this means is that the *Fair Work Act* brings to discrimina-

¹⁶² See Joanne Conaghan, ‘Women, Work, and Family: A British Revolution?’ in Joanne Conaghan, Richard Michael Fischl and Karl Klare (eds), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford University Press, 2002) 53 for a discussion and critique of New Labour’s family-friendly working policies.

¹⁶³ *Fair Work Act* pt 3-1.

¹⁶⁴ *Ibid* s 351(1).

¹⁶⁵ *Ibid* s 342(1).

¹⁶⁶ *Ibid* s 342(2).

¹⁶⁷ Belinda Smith, ‘Fair and Equal in the World of Work: Two Significant Federal Developments in Australian Discrimination Law’ (2010) 23 *Australian Journal of Labour Law* 199, 212.

¹⁶⁸ *Fair Work Act* s 365. See also *ibid* 216.

¹⁶⁹ *Fair Work Act* s 539. See *Fair Work Ombudsman v Wongtas Pty Ltd* (2011) 195 FCR 55 for discussion of this power.

¹⁷⁰ Smith, ‘Fair and Equal in the World of Work’, above n 167, 216–17.

tion claims the host of enforcement machinery that is available for other employment claims such as underpayment of wages. This is made even more noteworthy by the extended coverage of the federal laws since the national takeover started in 2006 by *WorkChoices*,¹⁷¹ and the simultaneous unprecedented expansion of powers and resources allocated to the enforcement of these laws.

The big question is how the general protections provisions are going to be interpreted. While the term discrimination is used in the section heading, it is not used in the section itself and not defined anywhere in the Act. These rights are thus not subject to limitations in the jurisprudence that has emerged out of the prescriptive drafting of anti-discrimination laws. This might provide an opening for the development of more modern and workable anti-discrimination principles.¹⁷²

In other jurisdictions, such as Canada, when interpreting such open legislation the courts have developed a definition of discrimination that clearly includes an obligation on employers to provide at least reasonable accommodation to enable the inclusion and equal participation of protected status groups.¹⁷³ However, the institutional structures and historical development of labour rights and human rights in Australia cannot be ignored in considering how these new *Fair Work Act* provisions will be interpreted.

Since its inception, the federal industrial tribunal has played a significant role in setting and developing labour conditions primarily through industrial awards. However, as noted above,¹⁷⁴ it has struggled to acknowledge and address gender claims and its role in setting industry-wide standards has gradually been reduced over the past few decades. While the *Fair Work Act* breathed new life into the tribunal, which was decimated by the *WorkChoices* legislation, it did not reinstate all of its arbitration functions. For instance, the Australian Industrial Relations Commission, as its last significant act, undertook a major overhaul of awards and produced a set of 'modern awards', but the Act provides very limited power to Fair Work Australia to vary or develop these instruments.¹⁷⁵

What we can also see is that in respect of the growing range of individual rights in the Act that are more akin to human rights protections, the role of the tribunal is very restricted. In response to complaints of adverse action under s 351, for instance, Fair Work Australia can only hold a conference, offering conciliation-type services, and cannot arbitrate or determine the matter.¹⁷⁶ The rights are enforceable, but only by taking the further step of pursuing the matter through a hearing in a federal court. Thus the workplace claims that permit some attention to status inequality are channelled away from the industrial tribunal into

¹⁷¹ See *Workplace Relations (Work Choices) Act 2005* (Cth). The extended coverage of federal laws continued with the more recent referral to the Commonwealth by most states of industrial relations power: see *Fair Work Amendment (State Referrals and Other Measures) Act 2009* (Cth).

¹⁷² Smith, 'Fair and Equal in the World of Work', above n 167, 218–19.

¹⁷³ See *British Columbia (Public Service Employee Relations Commission) v BCGEU* [1999] 3 SCR 3; Smith, 'Rethinking the Sex Discrimination Act', above n 112.

¹⁷⁴ See above Part II(A).

¹⁷⁵ *Fair Work Act* pt 2-3 divs 5–6.

¹⁷⁶ *Ibid* pt 3-1 div 8.

a court for interpretation as a purely legal issue. As discussed above,¹⁷⁷ in anti-discrimination law cases the courts in Australia have taken an increasingly conservative and technical approach to questions of status-based equality, often accepting arguments of managerial prerogative and industrial harmony when faced with human rights claims in the workplace. The inclusion of these human rights within the labour law itself, rather than in separate legislation, might not be enough to transform this approach.

