

IN THE AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
OF AUSTRALIA

C No. 2003/4198 and ors

Family Provisions Test Case

**SUBMISSION OF THE HUMAN RIGHTS AND EQUAL
OPPORTUNITY COMMISSION INTERVENING**

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CONTENTS

SUMMARY OF POSITION	3
PART A: INTRODUCTION	4
PART B: OBJECTS AND PURPOSES OF THE WRA	5
PART C: AUSTRALIA'S INTERNATIONAL OBLIGATIONS	6
PART D: FEDERAL DISCRIMINATION LAW	11
PART E: LIMITATIONS OF DISCRIMINATION LAW	20
PART F: HREOC'S COMPLAINT HANDLING ROLE	21
PART G: RESPONSES TO SPECIFIC SUBMISSIONS	22

SUMMARY OF POSITION

1. The Human Rights and Equal Opportunity Commission (HREOC) does not address specifically each of the applications before the Australian Industrial Relations Commission (AIRC), nor make any submission as to the precise form of appropriate award variations. However HREOC supports the introduction of award provisions that assist men and women to balance their paid work and family and caring responsibilities.
2. HREOC does not support the introduction of award provisions that would reduce existing employment conditions or result in the diminution of employment conditions for employees with family and caring responsibilities as compared with other employees.
3. Introducing further family friendly award provisions would be consistent with Australia's international obligations, in that they would assist to:
 - create equality of opportunity between men and women workers with family responsibilities, as well as between men and women with those responsibilities and those without; and
 - prevent and eliminate discrimination against women and workers who have family and caring responsibilities.
4. Such award provisions would also systemise current trends in federal discrimination law. This would provide certainty and clarity to both employers and employees in relation to their rights and responsibilities.
5. The limitations of discrimination law, given its individual complaints based nature, and, in the case of federal legislation, reliance upon specific constitutional powers resulting in the limited coverage afforded to men under the *Sex Discrimination Act 1984* (Cth) (SDA), further support the introduction of specific award provisions to assist all employees to balance their work and family responsibilities.
6. The flexible employment provisions introduced in the United Kingdom by the *Employment Act 2002* (UK) provide a useful indication of possible outcomes should similar provisions be inserted into the relevant awards in Australia. The fact that some employers may act unlawfully and discriminate against women of childbearing age or with family responsibilities, is no reason for the AIRC not to introduce family friendly award provisions. For labour market participation by women aged between 24 and 35 years has steadily increased in the last twenty years¹ despite the introduction of work entitlements such as maternity leave² and family leave³ (which were, at the time, equally as controversial as the current applications before the AIRC).

¹ See Australian Bureau of Statistics, *Labour Force Australia 2004*, Cat No. 6203.0. See also, HREOC, *Pregnant and Productive*, (1999), 10 [2.7].

² Introduced by the *Maternity Leave Test Case* (1979) 218 CAR 120.

³ Introduced by the *Family Leave Test Case* (1994) 57 IR 129.

PART A: INTRODUCTION

7. The Human Rights and Equal Opportunity Commission (HREOC) was granted leave to intervene in these proceedings on 26 September 2004.
8. The applications before the Australian Industrial Relations Commission (AIRC) relate to the following matters:
 - (a) part-time work on return from parental leave;⁴ job-sharing;⁵ and part-time and casual work generally;⁶
 - (b) hours of work and overtime;⁷
 - (c) purchased leave and long service leave;⁸ and
 - (d) parental leave.⁹
9. In these submissions HREOC does not address specifically each one of the applications before the AIRC, nor make any submission as to the precise form of appropriate award variations.
10. HREOC supports the insertion of specific award provisions that would assist employees to balance their work and family and caring responsibilities effectively, and which would be accessible at the initiative of the employee. HREOC does not support the introduction of any award provision that would reduce existing employment conditions or result in the diminution of employment conditions for employees with family and caring responsibilities as compared with other employees.
11. HREOC seeks to assist the Full Bench by setting out a number of matters it submits the AIRC should take account of in considering the applications. HREOC's submissions deal in turn with the following:
 - (a) the relevant objects and purposes of the *Workplace Relations Act 1996* (Cth) (WRA) (Part B);
 - (b) Australia's relevant international obligations (Part C);
 - (c) the relevant principles in relation to discrimination in employment embodied in the *Sex Discrimination Act 1984* (Cth) (SDA) and *Disability Discrimination Act 1992* (Cth) (DDA) (Part D);
 - (d) the limitations of federal discrimination law in assisting men and women workers balance their work and family and caring responsibilities (Part E);

