INDUSTRIAL LAW, WORKING HOURS, AND WORK, CARE AND FAMILY

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I INTRODUCTION

In feudal England, work was not physically or temporally separate from other daily activities, which all took place within the household. That household was likely to comprise married couples and their young children, as well as relatives and extended kin, lodgers, child and adult servants and apprentices.[1] Daily tasks were shared by adults and children alike, so that parents and other members of the household spent a great deal of time with children.[2] Ngaire Bissett writes that 'economic production and the social dimensions of life were thoroughly interwoven'.[3] Whilst sounding a caution against romanticising the life of a peasant in the feudal era, Bissett concludes that 'since work was connected to the expression of all aspects of life (particularly as social interactions were highly regarded), daily work patterns appear to have reflected an element of balance'.[4]

The divisions known today between waged work and other aspects of life such as leisure and recreation, and care and family, emerged as production moved from the household and into the factory in the late 18th and early 19th centuries. Through emerging industrial capitalism, waged work became separated from other parts of a person's life, both geographically into the factory, and temporally into working time. EP Thompson refers to this as a shift from 'task-orientation' to a 'timed work' regime.[5] Bissett writes that 'two worlds were created; work and leisure were divided into oppositionally structured forms of activity, each taking place in distinct environments'.[6] Philippe Aries has argued that it was during the course of industrialisation that the nuclear family, comprising married couples and their children, became an increasingly dominant form of living arrangement, at least for European nobles and the middle classes.[7]

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1 Philippe Aries, *Centuries of Childhood: A Social History of Family Life* (Robert Baldick trans, Random House, 1962) 365–9 [trans of: *L'enfant et la vie familiale sous l'Ancien Regime* (first published 1960)]; Frances and Joseph Gies, *Marriage and the Family in the Middle Ages* (Harper & Row, 1987) 4.

2 Ngaire Bissett, 'The History and Changing Structure of Employment' in Geoff Dow and Rachel Parker (eds), *Business, Work and Community: Into the New Millennium* (Oxford University Press, 2001) 121, 122–3; Peter N Stearns, 'Fatherhood in Historical Perspective: The Role of Social Change' in Frederick W Bozett and Shirley M H Hanson (eds), *Fatherhood and Families in Cultural Context* (Springer Publishing Company, 1991) 28, 30–1.

3 Bissett, above n 2, 123. See also EP Thompson, *Customs in Common* (New Press, 1991) 358.

4 Bissett, above n 2, 123.

5 Thompson, above n 3, 359.

6 Bissett, above n 2, 123.

7 Aries, above n 1, 398–404.

Conflict and tension that people experience today between commitments to waged work and other aspects of life, including and especially responsibilities to care for children, and ill or frail elderly parents, has become a major focus of academic research, and of trade union campaigns and government policy. A central dimension of this phenomenon of work and care conflict revolves around working hours, and specifically the quantum of hours an employee works, on which days and during what spans those hours are worked, the regularity of the employee's working hours from week to week, and month to month, and the employee's ability to shape and determine those matters in response to care needs. Academic scholarship on working hours in Australia documents empirically the experiences of workers and their families, and the impact of their working hours in terms of fatigue, stress and family conflict,[8] and for women curtailed career aspirations, reduced life time earnings, and inadequate superannuation.[9] Other scholarship focuses on government policy on parenthood and work.[10] The legal rules regulating working hours in Australia have also been examined, leading to arguments in favour of the introduction of new forms of rules.[11]

A small body of legal scholarship examines the normative understandings around gender embedded within working time regimes of Australia,[12] and at the international level.[13] This article builds on that work by providing a close examination of the operative assumptions of Australian industrial law more broadly around work, care for others, gender, and family. The questions addressed in the article are:

- Do the legal rules on working time constitute work and care as separate realms?

8 See Philippa Williams et al, '"Clawing Back Time": Expansive Working Time and Implications for Work-Life Outcomes in Australian Workers' (2008) 22 *Work, Employment and Society* 737; Ian Watson et al, *Fragmented Futures: New Challenges in Working Life* (Federation Press, 2003) ch 7; Barbara Pocock, *The Work/Life Collision: What Work is Doing to Australians and What to Do About It* (Federation Press, 2003) ch 6.

9 See Pocock, *The Work/Life Collision*, above n 8, ch 7; Tanya Carney, 'The Employment Disadvantage of Mothers: Evidence for Systemic Discrimination' (2009) 51 *Journal of Industrial Relations* 113; Jenny Chalmers and Trish Hill, 'Marginalising Women in the Labour Market: "Wage Scarring" Effects of Part-time Work' (2007) 33 *Australian Bulletin of Labour* 180.

10 See Lyn Craig et al, 'Parenthood, Policy and Work-Family Time in Australia 1992–2006' (2010) 24 *Work, Employment and Society* 27; Deborah Brennan, 'Babies, Budgets and Birthrates: Work/Family Policy in Australia 1996–2006' (2007) 14 *Social Politics: International Studies in Gender, State and Society* 31.

11 See Sara Charlesworth and Iain Campbell, 'Right to Request Regulation: Two New Australian Models' (2008) 21 *Australian Journal of Labour Law* 116; Iain Campbell, 'Long Working Hours in Australia: Working-Time Regulation and Employer Pressures' (2007) 18 *The Economic and Labour Relations Review* 37.

12 Rosemary Owens, 'Women, "Atypical" Work Relationships and the Law' (1993) 19 *Melbourne University Law Review* 399.

13 See Judy Fudge and Rosemary Owens (eds), *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms* (Hart Publishing, 2006); Deirdre McCann, 'The Role of Work/Family Discourse in Strengthening Traditional Working Time Laws: Some Lessons from the On-Call Work Debate' (2005) 23 *Law in Context* 127; Colette Fagan, 'Gender and Working Time in Industrialized Countries' in Jon C Messenger (ed), *Working Time and Workers' Preferences in Industrialized Countries: Finding the Balance* (Routledge, 2004) 108; Jill Murray, *Transnational Labour Regulation: The ILO and EC Compared* (Kluwer Law International, 2001) 43–4.

- How do the legal rules articulate care? Is it through a concept of a particular form of couple or family relationship? What are the specifics of that vision of care, family, sexual preference, race, and gender? Do the legal rules recognise diversity in care practices?

The article takes a broadly chronological approach to its subject matter, examining key moments and aspects of legal developments in working time regulation. The focus is on themes that have developed over time. It commences with an exploration of the emergence of the standard working time framework from the mid 19th century, and reductions in standard working hours over the next 150 years or so, showing how the law constituted work as lying in a different realm to care responsibilities. The development of non-standard work for mothers from the 1950s is examined, as is the disintegration of working time norms from the late 1980s. It is shown how old patterns of constituting work and care as separate provinces continued to be played out in these developments. These parts of the paper are most directed to the first research question posed above. From there the article considers recent initiatives from 2002 that formally recognise care responsibilities in the domain of industrial law, and examines the extent to which these have brought, and have the potential to bring, care responsibilities into the work sphere in a substantive way. The law's articulation of its understanding of care is examined last, and specifically whether and how diversity in care practices is recognised within the rules, addressing most directly the second set of research questions.

The law examined is the Australian industrial law on working time that has developed through decisions of industrial tribunals and through legislation.[14] The focus is on the regulatory framework and debates about limiting the length of working hours. It does not examine the myriad other ways in which working time is determined, through for example, various forms of leave such as annual leave and parental leave, public holidays, retirement ages, and the ability of parents to request a change in work arrangements in order to accommodate care responsibilities to children.[15] The examination of the article lies in the legal framework and the story told therein, rather than questions of enforcement, or the empirical reality of the hours that people actually worked and work, except where that informs the discussion of the rules themselves.

In examining the understandings of the key concepts used in the industrial law framework, this article points to limitations in the ability of the legal framework to

14 The concept of industrial law is used for ease of reference to refer to the regulation of paid work relationships through arbitration, enterprise bargaining, and statutory minimum standards, established under the current *Fair Work Act 2009* (Cth), and its predecessors going back to the *Conciliation and Arbitration Act 1904* (Cth). It also includes state and territory legislation specifically designed to regulate work relations, such as the *Industrial Relations Act 1996* (NSW) and the *Fair Work Act 1994* (SA) and their predecessors, and earlier legislation such as the *Factories and Shops Act 1885* (Vic). The concept of industrial tribunal or just tribunal is used to refer to all the various arbitral and adjudicative bodies established under this legislation over the years, except for the current institutions which are given their correct title.

15 These latter rules, known as 'right to request' regimes, will be examined as part of this project in a future paper. On those regimes, see Charlesworth and Campbell, above n 11.

bring about a deeper reconciliation between labour market engagement and care responsibilities. It is part of a larger project examining more broadly employment and industrial entitlements for their understandings of these concepts. It builds on earlier work of the author examining the ways in which those ideas are constituted in leave regimes relating to parental leave following the birth or adoption of a child, and personal/carer's leave, and anti-discrimination law.[16] The objective of the article (and the broader project) is to unpack the roles that law plays in the phenomenon of work and care conflict in Australia. The aim is to open up discussion on rethinking the key concepts of the law, with a view to producing further work developing more effective legal concepts and frameworks within which to understand law, work and care.

II THE STANDARD WORKING WEEK, WORK AND LEISURE

In April 1856, stonemasons on Melbourne building sites secured an eight hour work day.[17] From there, the eight hour day spread rapidly across Victoria, then interstate,[18] and was carried into the Commonwealth and state arbitration systems to become the 48 hour week from the early part of the 20th century.[19] Key foundational texts assumed this standard working week. For example, in the 1907 decision of *Ex parte HV McKay* ('*Harvester*'), Higgins J assessed whether the wages of the workers in question were sufficient as a family wage on the basis of an eight hour day for six days a week, totalling a 48 hour working week.[20]

16 The project comprises the author's PhD project at the University of Adelaide, and includes the following: Anna Chapman, 'Employment Entitlements to Carer's Leave: Domesticating Diverse Subjectivities' (2009) 18 *Griffith Law Review* 453; Anna Chapman, 'Work/Family, Australian Labour Law, and the Normative Worker' in Kerry Rittich and Joanne Conaghan (eds), *Labour Law, Work, and Family: Critical and Comparative Perspectives* (Oxford University Press, 2005) 79; Anna Chapman, 'Challenging the Constitution of the (White and Straight) Family in Work and Family Scholarship' (2005) 23 *Law in Context* 65.