For marginalised workers the new general protections provisions do provide additional protection against discrimination, despite the uncertainty of how the terms will be interpreted by Fair Work Australia and the courts. Possible interpretations of these provisions have been explored above and elsewhere.¹⁷⁸

What does not seem to have been explored yet is the connection between the general protection provisions and the regulation of awards and agreements. The *Fair Work Act* provides that both modern awards¹⁷⁹ and enterprise agreements¹⁸⁰ are not to contain discriminatory terms, which means terms that discriminate against an employee because of, or for reasons including, the employee's 'race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.'¹⁸¹ This type of prohibition is not entirely new in labour law.¹⁸²

However, what the *Fair Work Act* adds is that modern awards and agreements are also not to include 'objectionable terms'.¹⁸³ An objectionable term is one that:

- (a) requires, has the effect of requiring, or purports to require or have the effect of requiring; or
- (b) *permits, has the effect of permitting, or purports to permit or have the effect of permitting;*

either of the following:

- (c) a contravention of Part 3-1 (which deals with general protections);
- (d) the payment of a bargaining services fee.¹⁸⁴

¹⁷⁷ See above Part III(B)(2).

¹⁷⁸ See, eg, Carol Andrades, 'Intersections between "General Protections" under the *Fair Work Act 2009* (Cth) and Anti-Discrimination Law: Questions, Quirks and Quandaries' (Working Paper No 47, Centre for Employment and Labour Relations Law, The University of Melbourne, December 2009); Smith, 'Fair and Equal in the World of Work', above n 167, 216–18.

¹⁷⁹ *Fair Work Act* s 136(2) provides that a modern award must not include provisions that contravene sub-div D, and this includes the discriminatory terms as set out in s 153.

¹⁸⁰ *Ibid* s 194 provides that unlawful terms in agreements include discriminatory terms, which are defined in s 195.

¹⁸¹ *Ibid* s 195(1).

¹⁸² Under s 568(2)(e) of the *Workplace Relations Act 1996* (Cth), for example, the Australian Industrial Relations Commission was required to ensure that awards did not contain terms that discriminated.

¹⁸³ *Fair Work Act* ss 150 (modern awards), 194(b) (agreements). Under s 186(4), Fair Work Australia must ensure that an agreement does not contain any unlawful terms before approving it.

¹⁸⁴ *Ibid* s 12 (definition of 'objectionable term') (emphasis added).

Further, the Act spells out that a term of an award or agreement ‘has no effect to the extent that it is an objectionable term.’¹⁸⁵ The linking of awards and agreements to the general protections provisions through this ‘objectionable terms’ definition means that the interpretation of the general protections has some potential to impact the content of awards and agreements. If the general protections provisions are interpreted widely to prohibit both direct and indirect discrimination and to require some degree of accommodation or reasonable adjustments to promote social inclusion, then award or agreement terms that do not require or enable this may be objectionable and thus of no effect.

Again, however, we return to the institutional question of who has the power to examine such questions and what mechanisms are available to bring about such a challenge. The modern awards have been made and are only due to be reviewed in 2014.¹⁸⁶ Agreements are not to be approved if they contain discriminatory terms but, as with predecessor provisions, there is no clear mechanism whereby agreements are reviewed for possible discrimination, and there may be some pressure on the industrial commission to refrain from interfering in agreements that have been made by parties. The parties seeking to get an agreement approved are not likely to argue that it should not be approved.

The mechanism in anti-discrimination laws that allows for the human rights commission to identify apparently discriminatory awards and agreements has been carried over to the current legislation. The Australian Human Rights Commission has power to receive complaints about discriminatory acts under industrial instruments and refer the instrument to Fair Work Australia.¹⁸⁷ Looking specifically at awards, Fair Work Australia is then required to review a referred award and remove terms that would require a person to do an act which would be discriminatory under the *Sex Discrimination Act*.¹⁸⁸ We have yet to see whether these provisions will be used where their predecessors were not.