⁴ See applications C2003/4198, C2003/4199, C2003/4203, C2003/4301 and C2003/2302.

⁵ See applications C2003/5142, C2003/5143, C2003/5144.

⁶ See applications C2003/5166, C2003/5167, C2003/5168, C2003/5268 and C2003/5272.

⁷ Cf applications C2003/4198, C2003/4199, C2003/4203, C2003/4301 and C2003/2302 and C2003/5166, C2003/5167, C2003/5168, C2003/5268 and C2003/5272.

⁸ Cf C2003/4198, C2003/4199, C2003/4203, C2003/4301 and C2003/5142, C2003/5143, C2003/5144, C2003/2302, C2003/5166, C2003/5167, C2003/5168, C2003/5268 and C2003/5272.

⁹ Ibid.

- (e) HREOC’s complaint handling role in relation to complaints about discrimination in relation to family and caring responsibilities under the SDA and DDA (Part F); and
- (f) specific contentions made by the parties in relation to:
 - the employment laws introduced in the United Kingdom (UK) allowing employees with family responsibilities to request flexible working conditions; and
 - whether introducing provisions into awards in respect of part-time work on return from parental leave or other flexible work arrangements would lead to women being priced out of the labour market (Part G).

PART B: OBJECTS AND PURPOSES OF THE WRA

12. The AIRC is required to determine the applications before it ‘*in a way that furthers*’ the objects of the Act (as well as the objects of Part VI).¹⁰ That obligation mirrors the legal principle of statutory interpretation that a construction that promotes the underlying purpose or object of the Act (whether express or implied) is to be preferred.¹¹
13. Relevantly, s 3 sets out the objects of the WRA as including to provide a framework for co-operative workplace relations by:
 - (a) assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers;¹²
 - (b) respecting and valuing the diversity of the workforce by helping to prevent and eliminate discrimination on the basis of, *inter alia*, pregnancy, sex and family responsibilities;¹³ and
 - (c) assisting in giving effect to Australia’s international obligations in relation to labour standards.¹⁴
14. The AIRC must determine the applications before it in a manner that furthers those objects,¹⁵ and must also have regard to the ‘*need to prevent and eliminate discrimination because of, or for reasons including... sex... marital status, family responsibilities, pregnancy...*’.¹⁶
15. HREOC notes that ACCI/NFF appear to contend that the AIRC is required to adopt a ‘conservative approach’ when having regard to the objects of the Act.¹⁷

¹⁰ See s 88B(1) of the WRA.

¹¹ S 15AA *Acts Interpretation Act 1901* (Cth).

¹² See s 3(i).

¹³ See ss3(j).

¹⁴ See s 3(k).

¹⁵ See s 88B(1).

¹⁶ See s 88B(3).

¹⁷ ACCI/NFF, *Outline of Contentions in Response to ACTU Applications*, July 2004, [7.42].

HREOC does not agree with that contention.¹⁸ HREOC submits that there is nothing in the text or scheme or structure of the Act which would indicate that the AIRC should read down either the words of s 3 or s 88B(1) in the manner contended by ACCI/NFF.¹⁹

16. HREOC submits that introducing award provisions to enable women and men to manage their work and family responsibilities more effectively is consistent with the object of the WRA to ‘assist employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers’.