17 Significantly, this was affected through an industry wide agreement, and without a reduction in wages. See Victorian Operative Masons' Society, 'Report of the Committee Appointed by the Victorian Operative Masons' Society to Inquire into the Origin of the Eight-hours' Movement in Victoria: Adopted Annual Meeting, June 11, 1884' (Victorian Operative Masons' Society, 1912); TA Coghlan, *Labour and Industry in Australia: From the First Settlement in 1788 to the Establishment of the Commonwealth in 1901* (Macmillan, 1969) 727; Julie Kimber and Peter Love, 'The Time of Their Lives' in Julie Kimber and Peter Love (eds), *The Time of Their Lives: The Eight Hour Day and Working Life* (Australian Society for the Study of Labour History, 2007) 8.

18 Coghlan, above n 17; Sidney Webb and Harold Cox, *The Eight Hours Day* (W Scott, 1891) 38–9.

19 A standard working week of 48 hours was recognised in *Australian Builders' Labourers' Federation v Archer* (1913) 7 CAR 210, 228; *Australian Telegraph and Telephone Construction and Maintenance Union v Public Service Commissioner* (1914) 8 CAR 119, 135; *Australian Workers' Union v Dunstan Ltd, 1919* (1920–21) 4 SAIR 5, 11 ('*Quarries Case*'). See also O de R Foenander, *Studies in Australian Labour Law and Relations* (Melbourne University Press, 1952) 90.

20 *Ex parte HV McKay* (1907) 2 CAR 1, 5 ('*Harvester*'). This decision is credited as being the origins of the family wage or basic wage concept to setting minimum wages, which became a central plank in Australia's arbitral wage fixation system for most of the 20th century: Laura Bennett, 'Legal Intervention and the Female Workforce: The Australian Conciliation and Arbitration Court 1907–1921' (1984) 12 *International Journal of the Sociology of the Law* 23.

The next 150 years or so saw a number of reductions in standard working hours, so that by the end of the 1980s many awards provided a standard working week of 38 hours.[21] These reductions were effected through different mechanisms, including early state legislation,[22] and a 1947 Commonwealth award test case.[23]

The rationales of the labour movement in seeking shorter working hours, and of Parliaments and industrial tribunals in approving reductions, were various, and developed over the years in response to changing circumstances, and notably the state of the economy. Concerns over health and safety arising from fatigue were prominent considerations for the Melbourne stonemasons in 1856,[24] and indeed for union claims and tribunal decisions throughout the early part of the 20th century.[25] Economic matters such as productivity and efficiency were also

21 See *Federated Miscellaneous Workers Union of Australia v Home Case Service (NSW)* (1987) 19 IR 180, 187; *National Wage Case — August 1988* (1988) 25 IR 170, 182; *Bread Carters (SA) Award* (1989) 56 SAIR 265; *Brisbane City Council — Sextons and Assistant Sextons — Award* (1987) 125 Qld Ind G 763. From 1950 to 1980 the standard working week provided for in Commonwealth awards remained at 40 hours, with awards generally providing a permitted daily spread of hours (eg 7am to 5pm) within which an employee would be required to work his or her standard hours: see *The Australian Insurance Staffs Federation v Adelaide Fire Office* (1951) 73 CAR 489, 493; *The Municipal Officers (Adelaide City Council) Award, 1971* (1974) 156 CAR 36. See also Australia Bureau of Industry Economics, *Reducing Standard Hours of Work: Analysis of Australia's Recent Experience* (Aust Govt Publishing Service, 1984) 13; Peter Dawkins and Meredith Baker, 'Australia' in Gerhard Bosch, Peter Dawkins and Francois Michon (eds), *Times Are Changing: Working Time in Fourteen Industrialised Countries: An Overview* (Gelsenkirchen, 1992) 47, 60–2. The tribunal's view in 1988 was that claims for a reduction in the standard working week below 38 hours were not to be granted, even with full cost offsets through changed work practices: *National Wage Case – August 1988* (1988) 25 IR 170, 182.

22 The *Eight Hours (Amendment) Act 1920* (NSW) (which provided the machinery to enable the setting of a 44 hour working week in an industry) was repealed and replaced by the *Forty-Four Hours Week Act 1925* (NSW) (which set a default 44 hour week in most industries). The *Industrial Arbitration Act Amendment Act 1924* (Qld) amended the *Industrial Arbitration Act 1916* (Qld) to replace the existing 48 hour week standard with a 44 hour standard. Subsequent legislative amendment reduced standard hours to 40 in some states: *The Industrial Arbitration (Forty Hours Week) Amendment Act 1947* (NSW); *The Industrial Conciliation and Arbitration Acts Amendment Act 1947* (Qld).

23 *Standard Hours Inquiry, 1947* (1947) 59 CAR 581 (which reduced standard hours to 40 per week). Standard hours at the federal level were unsettled in the 1920s: *Australian Timber Workers' Union v John Sharp & Sons Ltd* (1920) 14 CAR 811, 839–43, 845–70 (reduced standard hours from 48 to 44); *Australian Timber Workers' Union v John Sharp & Sons Ltd* (1922) 16 CAR 649, 653, 661 (Powers J), 710–12 (Sir John Quick DP), 728–30 (Webb DP) (increased standard hours back to 48). The 1920 decision prompted federal Parliament to enact legislation to ensure that only a full court could decrease, or increase, 'standard hours in any industry': *Commonwealth Conciliation and Arbitration Act 1920* (Cth) which inserted s 18A(4) into the *Conciliation and Arbitration Act 1904* (Cth).

24 Victorian Operative Masons' Society, above n 17, 15; 'The Eight Hours' Question — Meeting at the Queen's Theatre', *The Age* (Melbourne), 27 March 1856, 3; 'The Eight Hours Question', *The Argus* (Melbourne), 21 April 1856, 4; WE Murphy, *History of the Eight Hours' Movement* (Spectator, 1896) 51, 52. Reports of the time also evidence a desire for workers to have more time available in which to become active and engaged citizens in the political process: Victorian Operative Masons' Society, above n 17, 10 (1st resolution: 'to improve our social and moral condition'); 'Eight Hours Festival', *The Age* (Melbourne), 23 April 1859, 6; Coghlan, above n 17, 727.

25 See, eg, *Federated Seamen's Union of Australia v Commonwealth Steam-Ship Owners' Association* (1911) 5 CAR 147, 156–9; *Federated Millers and Mill Employees' Association v Brunton and Company* (1920) 14 CAR 114, 124–7. Notably in *Australasian Meat Industry Employees Union v W Angliss and Co Pty Ltd* (1916) 10 CAR 465, 496 working hours for outdoor carters and drivers were set at 52 per week on the basis that the occupation was interesting and healthy for employees due to its 'comparative variety' and 'open-air character'.

main factors in shaping unions claims,[26] and in tribunal decision-making through this time,[27] with tribunals hearing arguments that reduced hours would be offset by greater efficiencies through mechanisation, and greater co-operation and enthusiasm by employees whilst they were at work. [28]

Although the idea that a stonemason might spend the extra time gained each day on household tasks — including 'teaching his children' — can be found in early discussions of the benefits of the eight hour day, this was not a dominant, or even clearly articulated, theme at the time.[29] Moreover, that motivation of domestic or parental responsibility seems to have largely disappeared from the working hours debate in the first part of the 20th century, only to resurface, in an inchoate way, in the 1947 Standard Hours Inquiry. That decision recognised 'the family aspects of … increased leisure', although with no more explanation than that being offered, and with no suggestion that was a significant reason, or even a reason, to support a decrease in standard hours.[30]

The core tension or issue in the question of reducing standard working hours in the first half of the 20th century became identified as being between work and leisure, and notably not work and care (or work and family). The work/leisure binary split became the conceptual framework through which the question of

26 Trade unions objectives included at different times a concern to preserve existing jobs during difficult economic times, or to create additional jobs in more prosperous times: Australia Bureau of Industry Economics, above n 21, 2 (which also notes the objective of raising incomes by increasing overtime payments). Another publication identifies union campaigns for reducing working hours (in 1980) as being motivated by a desire to create jobs to address unemployment: Confederation of Australian Industry ('CAI'), *Hours of Work* (CAI, 1980) 34.

27 See *Australian Timber Workers' Union v John Sharp and Sons Limited* (1920) 14 CAR 811, 839–43, 845–70; *Australian Timber Workers' Union v John Sharp & Sons Ltd* (1922) 16 CAR 649, 653, 661 (Powers J), 710–12 (Sir John Quick DP), 728–30 (Webb DP). In the late 1920s, in some industries standard working hours were increased from 44 to 48, on the basis of prevailing economic conditions: *The Timber Merchants and Sawmillers Association v Australian Timber Workers Union* [1928–29] 27 CAR 396; *The Amalgamated Engineering Union v Alderdice and Co Pty Ltd* [1928–29] 27 CAR 383. See also CAI, above n 26, 34; Australia Bureau of Industry Economics, above n 21, ch 1.

28 See *Australian Timber Workers' Union v John Sharp and Sons Limited* (1920) 14 CAR 811, 869; *Federated Millers and Mill Employees' Association v Brunton and Company* (1920) 14 CAR 114, 123–4; *The Amalgamated Engineering Union v J Alderdice & Company Pty Ltd* (1926) 24 CAR 755, 777 ('*Alderdice*').

29 For example, a newspaper report suggests that a worker might spend the extra time gained each day by 'digging his garden, feeding his poultry, milking the cow, teaching his children': 'The Eight Hours Question', *The Argus* (Melbourne), 21 April 1856, 4. See also 'Eight Hours Festival', *The Age* (Melbourne), 23 April 1859, 6.