Related to this power of referral, the exemption in the *Sex Discrimination Act* for ‘direct compliance’ with an ‘industrial instrument’ has been limited,¹⁸⁹ but in a complex and peculiar way. It is no longer sufficient for a respondent in discrimination proceedings to justify their actions simply by pointing to an industrial instrument and establishing that they were complying with that instrument. A clause of the instrument will not provide an exemption if it ‘has no effect’.¹⁹⁰ This odd wording presumably links to the *Fair Work Act*’s declaration that terms that are discriminatory under it have no effect. However, it is unclear how this provision would operate. If a respondent sought to rely upon the

¹⁸⁵ Ibid s 356.

¹⁸⁶ Ibid s 156.

¹⁸⁷ *Australian Human Rights Commission Act 1986* (Cth) s 46PW. In 2009 the grounds of discrimination were expanded to cover disability and age in addition to those grounds under pt II of the *Sex Discrimination Act 1984* (Cth): see *Fair Work (State Referral and Consequential and Other Amendments) Act 2009* (Cth).

¹⁸⁸ *Fair Work Act* s 161.

¹⁸⁹ *Sex Discrimination Act* s 40(1)(g).

¹⁹⁰ Ibid. See also the accompanying note to s 40(1)(g), which provides that the exemption does not apply if a person purports to comply with a provision of an instrument that is void, including for the reason that it contains prohibited content.

industrial instrument exemption in proceedings under anti-discrimination law, would the respondent also need to prove that the instrument is not discriminatory under the *Fair Work Act* and thus does have effect?

As a final point to provoke further questions, I ponder how the *Amery* complainants might have fared under the current provisions. Would the payment of wages to casuals — who are disproportionately women — at a lower rate than permanents constitute a breach of the general protections provisions? Would a different scale of pay for casuals and permanents in an enterprise agreement require, permit or have the effect of requiring or permitting adverse action because of an employee's sex, or carer or family responsibilities? If so, such pay scales would constitute 'objectionable terms' and hence be unlawful and of no effect. The different pay scales established in the enterprise agreement in the *Amery* case clearly impacted women and workers with caring responsibilities disproportionately. However, the question of validity turns on the question of how discrimination is to be interpreted. Will the evidence of impact warrant an examination of reasonableness? Will it prompt questions of legitimacy and proportionality? Or will the old framework of fault infuse interpretations of these provisions whereby changes will only be required if an employer can be found to have been motivated by some kind of bias? This demonstrates that the concepts and language of human rights have filtered into labour law, but maintaining separate regulatory frameworks allows for complexity, uncertainty and inconsistency. This can undermine effectiveness. Ultimately, while there *are* mechanisms that might enable industrial rules to be challenged on status grounds, some are hard to find, and most are hard to navigate. Furthermore, it will largely be up to courts to answer the status equality questions, and their track record of dealing with these questions does not inspire confidence.

V CONCLUSION

By tracing the development and operation of labour laws and anti-discrimination laws in Australia, it becomes clear that Australia has sought to regulate socioeconomic inequality separately from status-based inequality. While conceptually these two kinds of inequality can be considered separately, in reality they are inseparably intertwined. Failure to acknowledge and address this in law is likely to lead to regulatory failure on both fronts. Labour law has failed to effectively address the outsider status and gendered needs of women as workers, and anti-discrimination laws have failed to effectively address bias in the distributive rules imposed in labour markets. For this reason, women (and traditionally disadvantaged minority groups) continue to fill the categories of the poor and economically marginalised in Australia.

Over the last few decades there has been a growing trend within international law institutions to recognise and address the separation of labour rights and human rights. The International Labour Organization's decent work agenda most clearly illustrates this, with its inclusion of gender equality as one of the overarching principles guiding the achievement of fundamental rights and freedoms in work. Similarly, we have seen a trend in Australia of human rights being

incorporated into labour law, with the inclusion of anti-discrimination rights being a clear example of this.

The *Fair Work Act* reflects a continuation of this trend and possibly a significant step forward, but the inclusion of rights alone will not transform norms. The inclusion in the Act of a right to request flexible working arrangements could encourage employers to better accommodate the needs of workers with caring responsibilities, but the tight eligibility requirements for this right and its fundamental lack of enforceability are severe constraints on its transformative potential. The inclusion of general protections prohibiting discriminatory action and terms in awards and agreements similarly has some potential to challenge gender-biased structures of distribution. It is likely, however, that a formal notion of equality and traditional understandings of fairness and industrial logic will pervade conciliations by Fair Work Australia and legal determinations by the courts and in this way continue to obscure the connections between socio-economic and status-based inequality.