PART C: AUSTRALIA’S INTERNATIONAL OBLIGATIONS

17. As set out above, the AIRC is required to determine the applications before it in a manner that will ‘further the object of the Act’²⁰ to ‘assist in giving effect to Australia’s international obligations in relation to labour standards’.²¹ In addition, s 93A of the WRA provides:

93A Commission to take account of Family Responsibilities Convention

In performing its functions, the Commission must take account of the principles embodied in the Family Responsibilities Convention, in particular those relating to:

- (a) preventing discrimination against workers who have family responsibilities; or*
- (b) helping workers reconcile their employment and family responsibilities.*

18. As well as the *Convention Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities* (ILO 156)²² several other international instruments impose obligations on Australia in relation to labour standards.²³ Those include:

- (a) the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW);²⁴
- (b) the *Convention Concerning Discrimination in Respect of Employment and Occupation* (ILO 111);²⁵ and
- (c) the *Convention on the Rights of the Child* (CROC).²⁶

¹⁸ HREOC also does not agree with ACCI’s contention that this was the approach taken by Commissioner Lewin in *Award Simplification decision in relation to the Vehicle Industry (Repair, Services and Retail) Award 1983* (2002) [PS2974] (see Commissioner Lewin at [22]).

¹⁹ D Pearce and R Geddes, *Statutory Interpretation in Australia* (5th ed, 2001), [2.20] and the cases cited therein. Nor does the Second Reading Speech or Explanatory Memorandum to the *Workplace Relations and other Legislation Amendment Act 1996* (Cth) (which inserted ss 3 and 88B into the WRA) indicate that Parliament intended that the AIRC adopt a ‘conservative approach’ when having regard to the objects of the Act: Second Reading Speech, *Workplace Relations and Other Legislation Amendment Act 1996*, Commonwealth, House Hansard, 23 May 1996, p 1295.

²⁰ See s 88B(1) of the WRA.

²¹ See s 3(k) of the WRA.

²² Opened for signature 23 June 1981; entered into force for Australia 30 March 1990, [1991] ATS 7.

²³ Cf ACCI/NFF, *Outline of Contentions in Response to ACTU Applications*, July 2004, [7.3].

²⁴ Opened for signature 18 December 1979; entered into force for Australia 28 July 1983, [1983] ATS 9.

²⁵ Opened for signature 25 June 1958; entered into force for Australia 15 June 1973, [1974] ATS 12.

19. In interpreting Australia's obligations under those instruments the AIRC can have regard to the comments of expert bodies with responsibility for monitoring the progress made by States Parties in the implementation of those obligations. While the observations made by relevant monitoring bodies are not binding on the AIRC, they are relevant and significant, given that they are from committees composed of experts from a wide range of countries.²⁷ Similarly the AIRC may also have regard to interpretation of treaty obligations by other United Nations bodies, which again though not binding on the AIRC may be persuasive. Indeed Australian courts have accepted that guidance as to the meaning and effect of international conventions may be gathered from the writings and decisions of learned authors, foreign courts and expert international bodies.²⁸
20. The AIRC must determine the applications before it in a manner that '*assists Australia to give effect to its international obligations in relation to labour standards*'.²⁹ As noted by the ILO in relation to ILO 156, in giving effect to its international obligations under ILO 156, like other human rights instruments, Australia is required to '*be committed to taking continuous action towards eliminating discrimination in ways that are most appropriate to the individual circumstances of the state*'.³⁰ The rationale for this is that '*societies undergo a dynamic and permanent process of evolution, [such that] equality will remain an elusive goal unless the measures taken to combat discrimination are adapted regularly to new problems and circumstances*'.³¹ In any event HREOC submits that considerable scope remains for Australia to implement its relevant international obligations.

(a) ILO 156

21. ILO 156 deals specifically with the issue of family responsibilities and employment. It requires Australia to take all measures appropriate to national conditions and practice to:
- (a) ensure that family responsibilities shall not, as such, constitute a valid reason for termination of employment;³² and

²⁶ Opened for signature 20 November 1989; entered into force for Australia 17 December 1990, [1991] ATS 4.