30 *Standard Hours Inquiry, 1947* (1947) 59 CAR 581, 593.

standard working hours was conceived, debated and determined.[31] This echoes Bissett's description that with nascent industrial capitalism 'two worlds were created; work and leisure were divided into oppositionally structured forms of activity, each taking place in distinct environments'.[32] The central question for the legal regulation of working hours for at least the first half of the 20th century was whether employers and the economy could afford 'to extend the boon of increased leisure' to employees.[33] The view was of an employee's waking hours as comprising labour market engagement plus leisure, modelling working time as solely devoted to paid labour market work, and non-work time as free time, to be spent on leisure and recreation.[34]

This framework can be seen in collective action, union claims and tribunal decisions. For example, the Melbourne stonemasons' banner proclaimed '8 Hours Labour, 8 Hours Recreation, 8 Hours Rest'.[35] Some 60 years later Higgins J explained in a decision on working hours in the timber industry, that '[t]he feeling [of workers] is that all the energies of a man's waking hours should not be given to the making of a living; that he should have some energy left for other and higher things — art, education, science, literature, even hobbies and amusements, as he selects'.[36] Dethridge CJ, after referring to the spread of education to workers, stated in a 1927 decision on the engineering industry, that '[i]t is a natural consequence that they [the workers] should hope for a time to come when they would not have to spend quite so much of their energy in earning a living, when at the end of the day's work they would have more leisure and vigour with which to take a share in the other interests and pursuits of civilised life'.[37] And further, 'if employees could, without damaging their livelihood or the community, gain greater leisure and capacity for interests in life other than of earning a living, they would be better men'.[38] In this decision the Chief Justice developed the idea that the real aim of setting the standard working week in an industry was to achieve 'an equal

31 This was the conceptual framework of commentators in Australia: Bede Healey, *Federal Arbitration in Australia: An Historical Outline* (Georgian House, 1972) ch 13; EI Sykes and HJ Glasbeek, *Labour Law in Australia* (Butterworths, 1972) 629–33; Foenander, above n 19, ch IV, V (especially 120–1); Russell D Lansbury and Geoffrey J Prideaux, *Improving the Quality of Work Life* (Longman Cheshire, 1978) ch 5. It was also the framework internationally: Webb and Cox, above n 18, ch V; P Sargant Florance, 'The Forty-Eight Hour Week and Industrial Efficiency' (1924) 10 *International Labour Review* 1, 753; Rolande Cuvillier, *The Reduction of Working Time: Scope and Implications in Industrialised Market Economies* (International Labour Office, 1984) 17–19, 37–41. Even in 1980, trade unions and employer groups in Australia were still identifying the tension underlying the working hours issues as being one between work and leisure: Australia Bureau of Industry Economics, above n 21, ch 1; CAI, above n 26; ACTU Congress, 'Resolution 4: Hours, Leave and Leisure' (1979) annexed as attachment 4, CAI, above n 26.

32 Bissett, above n 2, 123.

33 *Standard Hours Inquiry, 1947* (1947) 59 CAR 581, 587 (see also at 590).

34 This is not to suggest that leisure was seen as being something completely separate to parental responsibilities and household activities, as the newspaper reports in 1856 and the 1947 test case suggests. Leisure was however seen as free time; spare time devoted to recreation, personal fulfillment and development. It might be spent with children, but that was merely one of a range of optional recreational pursuits open to the worker.

35 Murphy, above n 24, 1. See also Victorian Operative Masons' Society, above n 17, 19.

36 *Australian Timber Workers' Union v John Sharp and Sons Limited* (1920) 14 CAR 811, 847.

37 *Alderdice* (1926) 24 CAR 755, 763 (Dethridge CJ).

38 Ibid.

real and not mere nominal enjoyment of leisure' for those workers relative to workers in other industries.[39] In the 1947 award test case on hours of work, the issue of working hours was again conceived, argued, and granted, on the basis of the desirability of increasing the leisure time of workers, in a context in which the economy could afford it.[40]

These developments produce an understanding of an employee of standard working hours as being a person without responsibilities to undertake care tasks towards others. Although there was a glimmer of an employee father with responsibilities to teach and discipline his children in the 1856 eight hour day movement, such responsibilities largely slipped from vision for the rest of the period, in which a worker's life was construed to be divided between work and leisure. The worker of these developments was clearly gendered male. Not only did these developments and decisions on standard working hours occur in male industries, such as the building, timber and engineering industries, but clearly the worker in mind here was a male worker. This is well illustrated in the 1907 *Harvester* judgment, where Higgins J assumed that the workers in question were not only sole breadwinners for their families comprising their homemaker wife and children, but that they had little or no responsibility to undertake care tasks, as these were attended to by their wife who was not in the labour market.[41] In that framework, responsibility to undertake care tasks towards others was separated out from the worker's life, to be firmly positioned with the worker's homemaker wife. This located work and care in two different people.

There are few arbitration decisions in the early decades of the 20th century involving female workers,[42] but the decisions that do exist are built on an assumption that the women who were engaged in the labour market did not have care responsibilities towards others. They were assumed to be unmarried and without children.[43] This was most apparent in arbitral decisions that calculated the living wage for women workers on the assumption that women employees

39 Ibid 768. Achieving substantively the same leisure time across industries would, according to the Chief Justice, usually involve different standard working weeks in different industries, varying with the strain of the work (and so its impact on the quality of leisure hours). In less taxing industries, workers could expect to work a longer standard week, and in more taxing industries a shorter working week: at 790–1 (Dethridge CJ). This approach to setting working hours was prevalent from 1926 to 1933, and has been referred to as the 'equation of leisure': Healey, above n 31, 73.

40 *Standard Hours Inquiry, 1947* (1947) 59 CAR 581, 587, 590.

41 *Harvester* (1907) 2 CAR 1. This point is made in Sandra Berns, *Women Going Backwards: Law and Change in a Family Unfriendly Society* (Ashgate, 2002).

42 In the first such decision in 1912, Higgins J (the President of the tribunal) referred to 'the problem of female labour', reflecting a view of female labour as a troublesome aberration from the male norm: *Rural Workers' Union v Mildura Branch of the Australian Dried Fruits Association* (1912) 6 CAR 61, 70 ('*Dried Fruits Association*'). In a later decision Higgins J referred to female workers as the 'gentle invaders', reflecting similarly a norm of male workers: *Federated Clothing Trades v JA Archer* (1919) 13 CAR 647, 648 ('*Archer*').

43 Empirically it appears that most women in waged work at this time were unmarried and without children: Katy Richmond, 'The Workforce Participation of Married Women in Australia' in Donald E Edgar (ed), *Social Change in Australia: Readings in Sociology* (Cheshire, 1974) 267, 269–70; Ray Markey, 'Women and Labour, 1880–1900' in Elizabeth Windschuttle (ed), *Women, Class and History: Feminist Perspectives on Australia 1788–1978* (Fontana/Collins, 1980) 83.

financially supported themselves alone.[44] Although the interest of the tribunals lay solely in the financial responsibilities of the women in terms of who needed to be fed, clothed and housed on the woman's wage, the point nonetheless remains that the women workers were assumed to be unmarried and without children, with married women (and children of a marriage) assumed to be supported by male breadwinner husbands, in the *Harvester* tradition.[45]

Evidence was given in a 1919 decision on working hours in the clothing industry (an industry that had high levels of women workers) that at the end of the work day women workers must 'nearly always' go home and attend to household chores.[46] The tasks identified appeared largely to be the responsibilities of self-care, such as preparing her own food and attending to her own laundry, or helping out in her parents' house if she was living there.[47] What is interesting about this decision is that not only is a childless and unmarried woman worker assumed, but that even the evidence of the need for self-care was largely dismissed by the tribunal as an irrelevant consideration in setting working hours. The tribunal appeared most persuaded to reduce standard hours of work in the industry from 48 to 44 for health and safety reasons; especially with regard to young women's reproductive health, and more broadly, with regard to women as 'the more delicate sex', as Higgins J described it.[48] That self-care was raised by the union applicants in this case, and largely dismissed by the tribunal, highlights the absence of this argument and factor in relation to male industries, reflecting that all care tasks there were assumed to be attended to by the worker's homemaker wife.

Earlier forms of legal regulation specific to women also appeared to take as their subject a female worker without responsibilities to care for others. In the 1870s, several state Parliaments enacted legislation to set maximum working hours for women in factories and workrooms, and to introduce systems of inspection and

44 *Archer* (1919) 13 CAR 647, 691; *Women's Living Wage (Cardboard Box Makers) Case* (1919–20) 3 SAIR 11, which throughout the decision conflated female workers with 'single women' (at 18, 23, 29); *Australian Commonwealth Post and Telegraph Officers' Association v The Public Service Commissioner* (1918) 12 CAR 71, which also conflated female workers with 'single women' (at 713–15, 719, 724).

45 *Dried Fruits Association* (1912) 6 CAR 61, 71, although Higgins J did acknowledge, but discounted as a relevant consideration, that in 'exceptional circumstances' women workers might financially support parents and siblings; *Archer* (1919) 13 CAR 647, 691; *Women's Living Wage (Cardboard Box Makers) Case* (1919–20) 3 SAIR 11, 33 referring to circumstances where women financially support others as 'too abnormal to be taken into consideration'. See further Mark Hearn, 'Making Liberal Citizens: Justice Higgins and His Witnesses' (2007) 93 *Labour History* 57, 62; Marian Sawer, 'Changing Frames: Liberal and Feminist Perspectives on Harvester' (2008) 26 *Dissent* 45, 48; Edna Ryan and Anne Conlon, *Gentle Invaders: Australian Women and Work* (Penguin, 2nd ed, 1989) 83 extracting and discussing the *Bulletin of New South Wales Board of Trade Living Wage Adult Females 1918 Declaration* (1921) vi.

46 *Archer* (1919) 13 CAR 647, 708.

47 The evidence reported in the judgment was that '[w]hether she lives at home, her own or her parents', and helps in the household, or lives alone and is thrown on her own resources for clothing and clean linen as well as for food and for some sort of habitat, she must find time for some domestic duties after her wage work is done': ibid.

48 Ibid 709. See generally at 707–11. Higgins J said that '[a] great proportion — about one quarter — of the female workers are girls from the age of about fifteen upwards; and at this critical time of their lives they cannot be made victims of the Juggernaut of industry without permanent loss to the nation': at 709. Concerns of efficiency and output were also seen as relevant: at 709–11. See also obiter dicta in *Alderdice* (1926) 24 CAR 755, 777 (Dethridge CJ) (who mistakenly attributed this view to Florance, above n 31).

standards of sanitation, ventilation, heating and guarding of machinery.[49] Their motivation was a concern over the very poor health and safety conditions of factory work, into which large numbers of women had moved,[50] especially in a context in which women were seen as being industrially weak and so unable to organise collectively to address these health and safety matters. The stated motivations did not lie in assisting wives and mothers to manage their care responsibilities.[51]

This early period of legal regulation of working hours of women reveals the counterpart subject of the *Harvester* tradition — the unmarried childless female worker. Like the male breadwinner worker, she too is assumed to not have responsibilities to undertake care tasks for other people (and her needs of self-care were not understood to be significant in the 1919 decision in which they were raised). In this way this early legal regulation of women's work, like the regulation of male work, maintained the separation of work from care in a way that rendered care irrelevant to the industrial field.[52]

III NON-STANDARD WORK FOR MOTHERS

From the early days awards contained provisions for the engagement of employees on a basis other than the full-time standard working week. This occurred particularly in the male industries of agriculture and construction, where work was seasonally related, and typically took the form of casual employment.[53] Frequently, awards sought to constrain the use of casual labour by, for example, imposing quotas on the number of casuals that could be engaged relative to the workforce, imposing restrictions on when and for how long casuals could be used, and by attaching a pay loading to casual work, in the form of a percentage over the

49 See, eg, *Supervision of Workrooms and Factories Statute 1873* (Vic) s 3; *Factories and Shops Act 1885* (Vic) s 29; *Factories and Shops Act 1896* (NSW) s 37; *Factories Act 1894* (SA) s 13.