²⁷ H Burmester, 'Impact of Treaties and International Standards' (1995) 17 *Sydney Law Review* 127, 145. See also H Charlesworth, M Chiam, D Hovell and G Williams, 'Deep Anxieties: Australia and the International Legal Order', 25 *Sydney Law Review* 423, 457-459.

²⁸ *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 392 (Mason CJ), 396-7 and 399-400 (Dawson J), 405 (Toohey J), 416 (Gaudron J), 430 (McHugh J); *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 100, 117 (Gummow J); *Commonwealth v Hamilton* (2000) 108 FCR 378 at 388 per Katz J; *Commonwealth v Bradley* (1999) 95 FCR 218, 237 (Black CJ). Note also *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 294-5 (Lord Scarman). See as examples of references to the jurisprudence of human rights treaty bodies *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 42 (Brennan J (with whom Mason CJ and McHugh J agreed)); *Dietrich v The Queen* (1992) 177 CLR 292, 307 (Mason CJ and McHugh J); *Johnson v Johnson* (2000) 174 ALR 655, [38] (Kirby J); *Commonwealth v Bradley* (1999) 95 FCR 218, 237 (Black CJ); *Commonwealth v Hamilton* (2000) 108 FCR 378, [36] (Katz J); *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54.

²⁹ See s 3(k) of the WRA.

³⁰ ILO, *General Survey: Workers with Family Responsibilities*, International Labour Conference, 80th Session 1993, Geneva, Report III Part 4B, [251]. Cf ACCI/NFF, Outline of intentions in Response to ACTU Applications, July 2004, [7.18].

³¹ ILO, *General Survey: Workers with Family Responsibilities*, International Labour Conference, 80th Session 1993, Geneva, Report III Part 4B, [251].

³² See art 8.

- (b) take account of the needs of workers with family responsibilities in the terms and conditions of employment with a view to creating effective equality of opportunity for men and women workers.³³
22. As has been observed by the International Labour Organisation (ILO),³⁴ ILO 156 has a dual purpose. It seeks to create equality of opportunity between men and women workers with family responsibilities, and between men and women with such responsibilities and workers without such responsibilities.³⁵ The ILO's rationale for this approach is that full equality of opportunity and treatment of men and women in the workforce cannot be achieved without broader social changes. This is because the 'excessive burden' of caring and household responsibilities is still borne disproportionately by women, which constitutes 'one of the most important reasons for their continuing inequality in employment and occupation'.³⁶ Consequently, ILO 156 recognises that employment practices aimed at assisting both male and female employees to manage better the conflict between paid work and family can bring about greater gender equality in the workplace as they enable men and women with family responsibilities to participate in the labour market more easily, and encourage men to take greater responsibility for family care.³⁷ Flexible work arrangements which are available to men and women also avoid further entrenching traditional, gendered divisions of family caring responsibilities.³⁸
23. The ILO has emphasised that the provisions of ILO 156 should be interpreted and applied broadly saying that, 'it is evident from the terms of this instrument that its implementation requires measures to be taken in a number of distinct areas'.³⁹ ILO Recommendation 165⁴⁰ spells out more concrete measures that can be taken by States to implement their obligations under ILO 156. ILO Recommendation 165 suggests that, in relation to States' obligations regarding the terms and conditions of employment, States pay particular attention to measures aimed at providing employees with family responsibilities access to:
- (a) more flexible work arrangements, including in relation to work schedules and holidays;⁴¹
- (b) parental leave without any diminution of employment conditions or rights;⁴² and

³³ See art 4(b).

³⁴ The expert body responsible for considering the progress made by States in implementing their obligations under various ILO treaties.

³⁵ ILO, *General Survey: Workers with Family Responsibilities*, International Labour Conference, 80th Session 1993, Geneva, Report III Part 4B, [25].

³⁶ *Ibid*, [25], [62]. See also, ILO, *Time for Equality at Work*, International Labour Conference, 91st Session 2003, Geneva, Report I(B), [228]-[241].

³⁷ *Ibid*. See also, B Smith and J Riley, 'Family-friendly Work Practices and The Law', (2004) 26(3) *Sydney Law Review* 395, 397.

³⁸ ILO, *Time for Equality at Work*, International Labour Conference, 91st Session 2003, Geneva, Report I(B), [241]. See also, B Smith and J Riley, 'Family-friendly Work Practices and The Law', (2004) 26(3) *Sydney Law Review* 395, 397.

³⁹ *Ibid*.

⁴⁰ Adopted by the ILO at the International Labour Conference, 67th Session, Geneva, 23 June 1981.

⁴¹ See cl 18(b).

⁴² See cl 22(1).

- (c) leave in the event of the illness of a dependent child or other member of the employee's immediate family.⁴³

(b) CEDAW

24. One of the objects of the SDA is to give effect to certain provisions of CEDAW, which is annexed to the SDA. The fundamental object of CEDAW is to prevent discrimination against women and create equality between men and women.
25. The preamble to CEDAW recognises that the '*upbringing of children requires a sharing of responsibility between men and women and society as a whole*' and that '*a change in the traditional role of women in society and in the family is needed to achieve full equality between men and women*'. Relevantly the operative provisions of CEDAW require Australia to take all appropriate measures to:
- (a) ensure that family education includes the recognition of the '*common responsibility of men and women in the upbringing and development*' of their children;⁴⁴
 - (b) encourage '*the provision of necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life*';⁴⁵ and
 - (c) eliminate discrimination against women in all its forms, including in the area of employment.⁴⁶ While 'discrimination' in that provision refers to '*any distinction, exclusion or restriction made on the basis of sex*', the Committee on the Elimination of Discrimination Against Women⁴⁷ has made it clear that that term is to be given a broad and beneficial interpretation, and can include acts that would constitute discrimination on the ground of pregnancy.⁴⁸
26. At its annual meeting in March 2004 the United Nations Commission on the Status of Women (CSW) confirmed its commitment to employment measures as a means of achieving gender equality.⁴⁹ At that meeting CSW urged States to:

*adopt and implement legislation and/or policies to close the gap between women's and men's pay and promote reconciliation of occupational and family responsibilities, including through reduction of occupational segregation, introduction or expansion of parental leave, flexible working arrangements, such as voluntary part time work, teleworking and other home-based work.*⁵⁰

(c) ILO 111

27. ILO 111 is aimed at preventing and eliminating discrimination in employment. 'Discrimination' for the purposes of the ILO 111 includes 'any distinction made on

⁴³ See cls 23(1) and 23(2).

⁴⁴ See art 5(b).

⁴⁵ See art 11(2)(c).

⁴⁶ See arts 1, 2 and 11.

⁴⁷ The expert body with responsibility for considering the progress made by States Parties in implementing CEDAW (see art 17(1)).

⁴⁸ See by way of analogy, *Thomson v Orica Australia Pty Ltd* [2002] FCA 939, [168].

⁴⁹ Commission on the Status of Women, 48th Session, 1-12 March 2004.

⁵⁰ Commission on the Status of Women, *The role of men and boys in achieving gender equality: Agreed Conclusions*, 48th Session, 1-12 March 2004, [6(m)].

the basis of sex or such other distinction, exclusion or preference, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation'.⁵¹ The ILO has noted that this includes discrimination on the basis of family responsibilities or pregnancy.⁵²

28. The operative provisions of ILO 111 require Australia to undertake all appropriate measures to declare and pursue a national policy designed to promote equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination therein. It also requires Australia to:⁵³
- (a) seek the co-operation of employers' and workers' organisations and other appropriate bodies in promoting the acceptance and observance of that policy;⁵⁴
 - (b) enact such legislation ... as may be calculated to secure the acceptance and observance of that policy;⁵⁵ and
 - (c) ... modify any administrative instructions or practices which are inconsistent with that policy.⁵⁶