50 Markey, above n 43, 84–6; Rosemary Hunter, 'Women Workers and the Liberal State: Legal Regulation of the Workplace, 1880s–1980s' in Diane Kirkby (ed), *Sex Power and Justice: Historical Perspectives of Law in Australia* (Oxford University Press, 1995) 219, 227.

51 See Victoria, *Parliamentary Debates*, Legislative Assembly, 1885, 1468 (Dr Rose), 1469–70 (Mr Walker); 1751 (Mr Pearson), 2264 (Mr Cuthbert); *Votes and Proceedings of Legislative Assembly, NSW, 1875–6*, vol 5, 551–659, cited in Markey, above n 43, 90. See also Ryan and Conlon, above n 45, 31.

52 A division in thinking between work and leisure is also apparent in the assumptions underlying international standards developed in the early part of the 20th century: Murray, above n 13, 43–4.

53 The concept of casual employment does not have a settled legal meaning: Joo-Cheong Tham, 'Towards an Understanding of Standard Employment Relationships Under Australian Labour Law' (2007) 20 *Australian Journal of Labour Law* 123; Iain Campbell, 'Casual Employment, Labour Regulation and Australian Trade Unions' (1996) 38 *Journal of Industrial Relations* 571, 573–6. For the purposes of this article is not important to specify a meaning for this form of labour market engagement.

rate of pay of full-time standard work.[54] The rationale behind these restrictions was to discourage employers from over reliance on casuals, in order to preserve male full-time jobs in the industry.[55]

From the 1950s, the participation rates of women, and particularly married women with children, climbed steadily and much of that work was and remains in the form of part-time and casual engagement,[56] which also gradually increased as a proportion of the Australian labour force.[57] Awards began to include clauses permitting the offering of part-time employment, often confining that form of engagement specifically to women. Strict controls on the ratio of part-time work to full-time work were common, as were provisions that part-time work was only permissible where there was no full-time worker available to do the work. Notably, and in contrast to the premium rates that casuals attracted, the pro rata rate of pay for part-time work was less than that for full-time work.[58]

The situation in relation to part-time work changed from the second half of the 1980s when award restrictions on the engagement of part-time and casual workers were lessened in the processes of award restructuring and enterprise bargaining, and permanent part-time employment developed which attracted pro rata wage entitlements.[59] From the early 1990s part-time work, and especially permanent part-time employment, was actively promoted in the arbitration system, and by

54 See *Australian Builders Labourers' Federation v Archer* (1913) 7 CAR 210; *Waterside Workers' Federation of Australia v Commonwealth Steamship Owners' Association* (1914) 8 CAR 53; *Electrical Workers Board Case 1921* (1920–21) 4 SAIR 250. See also Campbell, 'Casual Employment', above n 53, 576–9; Helen Lewis, *Part-Time Work: Trends and Issues* (AGPS, 1990) 24–5, 109 (Table 30); Jane Romeyn, *Flexible Working Time — Part-Time and Casual Employment: An Information and Discussion Paper* (Dept of Industrial Relations, 1992) 4–5. An objective of the casual loading in the early part of the 20th century was to ensure that (male) casuals could take home a wage sufficient to financially support their families: *Waterside Workers Federation v Commonwealth Steam-Ship Owners Association* (1914) 8 CAR 53, 72–3; *The Australian Workers Union v Irvine* (1920) 14 CAR 204, 218–19; *The Australian Builders Labourers' Federation v LJ Adam* (1923) 17 CAR 19, 32–3. In more contemporary times the loading is seen as providing compensation for benefits foregone, such as sick and annual leave, and notice of termination, which many employees who work less than full-time are not entitled to: see *Re Metal, Engineering and Associated Industries Award 1998 – Part I* (2002) 110 IR 247, 306–20.

55 See *Re Vehicle Industry — Repair Services and Retail — Award 1980* (1983) 5 IR 100; *In re Hospital Employees (Metropolitan) Award* [1947] AR (NSW) 678, 680; *In re Watchmen (State) Award* [1965] AR (NSW) 268, 276, 283. See also Lewis, above n 54, 25; Romeyn, above n 54, 4.

56 Katy Richmond, 'The Workforce Participation of Married Women in Australia' in Donald E Edgar (ed), *Social Change in Australia: Readings in Sociology* (Cheshire, 1974) 267, 269–77 (Table 1); Alison Preston and John Burgess, 'Women's Work in Australia: Trends, Issues and Prospects' (2003) 6 *Australian Journal of Labour Economics* 497, 503, 506–8; Australian Bureau of Statistics, *Labour Force, 6202.0* (April 2010) 19 (Table 14).

57 F H Gruen, *The Future of Work: An Economic Perspective* (ANU, 1981) 1, 12–3; Brian Brooks, 'Aspects of Casual and Part-Time Employment' (1985) 27 *Journal of Industrial Relations* 158, 159; Australian Bureau of Statistics, *6202.0* (April 2010) above n 56, 6–8 (Tables 1–3).

58 See *The Clerks (State) Award* [1953] AR (NSW) 199, 224; *Victorian Chamber of Manufacturers v Clothing and Allied Trades Union of Australia* (1957) 87 CAR 327, 339; *Clerks Newspapers (Metropolitan) and Other Awards Case* [1976] AR (NSW) 839. Historically most trade unions were opposed to part-time employment, seeing it as a threat to male full-time work: Romeyn, above n 54, 7; Constance Lever-Tracy, 'Reorienting Union Strategies on Part-time Work' in Mark Bray and Vic Taylor (eds), *The Other Side of Flexibility: Unions and Marginal Workers in Australia* (Australian Centre for Industrial Relations Research and Teaching, 1991) 75. See also Owens, 'Women', above n 12, 411–17.

59 *National Wage Case — August 1988* (1988) 25 IR 170; *National Wage Case August 1989* (1989) 30 IR 81. See Romeyn, above n 54, 51–68.

trade unions and governments, as a particularly appropriate form of engagement for mothers, allowing a combination of domestic responsibilities alongside labour market work.[60]

Scholars have analysed the development of part-time work for women, and especially mothers, as continuing gendered understandings of work and care, with fathers remaining as full-time wage earners (without care responsibilities), and mothers as homemakers and primary care-givers first, and part-time waged workers second.[61] As Rosemary Owens wrote in 1993, '[p]art-time work for women in the paid work force is accepted because it is not an aberration from, but an accommodation of, the true (natural) role played by women through their work in the home'.[62] Whilst the concern of the casual loading and the living or family wage that originated in *Harvester* was to keep male wages at a level that would enable a family to live above the poverty line, this was never articulated as an objective in relation to the wages of part-time work, reflecting the assumption that working mothers have access to the benefits of a full-time male wage.[63] Cultural values around women's part-time work also indicate its status as secondary, where wages from women's part-time work are represented as supplemental and optional to male full-time wages, to be spent on luxuries, and more generally to enable a family's lifestyle to be more comfortable than it would otherwise be relying on a male full-time wage alone.[64]

Although in one sense the development of part-time work is itself an acknowledgement of the intersections between waged work and care responsibilities as experienced by mothers, it doesn't bring work and care closer for the mother herself, let alone merge them. Rather, it merely facilitates and allows for a smaller sphere of labour market engagement, with all the attendant precariousness that often entails. Part-time work has not generated stories of successful management of work and care. Rather, the view that has emerged through the literature is one of precariousness, in the sense of poorly remunerated and insecure work without

60 Romeyn, above n 54, 51–68; Owens, 'Women', above n 12, 411–17. See also Brennan, above n 2, which discusses a policy retreat from support of waged work for partnered mothers from the election of the federal Coalition government in 1996.

61 Owens, 'Women', above n 12; Rosemary Owens, 'Engendering Flexibility in a World of Precarious Work' in Judy Fudge and Rosemary Owens (eds), *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms* (Hart Publishing, 2006) 329; Belinda Probert, *Part-time Work and Managerial Strategy: 'Flexibility' in the New Industrial Relations Framework* (AGPS, 1995) 2–5; Barbara Pocock, 'Work/Care Regimes: Institutions, Culture and Behaviour and the Australian Case' (2005) 12 *Gender, Work and Organization* 32; Gillian Whitehouse, 'From Family Wage to Parental Leave: The Changing Relationship Between Arbitration and the Family' (2004) 46 *Journal of Industrial Relations* 400.

62 Owens, 'Women', above n 12, 410. Notably, the gender dimension of child care and household domestic work has not changed greatly over the second half of the 20th century, with women undertaking almost twice as much domestic work as men in 1997: Janeen Baxter, 'Patterns of Change and Stability in the Gender Division of Household Labour in Australia, 1986–1997' (2002) 38 *Journal of Sociology* 399, 419–20; Australian Bureau of Statistics, *Australian Social Trends, 4102.0* (March 2009).

63 Owens, 'Women', above n 12, 409.

64 Such views are recorded in Department of Employment, Education and Training, Women's Bureau, *New Brooms: Restructuring and Training Issues for Women in the Service Sector* (AGPS, 1989) 138. See also ibid 423–4.

training and promotion opportunities, and with continuing clashes between work and care responsibilities for part-time workers and casuals.[65]

IV DISINTEGRATION OF THE STANDARD WORKING WEEK

The concept and actuality of the standard working week in Australia began to dissolve from the late 1980s, as decentralised bargaining came to occupy a larger part of the legal regulation of industrial relations. The National Wage Cases of 1988 and 1989 adopted a Structural Efficiency Principle which linked wage rises with a number of outcomes, including action to ensure that 'working patterns and arrangements enhance flexibility and meet the competitive requirements of the industry'.[66] The language of labour market flexibility became a central organising principle in bargaining, with various mechanisms regarding working time introduced in its name. Commentators have concluded that most of these working time developments in bargained outcomes were driven by business and employer imperatives of efficiency, productivity and employer discretionary power, rather than employee interests in gaining greater autonomy and choice over working hours.[67] Mechanisms broadly seen to favour employers included an extension in the spread of hours over which standard hours were to be worked (for example, 7am to 7pm Monday to Friday), new shiftwork and roster arrangements such as 12 hour shifts, the averaging of standard hours and longer periods of time over which this averaging could occur, time off in lieu of overtime pay rates, annualised salaries, and a reduction or elimination in overtime penalty rates.[68]

These developments in working time arrangements led to fewer workers working a standard working week of 38 hours than in the past, both because more full-time employees (and especially men) work hours above that level, and because more people (and especially mothers) are working less than the standard under part-

65 See eg, Owens, 'Women', above n 12, 421–2; Probert, above n 61, 7; Anne Junor, 'Permanent Part-time Work: New Family-Friendly Standard or High Intensity Cheap Skills?' (1998) 8 *Labour & Industry* 77; Rosemary Hunter, 'The Legal Production of Precarious Work' in Judy Fudge and Rosemary Owens (eds), *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms* (Hart Publishing, 2006) 283; Owens, 'Engendering Flexibility', above n 61; Judy Fudge, 'Precarious Employment in Australia and Canada: The Road to Labour Law Reform' (2006) 19 *Australian Journal of Labour Law* 105.

66 *National Wage Case — August 1988* (1988) 25 IR 170, 175.

67 Andrew Stewart, 'Flexibility in Working Time' in Alice E-S Taylor (ed), *Australian Law and Legal Thinking Between the Decades* (Faculty of Law, University of Sydney, 1990) 205; Iain Campbell, 'Labour Market Flexibility in Australia: Enhancing Management Prerogative?' (1993) 5 *Labour & Industry* 1; Campbell, 'Long Working Hours in Australia', above n 11, 55; Laura Bennett, 'Women and Enterprise Bargaining: The Legal and Institutional Framework' (1994) 36 *Journal of Industrial Relations* 191.

68 David Peetz and Cameron Allan, 'Flexitime and the Long-Hours Culture in the Public Sector: Causes and Effects' (2005) 15 *The Economic and Labour Relations Review* 159; Campbell, 'Long Working Hours in Australia', above n 11, 61 (which dates the changes from the late 1970s and early 1980s, and also notes, amongst other factors, employers seeking to exclude trade union influence); Julie Lee and Glenda Strachan, 'Family Preferences, Child Care and Working Hours' (1999) 43 *Journal of Australian Political Economy* 22, 33–5.

time and casual engagements.[69] In contrast to most of the 20th century — which saw average hours worked each week by full time employees steadily decline — the hours worked by full-timers have been increasing since the early 1980s.[70] In 1982, the average actual weekly hours of full time employees was 38.2, whereas in 2000 the figure was 41.9 hours, and by 2006 it had reduced slightly back to 41.2 hours per week.[71] In addition, a growing number of full-timers are working long hours of 50 or more per week. In 1985, 10.2 per cent of all employees were working such hours; in 2000, the figure had climbed to 17.4 per cent, whilst in 2006 it had fallen back to 15.9 per cent (which comprised 22.2 per cent of all full-time employees).[72] There is a clear gender dimension in such working hours, with men comprising 75 per cent of the 'long hours' workers, although women are increasing as a proportion of this group.[73]

This trend of long hours of work clearly has as its subject a male worker. The demarcation in the 'long hours' worker's life between work and care has shifted so that work increasingly occupies more of the worker's waking hours, leaving less time to spend on other aspects of life, including care. At the same time the divide has become porous, notably in one direction in allowing work to creep into non-work time, through the greater availability of mobile phones and other technologies, combined with heightened expectations of client service, work intensification, and a move back to task-oriented forms of work organisation.[74] In this sense the separation between work and care for the full-timer has become less sealed, but not in a way that is beneficial to care responsibilities. Even leaving aside the growing group of long hour workers, all full-time employees are now

69 Campbell, 'Long Working Hours in Australia', above n 11, 41.This is also the finding of Full Bench in the *Working Hours Case July 2002* (2002) 114 IR 390, 392, 417. The Full Bench identified, as at 2002, three categories of working time arrangements: 'standard hours (between 35 and 44 hours a week)', 'part-time hours (less than 35 hours a week)' and 'extended hours (more than 44 hours a week)': at 392, 417.

70 The global financial crisis has caused aggregate hours of work to decline from October 2008, reaching a low point in June 2009, before recovering (in December 2009) back to December 2007 figures. It is expected that hours of work will recover back to October 2008 levels during the course of 2010–11. See *Annual Wage Review 2009–2010* [2010] FWAFB 4000 [115], [135], [145]. See also Australian Bureau of Statistics, *Labour Force, 6202*.0 (May 2010) Table 19.

71 Campbell, 'Long Working Hours in Australia', above n 11, 39–41. Most often long working hours arise for an employee in their one position, rather than as a result of the employee holding more than one job at the same time. The extra hours are mostly not remunerated, at least not directly: at 46–7.

72 Ibid. For earlier studies on working hours, see Watson et al, above n 8, ch 7; Dawkins and Baker, above n 21.

73 Long hours work is found in many industries and occupations, and notably amongst managers and administrators, professionals and associate professionals: Campbell, 'Long Working Hours in Australia', above n 11, 41. The profile of working hours presented in this paragraph does not align with the preferences on working hours expressed by employees: Brigid van Wanrooy, 'A Desire for 9 to 5: Australians' Preference for a Standard Working Week' (2007) 17 *Labour & Industry* 71.

74 Philippa Williams et al, '"Clawing Back Time": Expansive Working Time and Implications for Work-Life Outcomes in Australian Workers' (2008) 22 *Work, Employment and Society* 737; Watson et al, above n 8, 94–9; Madeleine Bunting, *Willing Slaves: How the Overwork Culture is Ruling Our Lives* (Harper Perennial, 2004).

working considerably longer hours than they were in the early 1980s,[75] again leaving less time for care. The porosity of non-work time to work demands is likely to be relevant for this group as well. For full-timers then, and especially male full-timers, their hours of work positions them even more strongly as workers without care responsibilities than arguably they were in the early part of the 20th century, and the 1856 eight hour day movement.

The article now turns to developments in the 21st century that seek to bring care responsibilities into the realm of labour market considerations.

V BRINGING CARE INTO INDUSTRIAL LAW

In 2002, the Commonwealth tribunal granted an award test case standard relating to overtime to the effect that 'an employer may require an employee to work reasonable overtime at overtime rates'.[76] That clause provided a list of factors to consider in the assessment of reasonableness, including health and safety, the needs of the enterprise, and 'personal circumstances' 'including any family responsibilities'.[77] This was the first time that responsibilities that a full-time employee has to undertake care tasks was acknowledged, in an explicit and formal manner, to be a relevant legal consideration in determining the length of the employee's working week. This highlights the longevity throughout the 20th century, and earlier, of the legal assumption that care responsibilities belong solely in a separate domain, and were of no relevance to the legal regulation of working hours.

When the *Workplace Relations Act 1996* (Cth) ('*WR Act*') was amended by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), a new legislative standard was enacted providing an ordinary working week of 38 hours, plus 'reasonable additional hours'.[78] This effectively replaced the existing award standards on working hours, including the short-lived 2002 test case provision on reasonable overtime.[79] This set of rules in the *WR Act* was itself replaced with the enactment of the current *Fair Work Act 2009* (Cth) ('*FW Act*'). The *FW Act*

75 An even starker contrast is provided by the 35 hour week won through enterprise bargaining in the 1970s in the coal mining, stevedoring and electricity industries, and the 36¾ standard working week in the Commonwealth public sector and Commonwealth statutory bodies: Australia Bureau of Industry Economics, above n 21, 18–21; CAI, above n 26, 15–23; CP Mills, 'Legislation and Decisions Affecting Industrial Relations' (1972) 14 *Journal of Industrial Relations* 307, 309–10.

76 *Re Working Hours Case July 2002* (2002) 114 IR 390, 465 [278] (cl 1.1). The Commission also awarded a clause that gave employees an explicit right to refuse to work overtime where that would result in the employee working 'unreasonable' hours: at 465 [278] (cl 1.2). The standard clauses were only to be inserted into awards that specify ordinary time and provide for overtime: at 394.

77 Ibid 465 [278] (cl 1.2.2).

78 *WR Act* ss 226, 226(1A). The agreement to average hours must be in writing, and may be in a workplace agreement, an award or some other form such as the contract of employment: at ss 225, 226(1)(a)(ii). Note that the *WR Act* was repealed and replaced by the *Fair Work Act 2009* (Cth), discussed below.

79 Rosemary Owens, 'Working Precariously: The Safety Net After Work Choices' (2006) 19 *Australian Journal of Labour Law* 161; Jill Murray and Rosemary Owens, 'The Safety Net: Labour Standards in the New Era' in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009) 40.

sets the number of hours for a full-time employee at 38 per week, and for an employee who is not full-time, the lesser of 38 hours or the employee's 'ordinary hours of work in a week',[80] plus stating that an employer 'must not request or require' an employee to work more than the relevant set number of hours in a week 'unless the additional hours are reasonable'.[81] Both the *WR Act* and the *FW Act* contain lists of potentially relevant factors to take into consideration when assessing reasonableness, including the 2002 award formulation of 'personal circumstances' 'including' 'family responsibilities'.[82]

It is impossible to assess the effectiveness of these 21st century mechanisms that attempt to bring care responsibilities into the domain of work as a substantive consideration in determining the reasonableness of additional hours. Whether they will take effect to break down the separation of work and care, and slow the trend in long working hours, is unclear. There are however a number of reasons to doubt the efficacy of the rules in these respects. They are themselves conservative in character in not breaking away from the 20th century paradigms for thinking about time in relation to work. In addition, they contain substantive technical limitations written into their formulation, and their use of the central concept of 'reasonableness' is likely to uphold the status quo. These matters are examined in turn.

The 2002 test case clause, and the *WR Act* and *FW Act* rules, are modest and conventional in the sense of continuing the framework of a 38 hour week for a full-timer, plus reasonable overtime.[83] All assume that some overtime will be reasonable for all employees, and so they constitute as their subject a worker that can undertake a level of overtime, in addition to their usual hours. Notably, none impose maximum overtime limits, or limits on daily, weekly or monthly total working hours. Interestingly, the union claim in the 2002 test case was a departure from earlier test case strategy in that the claim sought to restrain overall hours worked by the concept of reasonable, and not just overtime. The tribunal portentously characterised this aspect of the union's claim as a 'substantial alteration to the manner in which working time has been regulated in awards of the Commission for almost a century'.[84] The decision expresses much support for that existing award framework, describing it as 'a proven method of regulation which has the great benefit of clarity'.[85] The tribunal wrote that were it to grant this claim, '[t]he certainty and predictability of the normal working week for award employees … would give way to an imprecise and less predictable test based

80 The 'ordinary hours of work' for an employee to whom a modern award or enterprise agreement applies will be those hours defined or determined by the relevant modern award or enterprise agreement: *FW Act* s 147. The 'ordinary hours of work' for an 'award/agreement free' employee are effectively the hours agreed between the employee and his or her employer, or 38 hours per week or the 'usual weekly hours' of the employee (whichever is less): at ss 12, 20.