(d) CROC

29. The preamble to CROC recognises that the family, '*as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities in the community*'. Relevantly article 18 of CROC requires Australia to take all appropriate measures to:
- (a) ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of children;⁵⁷ and
 - (b) render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities.⁵⁸
30. As the United Nations Children's Fund (UNICEF) has noted in its guide to the implementation of CROC,⁵⁹ article 18 concerns the balance of responsibilities between parents and the State in the performance of parents' child-rearing responsibilities.⁶⁰ It also reflects the provisions of article 3(2) in which States Parties are required to ensure a child such protection and care as is necessary for his or her

⁵¹ See art 1.

⁵² International Labour Organisation, *General Survey: Workers with Family Responsibilities*, International Labour Conference, 80th Session 1993, Geneva, Report III Part 4B, [3].

⁵³ See art 2.

⁵⁴ See art 3(a).

⁵⁵ See art 3(b).

⁵⁶ See art 3(c).

⁵⁷ See art 18(1).

⁵⁸ See art 18(2).

⁵⁹ UNICEF, *Implementation Handbook for the Convention on the Rights of the Child*, (Revised Ed, 2002).

⁶⁰ Ibid, 243. See also Human Rights Committee, General Comment 17, 1989, (UN Doc HRI/GEN/1/Rev 5, 133) in which the Committee states, in relation to art 17 of the International Convention on Civil and Political Rights, which is similar to art 18 of CROC, that '*since it is quite common for the father and mother to be gainfully employed outside the home, reports by States Parties should indicate how society, social institutions are discharging their responsibility to assist the family in ensuring the protection of the child*'.

wellbeing, and article 27(3) as regards a child's right to an adequate standard of living.⁶¹ In relation to the implementation of article 18, UNICEF has noted that 'generous maternity and paternity leave and pay and "family-sensitive" working conditions clearly meet the needs of both children and working parents'.⁶²

Conclusion

31. HREOC submits that the introduction of provisions into the relevant awards that assist employees to balance their paid work and family and caring responsibilities more effectively would assist Australia to give effect to its obligations under ILO 156, ILO 111, CEDAW and CROC, and so 'to give effect to its international obligations in relation to labour standards' in accordance with s 3 of the WRA.

PART D: FEDERAL DISCRIMINATION LAW

32. Under s 93 of the WRA the AIRC is required to take account of the principles embodied in the SDA and DDA relating to discrimination in relation to employment:

93 Commission to take account of Racial Discrimination Act, Sex Discrimination Act, Disability Discrimination Act and Age Discrimination Act

In the performance of its functions, the Commission shall take account of the principles embodied in the Racial Discrimination Act 1975, the Sex Discrimination Act 1984, the Disability Discrimination Act 1992 and the Age Discrimination Act 2004 relating to discrimination in relation to employment.

33. There is a considerable body of legal authority concerning the construction and application of relevant provisions of the SDA and DDA. Australian courts and tribunals charged with the task of construing and applying discrimination legislation have regard to this body of authority, which is at least persuasive, and in some circumstances binding. Many of the legislative provisions the subject of the cases have remained unamended so that the cases are of strong persuasive value.⁶³ In light of this, and having regard to s 93 of the WRA, the AIRC ought to have regard to the principles of discrimination embodied in the relevant legislation, as those principles have been interpreted and applied previously by courts and tribunals.⁶⁴ This was the approach adopted in relation to s 93 by Deputy President Ives in *Community Public Sector Union v CSL Limited*.⁶⁵

⁶¹ UNICEF, *Implementation Handbook for the Convention on the Rights of the Child*, (Revised Ed, 2002), 250.

⁶² *Ibid*, 253.