81 *FW Act* s 62. In contrast to the *WR Act* scheme, the *FW Act* gives employees an explicit entitlement to refuse to work additional hours if they are 'unreasonable': at s 62(2).

82 *WR Act* s 226(4)(b); *FW Act* s 62(3)(b).

83 A requirement on employees to work reasonable overtime (at overtime rates) dates back to the *Re Standard Hours Inquiry, 1947* (1947) 59 CAR 581, 612.

84 *Re Working Hours Case July 2002* (2002) 114 IR 390, 456.

85 Ibid.

on reasonableness', resulting in 'serious consequences' where people would not know where they stand.[86] The tribunal soundly rejected the union approach and framing of the issue, and this indicates the strength of 20th century framework regarding the regulation of working hours, with its accompanying conservative assumptions about work and care.

Both the *WR Act* and the *FW Act* provisions are substantively weak in important respects. The *WR Act* scheme was so technically limited that it must be questioned whether it in fact provided any effective standard at all on hours of work, let alone one that could be accurately described as a 'guarantee'.[87] Most notably, as weekly working hours could be averaged over a 12 month period, employers might lawfully require potentially wide and unpredictable variations in hours worked from week to week, and month to month, with both employees and employers potentially not knowing which hours were in fact additional hours (and then whether or not those additional hours were reasonable) until an assessment at the end of the 12 months was conducted.[88] The new *FW Act* scheme addresses some of the main limitations of the *WR Act* provisions, and importantly extends the concept of reasonable additional hours to employees working less than full-time.[89] In addition it ties the requirement of reasonableness to each week, so that the total number of hours worked each week at the requirement of the employer must not be unreasonable.[90] The new scheme also makes the question of payment for the additional hours an explicit consideration in the assessment of whether additional hours are reasonable or not.[91] This was not listed as a relevant factor under the *WR Act*.[92] Although averaging agreements in awards and enterprise agreements are permitted to continue to average hours over long periods of time, the *FW Act* reduces the significance of such agreements to being merely one of several relevant considerations in assessing reasonableness. Importantly, additional hours may be unreasonable even where they accord with an averaging agreement in place.[93]

86 Ibid.

87 The heading to *WR Act* s 226 uses the terminology of 'guarantee'. See Owens, 'Working Precariously', above n 79; Campbell, 'Long Working Hours in Australia', above n 11, 55; Andrew Stewart, 'Work Choices in Overview: Big Bang or Slow Burn?' (2006) 16 *Economic and Labour Relations Review* 25, 38; Sean Cooney, John Howe and Jill Murray, 'Time and Money Under Work Choices: Understanding the New Workplace Relations Act as a Scheme of Regulation' (2006) 29 *University of New South Wales Law Journal* 215.

88 Twelve months is provided in *WR Act* s 226(1)(a)(ii). Rosemary Owens has pointed out both that there is no requirement that the averaging agreement itself be reasonable: Owens, 'Working Precariously', above n 79, 164. Averaging is also likely to disrupt an employee's income: at 165. Employees might not be entitled to overtime rates, or any direct compensation for working additional hours, and remuneration for working additional hours was not listed as a relevant factor in the assessment of the reasonableness of the additional hours: *WR Act* s 226(4). See Rosemary Owens and Joellen Riley, *The Law of Work* (Oxford University Press, 2007) 309–12.

89 *FW Act* ss 62(1)(b), 62(2).

90 Ibid s 62(1).

91 Ibid s 62(3)(d).

92 *WR Act* s 226(4) (which provided an inclusive list).

93 *FW Act* s 62(3)(i). The Explanatory Memorandum to the Fair Work Bill is explicit that the fact that additional hours are worked in accordance with an averaging arrangement does not necessarily mean that those hours are reasonable: Explanatory Memorandum, Fair Work Bill (2008) (Cth) 42 [252].

Although the *FW Act* provisions are stronger substantively than the *WR Act* rules, and so more likely to provide a genuine standard, a March 2010 decision of Fair Work Australia indicates the limits of the current legislation in applying a brake to long hours of work.[94] The decision approved over 100 enterprise agreements covering Queensland fruit and vegetable growers that provided for an unlimited amount of 'voluntary additional hours', in the following terms:

> Voluntary additional hours are where the employer states that there is additional work available. Employees must make written and signed application to undertake voluntary additional hours, where such work is available. No employee can be required or directed to undertaking (sic) additional voluntary hours under this clause. All time worked by an employee in excess of their ordinary working hours, at the employee's specific request, shall be deemed voluntary additional hours. Such additional hours shall only be worked by the employee with the consent of the employer. The application shall remain in force until varied in writing by the employee. Additional hours shall be paid at the employee's ordinary time rate.[95]

Importantly, the tribunal took the view that the central rule in the *FW Act* dealing with reasonable additional hours has no application in relation to 'voluntary additional hours', as the legislation 'does not concern itself with hours worked by an employee which are voluntary hours and which an employer does not "request or require an employee to work"'.[96] In short, 'voluntary additional hours' are not constrained by the test of reasonableness, and no amount of unreasonably or excessively long 'voluntary' hours will infringe the standard under the *FW Act*. In a sense this 2010 decision merely continues the reasoning of earlier cases in the 1960s interpreting the standard award clause that provided that an employer may require an employee to work reasonable overtime. Those earlier decisions are to the effect 'that such a clause does not prohibit the working of unreasonable overtime; it merely prohibited an employer requiring it'.[97]

Many scholars have long recognised that the idea of employee choice, and especially choice of an individual employee or small group of employees, in the face of pressing employer demands, is fraught, as most workers face a limited

94 *Fanoka Pty Ltd T/A Fairview Orchards* [2010] FWA 2139 ('*Fairview Orchards*'). These agreements were subject to the no disadvantage test: at [2], and were determined to satisfy that test: at [30]–[34]. Doubt has been cast on the correctness of the reasoning on the application of the no disadvantage test by the later Full Bench decision of *Re Bupa Care Services Pty Ltd* (2010) 196 IR 1. The Australian Workers Union announced in March that it will appeal this decision: 'AWU Challenges "Preferred Hours": Lesser DEEWR Role in APS Revamp, More', *Workplace Express*, 31 March 2010.

95 *Fairview Orchards* [2010] FWA 2139 (16 March 2010) [9]. For similar voluntary additional hours clauses that have been approved, especially in the agriculture and harvesting industry, see at [35]–[42].

96 Ibid [46]. Fair Work Australia noted that in any event the ability to average hours under the *FW Act* would permit the arrangement here in question: at [47].

97 *Australian Glass Manufacturers Co Pty Ltd v The Amalgamated Engineering Union (Australian Section)* [1960] 1 FLR 302, 303; *Vickers Ruwolt Pty Ltd v Federated Moulders' (Metals) Union of Australia* (1962) 105 CAR 989, 1002 (Joske J). This standard award clause requiring an employee to work reasonable overtime was formulated in the *Re Standard Hours Inquiry, 1947* (1947) 59 CAR 581, 612.

range of options given their need to work.[98] The context in which employees might find themselves working 'voluntary additional hours' was not examined nor commented on in this recent 2010 decision, suggesting that the dynamics of power and choice in actual practice, including notably in this low wage sector with seasonal work fluctuations, may be irrelevant. In this way the central rule in the *FW Act* was read in a technical and narrow manner, and applied in a way that emphasised form over substance. This suggests that at least in some circumstances the *FW Act* may have limited effectiveness in slowing long hours of work.

Lastly, there is reason to question how successfully a legal test of 'reasonableness' will enable care responsibilities to be brought into the realm of working hours considerations. Over the years tribunals have applied the meaning of reasonableness in relation to working hours in a range of different contexts, from an unfair dismissal claim where the employee was dismissed after refusing to work overtime,[99] to cases involving union bans on the working of overtime as a form of award breach or prohibited industrial action.[100] An approach of balancing employee interests against employer concerns, in all the relevant circumstances, is evident,[101] and it is clear that what is reasonable will vary from case to case.[102] Tribunals have emphasised a range of different factors relevant in different contexts, including: health and safety matters; the amount of overtime already worked that week; whether prior notice of the need to work overtime was given; whether payment at overtime rates was provided; and the adequacy of staffing levels generally.[103] Although an employee's 'afterwork domestic or social commitments' was identified as a relevant factor in shaping the meaning of reasonable overtime in a case in 1962,[104] that matter was not relevant to the facts of the case, and moreover does not appear to have been used or developed in subsequent cases on overtime and the meaning of reasonableness, at least until 2009.

98 See Otto Kahn-Freund, *Labour and the Law* (Stevens, 2nd ed, 1977) 6.

99 See *Mukesh Chand v Refined Sugar Pty Ltd* (Unreported, Australian Industrial Relations Commission, Senior Deputy President Lacy, 17 March 2006).

100 See, eg, *Australian Glass Manufacturers Co Pty Ltd v The Amalgamated Engineering Union (Australian Section)* [1960] 1 FLR 302, 303–4; *Vickers Ruwolt Pty Ltd v Federated Moulders' (Metals) Union of Australia* (1962) 105 CAR 989.

101 See, eg, *MacPherson v Coal & Allied Mining Services Pty Ltd (No 2)* (2009) 189 IR 50, 76 [61] ('*MacPherson*'); *Metal Trades Employers Association v Boilermakers Society of Australia* (1960) 4 FLR 333.

102 See *Inspector Trundle v M & K Angelopoulos Pty Ltd* [2009] FMCA 37 [41]; *The Australian Workers' Union v Australian Trainers' Association* [2009] FWA 418 [9] (a mandatory requirement of two hours per week additional hours for all employees would not satisfy the reasonableness test as it fails to take into account individual circumstances).

103 See, eg, *Vickers Ruwolt Pty Ltd v Federated Moulders' (Metals) Union of Australia* (1962) 105 CAR 989, 997–8 (Dunphy J), 1001 (Joske J); *Australasian Meat Industry Employees Union v Australian Meat Holdings* (Unreported, Australian Industrial Relations Commission, Maher DP, 18 March 1993) 3–4, cited and adopted in *Rocca Bros (SA) Pty Ltd v Shop, Distributive and Allied Employees Association* (Unreported, Australian Industrial Relations Commission, Commissioner Foggo, 17 October 2000) [3]; *Mukesh Chand v Refined Sugar Pty Ltd* (Unreported, Australian Industrial Relations Commission, Senior Deputy President Lacy, 17 March 2006) [42]–[43].

104 *Vickers Ruwolt Pty Ltd v Federated Moulders' (Metals) Union of Australia* (1962) 105 CAR 989, 997 (Dunphy J);

The first and only decision to date in which care responsibilities have substantively entered into the consideration of reasonableness of additional hours is a 2009 decision under the *WR Act*.[105] The case involved an electrical fitter engaged as part of the maintenance crew at an open cut coal mine. The employee was working a three week roster of 8 hour day/afternoon shifts (some from 3–11pm) Monday to Friday (which averaged 40 hours per week), until a change in roster arrangements when he was directed to work an average of 44 hours per week, comprising a fixed two week cycle of four day shifts (three of these day shifts were 12 hours, and one was eight hours).[106] The employee refused to work the new roster, claiming that it would involve him working unreasonable additional hours. The Federal Magistrates Court went through each of the factors articulated in the legislation as of potential relevance in the determination of whether the six additional hours per week above the 38 standard week were reasonable, concluding that they were. The evidence of the employer in favour of the new shift arrangements was strong, including pointing to significant efficiencies. In contrast, the employee's case was not seen to be strong. His evidence was that the new roster would mean that he could no longer drop his teenage sons off at their various sports training during the week, could not himself continue to coach their soccer team on the days he worked the 12 hour shifts, and that he would be unable to be present for his family dinner at 6pm.[107] He also gave evidence that he thought his ability to communicate with his partner and children would suffer under the new arrangements. The Court noted the lack of medical or other evidence that health and safety concerns arose in the new arrangements, or that fatigue would result to him, or even evidence from his wife about the strain of the new shift arrangements. The Court wondered why the family dinner could not be altered to 7pm, especially given that these were teenagers and not young children. That the new shift involved no contravention of health and safety standards was noted as being relevant.[108] Also relevant was that the employee had in fact been able to alter some of his soccer coaching commitments, thus mitigating the effect of the new roster. There was no argument made that his sons, aged 13 and 15, needed his parental supervision, and that this would be disrupted with the new roster. Importantly, the context of longer working hours generally in Australia was seen to be relevant, as was evidence that in the mining industry 44 hour weeks and 12 hour shifts of this type are common.[109]

This decision illustrates that the concept of reasonableness takes its meaning from its cultural context, including the contemporary features of working time in Australia, both generally and in particular industries. In this case the characteristics of working time that were highly relevant included the prevalence of 44 hour working weeks, the spread of hours into evenings, and the working

105 *MacPherson* (2009) 189 IR 50.

106 The new arrangements did not involve weekend work or any work after 6.30pm.

107 Although the decision notes that the employee's partner was also employed, it does not explicitly note whether she would be in a position to collect the boys from their sports training.

108 *MacPherson* (2009) 189 IR 50, 68 [38].

109 Ibid 68 [38], 75–6 [57]. It was also relevant that the employee was to receive a work pattern allowance for the increase in hours from 40 to 44, based on the overtime rate in the relevant agreement: at 74 [52].

of 12 hour shifts.[110] This decision suggests that only working hour arrangements that are markedly outside current, and perhaps even emerging, practices will be identified as unreasonable. The standard of reasonableness supports the status quo, as perhaps many would argue it ought.[111] The point though is that for this reason, the concept of reasonableness does not impose an external constraint or standard, as its benchmark lies within current practices and the assumption of a subject worker without care responsibilities. In a context in which existing practices are moving in the direction of longer working hours, the idea that a legal test of reasonableness will impose a constraint on excessive hours of work is unrealistic. In short, applying a test of reasonableness is likely to mean by definition accepting as reasonable current practices in relation to hours arrangements. The Explanatory Memorandum to the Bill for the *FW Act* comments that '[t]he significant remuneration and other benefits paid to a senior manager, together with the nature of the role and level of responsibility, may be sufficient to ensure that additional hours are reasonable in many cases'.[112] The level of confidence with which this conclusion is expressed tends to support the view that current practices in relation to working hours will be seen as reasonable.

In these developments, care responsibilities have been recognised through the vehicle of 'personal circumstances' including 'family responsibilities'. The article turns now to address law's meaning of those concepts, to uncover the particular vision of care and family that lies within those rules.

VI LAW'S RELATIONSHIPS OF CARE

The 2002 award test case, the *WR Act* and the *FW Act*, all express the relevant factor as being the employee's 'personal circumstances' 'including' 'family responsibilities'.[113] There have not been any cases that interpret the meaning

110 Indeed, some employees have fought to hold onto 12 hour shifts (rather than 8 hour shifts), citing family responsibilities as a reason for their preference. See, eg, *Police Federation of Australia — Victoria Police Branch v Victoria Police Force* [2009] AIRC 104 (2 February 2009).

111 Scholars have shown how the concept of reasonableness in Australian anti-discrimination law has been interpreted in ways that reinforce the status quo of existing work arrangements: Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26 *Melbourne University Law Review* 325; Saku Akmeemana and Melinda Jones, 'Fighting Racial Hatred' in Race Discrimination Commissioner, *The Racial Discrimination Act: A Review* (Race Discrimination Commissioner, 1995) 129, 168; Anna Chapman, 'Australian Racial Hatred Law: Some Comments on Reasonableness and Adjudicative Method in Complaints Brought by Indigenous People' (2004) 30 *Monash University Law Review* 27.

112 Explanatory Memorandum, Fair Work Bill (2008) (Cth) 42 [250].

113 *Re Working Hours Case July 2002* (2002) 114 IR 390, 465 [278] (cl 1.2.2); *WR Act* s 226(4)(b); *FW Act* s 62(3)(b).

of 'personal circumstances', and neither Act defines that phrase.[114] 'Personal circumstances' though appears broadly drawn and seems likely to encompass a wide range of contexts in which an employee cares for another person, such as caring for a close friend, a neighbour, or a person that is part of the employee's extended community or Indigenous kinship network. The concept is likely to be interpreted more broadly than the idea of 'family responsibilities', not the least because 'personal circumstances' is expressed to 'include' 'family responsibilities', thereby indicating that family responsibilities is a sub-set of it.

The concept of 'family responsibilities' was and is used in a number of different contexts in both the *WR Act* and the *FW Act*, including in relation to protection from dismissal on the ground of 'family responsibilities'.[115] Neither Act though provides a definition of the term. Case decisions have not explored the particularities of the employee's 'family responsibilities' where that has been argued, as the situations appear to clearly fall within the definitions; for example, with employees described as parents or wives.[116] For these reasons decisions have not to date provided an exploration of the outer limits of the meaning of 'family responsibilities'.

Interestingly, the *FW Act* enacted a new concept — 'carer's responsibilities' — for use in a number of different contexts.[117] That concept is left undefined in the *FW Act*. In these other sets of rules, 'carer's responsibilities' is often attached to 'family responsibilities', so for example, redress is now available under the *FW Act* where an employer takes 'adverse action' against an employee (including dismissal), because of the employee's 'family or carer's responsibilities'.[118] The addition of 'carer's responsibilities' in these other contexts suggests that 'family responsibilities' and 'carer's responsibilities' are not synonymous, and moreover that the drafting choice against expanding the working hour standard to include 'carer's responsibilities' must be interpreted as a decision to keep consideration to responsibilities in a 'family' context, and not any broader concept of care that takes place outside that context.

Both sets of objectives in the *WR Act* and the *FW Act* include the principle of assisting in giving effect to, or at least of taking into account, Australia's international legal obligations.[119] Given this, it might be expected that the meaning

114 The decision in the 2002 test case does not explain the meaning of those words. The union claim in the test case listed an employee's 'social and community life', as well as an employee's 'family responsibilities' as separate relevant factors (and not 'personal circumstances'): *Re Working Hours Case July 2002* (2002) 114 IR 390, 390–1 (cl 1.2). The tribunal expressed concern about the potential expansiveness of 'social and community life', preferring to articulate a factor of the employee's 'personal circumstances' 'including family responsibilities': at 456. The tribunal did not explain the reasons for its preference in wording, and the difference in meaning between 'social and community life' and 'personal circumstances' remains unexplored.

115 *WR Act* s 659; *FW Act* ss 342, 351, 12 (the claim of adverse action for 'national system employees'), s 772 (for non-'national system employees').

116 See *MacPherson* (2009) 189 IR 50; *Elizabeth Treadwell v Acco Australia Pty Ltd* [1997] FCA 1440 (16 December 1997); *Robertson v South* (2000) 140 IR 169.

117 See *FW Act* ss 153, 195, 351(1), 578, 772.

118 Ibid ss 351(1), 342.

119 *WR Act* s 3(n). See also ss 3(l), (m); *FW Act* ss 3(a), (d), (e).

of 'family responsibilities' used in the International Labour Organization ('ILO') Family Responsibilities Convention would be relevant in interpreting each statute's legislative provisions regarding reasonable additional hours.[120] Decisions under the *WR Act* and the *FW Act* have drawn on ILO Conventions to interpret the meaning of the legislation.[121] The Family Responsibilities Convention applies in relation to men and women workers with responsibilities in relation to 'dependent children', and in relation to 'other members of their immediate family who clearly need their care or support'.[122] The Convention states explicitly that those concepts are to be defined by each country for itself, as appropriate, 'account being taken of national conditions'.[123]

The *Sex Discrimination Act 1984* (Cth) ('*SDA*') uses a concept of 'family responsibilities',[124] and these *SDA* rules have been relied on by tribunals in interpreting the *WR Act* rules.[125] The *SDA* provisions were enacted in 1992 under the external affairs power in the Australian Constitution, drawing on the Family Responsibilities Convention.[126] They prohibit discrimination on the ground of 'family responsibilities' in a limited range of employment circumstances. It seems most likely that this *SDA* meaning of 'family responsibilities' would be relevant in interpreting the meaning of 'family responsibilities' as a factor in determining whether additional hours worked by an employee were reasonable under the former test case standard, the *WR Act*, and the current *FW Act*.

It is clear that the *SDA* ground of 'family responsibilities' does not cover all circumstances in which care is provided by one person to another. It only recognises care in carefully delineated circumstances, and does so in a process that conveys messages about which relationships and family structures are cognisable and protected by law, and which are not. Like the Convention on which it draws, the *SDA* ground is defined around responsibilities to care for, or support, a 'dependent child', or any other 'immediate family member who is in need of care and support'.[127] The 'dependent child' covered is defined broadly and inclusively, and identifies the idea that the child is 'wholly or substantially

120 The formal title is the International Labour Organization Convention No 156 Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities 1981 ('*Convention 156*'). It was contained as Schedule 5 to the *WR Act*. There are no conventions annexed to the *FW Act*, where the drafters have preferred to refer readers to the Australian Treaties Library: see *FW Act* s 743.

121 See *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Telstra Corporation Limited* (Unreported, Australian Industrial Relations Commission, Commissioner Smith, 16 May 2005); *Lee v Hills Before & After School Care Pty Ltd* (2007) 160 IR 440; *MIDG Pty Ltd* [2010] FWA 1131 (15 February 2010); *Newlands Coal Pty Ltd* [2010] FWA 4811 (29 June 2010).

122 *Convention 156* arts 1, 2.

123 *Convention 156* art 9. See also art 3.

124 The main provisions relating to family responsibilities are contained in *SDA* ss 4A, 7A, 14(3A).

125 See, eg, *Australian Municipal, Administrative, Clerical and Services Union v Moreland City Council* (Unreported, Australian Industrial Relations Commission, Commissioner Grainger, 24 March 2006) [36]–[49].

126 *Australian Constitution* s 51(xxix) 'external affairs'. The Act that amended the *SDA* was the *Human Rights and Equal Opportunity Legislation Amendment Act (No 2) 1992* (Cth).

127 *SDA* s 4A(1).

dependent on the employee'.[128] The concept of 'immediate family member' is defined to include conventional understandings of family as a married spouse or former married spouse, adult children, parents, grandparents, grandchildren, and siblings of the employee.[129] Unmarried heterosexual de facto couples were recognised as 'spouses' within the definition of 'immediate family' from the enactment of these provisions in 1992.[130] Recently in 2008, the provisions were extended to include same sex couples as 'de facto partners' in the definition of 'spouse'.[131]

The definition of 'de facto partner' references people 'living together' as a 'couple', 'on a genuine domestic basis'.[132] In determining whether a person is a 'de facto partner', all the circumstances of the relationship are to be taken into account, including any or all of the following list of indicative factors:

- the duration of the relationship;
- the nature and extent of their common residence;
- whether a sexual relationship exists;
- the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
- the ownership, use and acquisition of their property;
- the degree of mutual commitment to a shared life;
- the care and support of children; and
- the reputation and public aspects of the relationship.[133]

128 Ibid s 4A(2) (definitions of 'child', 'dependent child' and 'stepchild').

129 Ibid s 4A(2) (definitions of 'immediate family member', 'spouse', 'de facto partner' and 'parent'). Australian law does not recognise same sex marriages, whether performed in Australia or in a country that recognises marriage between people of the same sex: *Marriage Act 1961* (Cth) s 5 (definition of 'marriage'), amended by the *Marriage Amendment Act 2004* (Cth). Confirming that 'spouse' under the *Public Service Act 1922* (Cth) does not include same sex relationships: see *Commonwealth of Australia v Human Rights & Equal Opportunity Commission* (includes corrigendum dated 2 June 1998) [1998] FCA 138 (27 February 1998).

130 The *Human Rights and Equal Opportunity Legislation Amendment Act (No 2) 1992* (Cth) provisions included 'de facto spouse' within the meaning of 'spouse', but did not define 'de facto spouse'. The *SDA* defined (and still defines) 'de facto spouse' to mean 'a person of the opposite sex to the first-mentioned person who lives with the first-mentioned person as the husband or wife of that person on a *bona fide* domestic basis although not legally married to that person': at s 4(1) (emphasis in original).

131 *SDA* s 4A 'de facto partner' is included in the concept of 'spouse'. The new *SDA* concept — 'de facto partner' — is contained in the *Acts Interpretation Act 1901* (Cth) s 22C(1)(c). See also at ss 22A, 22B. The amendment to the *SDA* was made by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws — General Law Reform) Act 2008* (Cth) sch 2, and the amendment to the *Acts Interpretation Act 1901* (Cth) was made by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws — Superannuation) Act 2008* (Cth) sch 2.

132 *Acts Interpretation Act 1901* (Cth) s 22C(1)(c).

133 Ibid s 22C(2). The Commonwealth legislation is clear that none of these factors are determinative, and a temporary absence from living together, or where an illness or infirmity causes a separation in living arrangements, does not mean that a 'de facto' partnership does not exist: at s 22C(3), (4). In addition, a de facto partnership can exist even where one person is married to someone else, or is in a registered relationship with someone else: at s 22C(5).

These provisions mean that 'family responsibilities' only recognises caring within carefully defined contexts, namely the care of children of the employee, and other members of the employee's 'immediate family' such as a spouse, a cohabiting couple partner, parents, grandparents and siblings of the employee. Although the provisions covering care of children are quite broadly drawn, and may extend beyond conventional understandings of nuclear family arrangements,[134] the remainder of 'immediate family' draws upon and reinforces a conventional view of families and intimate relationships. Indeed the *SDA* itself signifies its relatively narrow scope through the use of the appellation of 'immediate' in the category of family recognised. Until 2008, only different sex couples were countenanced as 'immediate family'; same sex relationships were not recognised at all. Although same sex couple relationships are now recognised as 'immediate family', this has been done in a way that reinforces the primacy of the cohabiting couple. Couples that live together are constituted as the normative care relation for these purposes, rather than, for example, non-cohabiting couples, broader relations of care within kinship, social and friendship networks, between neighbours, and people in multiple intimate relationships.

The *SDA* list of indicative factors draws on conventional understandings of couple relationships as sharing a residence, pooled finances, public reputation, etc. Those factors are said to have been drawn from a 1986 New South Wales case about property adjustment that determined whether a man and a woman were 'living … together as husband and wife on a bona fide domestic basis although not married to each other'.[135] In referencing judicial understandings of the traditional hallmarks of marriage, marriage provides the benchmark family relation against which the existence of a de facto relationship as 'immediate family' is tested to assess similarity, whether same-sex or not. Indeed, marriage still provides the reference point for the name of the 'de facto partner' category, in the sense of a de facto rather than de jure spouse. Cases in anti-discrimination law have not explored the meaning of the 'de facto' definitions of 'immediate family', although the same definitions have been applied in other contexts such as property division regimes, intestacy laws and superannuation claims. In those frameworks a trend has been discerned towards more flexible and purposive approaches to judicial interpretation, with lesser reliance on the conventional traits of marriage.[136] Although a more flexible and contemporary understanding might also be expected to apply in relation to the *SDA* (and the previous test case standard, *WR Act* and current *FW Act* additional hours provisions), the legislation itself makes clear the need for the presence of at least some key traditional markers of marriage — a cohabiting couple of two adults.

134 This has not been explored in case decisions.

135 *D v McA* (1986) 11 Fam LR 214, 227 (Powell J). The formula of 'living … together as husband and wife on a bona fide domestic basis although not married to each other' was the definition of de facto relationship in the *De Facto Relationships Act 1984* (NSW), applicable in this case. See Jenni Millbank, 'The Role of "Functional Family" in Same-Sex Family Recognition Trends' (2008) 20 *Child and Family Law Quarterly* 1, 10; Jenni Millbank, 'The Changing Meaning of "De Facto" Relationships' (2006) 12 *Current Family Law* 82, 86.

136 Millbank, 'The Changing Meaning', above n 135, 94.

The anti-discrimination statutes of some states and territories provide for a broader recognition of care responsibilities per se, and do not require that the care take place in any particular setting, other than it not be provided for commercial reward.[137] These developments highlight the relative narrowness of the concept of 'family responsibilities' to cover relations of care. For example, the *Equal Opportunity Act 1984* (WA) has broad scope in this respect, where the relevant concept is defined to include 'having responsibility for the care of another person, whether or not that person is a dependant'.[138] This definition does not appear to require ongoing care or any particular level of dependence.[139] The South Australian Act was amended in 2009 to explicitly include within its definition of 'caring responsibilities' the responsibilities of Aboriginal and Torres Strait Islander people.[140] These concepts used in state and territory anti-discrimination legislation cover broader care relations than provided for in the *SDA* 'family responsibilities' concept, and in doing so highlight the limited character of the *SDA* as lying in the marriage-like cohabiting couple, and the likely replication of that limitation to the 2002 test case, the *WR Act* and the current *FW Act.*

VII CONCLUSIONS

This article has examined how industrial law on working time understands its concepts of work, care for others, gender and family. It took a broadly chronological approach to its subject matter, commencing its story with the Melbourne stonemasons and their 1856 claim of '8 Hours Labour, 8 Hours Recreation, 8 Hours Rest'. The article traced the development of the standard working week through the first part of the 20th century, and the reasoning and motivations for union action and tribunal decisions to reduce standard working hours. It also examined the emergence of part-time work for mothers from the 1950s, and the disintegration of norms around working hours with enterprise bargaining at the end of the century. It was shown how these developments reflected an ideological separation between work and care, in which care responsibilities were placed beyond the scope of industrial law's concern with work and working hours. This period of industrial law broadly reflected a *Harvester* understanding of work and care where the normative worker of the labour market is without responsibilities to care for others.

137 See *Equal Opportunity Act 1995* (Vic) ss 6(ea) (status of being a 'carer'), 4(1) (definition of 'carer'); *Discrimination Act 1991* (ACT) s 7(1)(e) (status of being a 'carer' and definition of 'carer'). The Tasmanian statute is similar: *Anti-Discrimination Act 1998* (Tas) s 16(i)–(j).

138 *Equal Opportunity Act 1984* (WA) ss 4(1) (definition of 'family responsibility or family status'), 35A (family responsibility or family status).

139 This has not been explored in case decisions.

140 *Equal Opportunity Act 1984* (SA) s 5(3)(b): 'an Aboriginal or Torres Strait Islander person also has caring responsibilities if the person has responsibilities to care for or support any person to whom that person is held to be related according to Aboriginal kinship rules or Torres Strait Islander kinship rules, as the case may require' (emphasis altered). This provision was inserted into the South Australian statute along with the provisions on 'caring responsibilities' by the *Equal Opportunity (Miscellaneous) Amendment Act 2009* (SA).

The second part of the article examined new mechanisms introduced from 2002 in a conscious attempt to bring care responsibilities into the realm of work, as a relevant factor in the consideration of the legal test of reasonableness of overtime. It was shown that the *WR Act* amendments in 2005 were so limited that it is difficult to conclude that any minimum standard was imposed by them in relation to working hours. The current *FW Act* provisions, although undoubtedly an improvement on the 2005 statutory scheme, nonetheless contains substantive limitations, and it must be questioned whether they offer the capacity to effectively break down the separation of work and care, and/or impose a break on long working hours. The central test of 'reasonableness' in the rule on additional hours presents a key limitation in the current rules.

The final section of the paper turned to examine the specifics of care and family recognised in these new mechanisms. The concept of 'family responsibilities' performs the role as a main gatekeeper to recognising responsibilities to care for others in these 21st century mechanisms, and the article shows how that concept is limited in important respects to conventional understandings of family, and not extended meanings of family as close friends, people in multiple intimate relationships, social, community and kinship networks. Although in 2008 the cohabiting couple of 'family responsibilities' was redrafted to include same-sex couples, the couple living under the same roof, and with other hallmarks of traditional marriage, remains firmly the basis of the family of these legal rules.