⁶³ *Cf* ACCI/NFF, *Outline of Contentions in Response to ACTU Applications*, July 2004, [8.3]-[8.4], [8.14]-[8.15]. See *Takapana Investments Pty Ltd v Teco Information Systems Co Ltd* (1998) 153 ALR 377, 383-384 (Goldberg J); *Towney v Minister for Land and Water Conservation for New South Wales* (1997) 147 ALR 402, 412; *Esso Australia Resources Ltd v FCT* (1997) ALR 117, 121. This is for the reason that, if the legislature has chosen not to make any change to the Act following its interpretation by the judiciary, there are strong grounds for thinking that the legislature is satisfied with the court's ruling: D Pearce and R Geddes, *Statutory Interpretation in Australia*, (5th Ed, 2001), [1.7].

⁶⁴ *Cf* ACCI/NFF, *Outline of Contentions in Response to ACTU Applications*, July 2004, [8.63].

⁶⁵ (2002) [PR92178], [58].

The Sex Discrimination Act 1984

34. Equality between men and women, the importance of pregnancy as a social function, and the right of women to combine work, pregnancy and family are fundamental principles underlying the SDA.⁶⁶ In particular, the SDA renders it unlawful to directly discriminate against a person by dismissing them from their employment on the basis of their family responsibilities; and proscribes indirect discrimination on the basis of sex and pregnancy.
35. Anti-discrimination legislation in Australia has separate definitions of direct and indirect discrimination. The tests for each vary considerably. Direct discrimination arises where the treatment of a person is grounded upon their status, for example their sex or their family responsibilities, or upon a characteristic appertaining generally or generally imputed to their status, and where the person is treated less favourably than someone with a different status or without such a characteristic. The basis of the definition of direct discrimination is that of a comparison between the treatment of the aggrieved person and some other person without that status (the comparator). Indirect discrimination is concerned with the impact of policies and practices which on their face appear to operate in a neutral or non discriminatory manner but which have a disproportionate detrimental impact on people of a particular status and are unreasonable. Indirect discrimination identifies systemic discrimination and targets the factors that lead to a result which disadvantages one particular group.⁶⁷ The principles of direct and indirect discrimination as they apply in relation to employees with family responsibilities are discussed below.

Direct Discrimination and family responsibilities

36. The provision made by federal discrimination law in respect of discrimination on the ground of family responsibilities is confined to direct discrimination in respect of the termination of employment. This has resulted in an increased reliance upon other grounds, such as sex, where the employer's conduct does not fit comfortably within the concept of direct discrimination or where the detriment suffered is not confined to the termination of the employment.
37. Section 14(3A) of the SDA renders it unlawful to dismiss a person from their employment on the ground of their family responsibilities, as follows:

14 Discrimination in employment or in superannuation

(3A) It is unlawful for an employer to discriminate against an employee on the ground of the employee's family responsibilities by dismissing that employee.

38. The definition of discrimination on the ground of family responsibilities is limited under s 7A of the SDA to direct discrimination:

⁶⁶ See s 3 of the SDA. See also, HREOC, *A Time to Value: Proposal for a national paid maternity leave scheme*, 2002, 73-77.

⁶⁷ C Ronalds and R Pepper, *Discrimination Law and Practice* (Federation Press, 2004), 32.

7A *Discrimination on the ground of family responsibilities*

For the purposes of this Act, an employer discriminates against an employee on the ground of the employee's family responsibilities if:

- (a) *the employer treats the employee less favourably than the employer treats, or would treat, a person without family responsibilities in circumstances that are the same or not materially different; and*
- (b) *the less favourable treatment is by reason of:*
 - (i) *the family responsibilities of the employee; or*
 - (ii) *a characteristic that appertains generally to persons with family responsibilities; or*
 - (iii) *a characteristic that is generally imputed to persons with family responsibilities.*

39. Discrimination on the basis of family responsibilities in s 14(3A) is limited to termination of employment including constructive dismissal.⁶⁸ However, the identification of a 'comparator' and causal connection required to be established do pose difficulties for complainants, especially in cases in which the evidence does not clearly establish why flexible work arrangements were refused, or where all such requests (whether or not for reasons associated with family responsibilities) are refused.⁶⁹

40. As a result of these limitations, the indirect discrimination provisions on grounds other than family responsibilities, namely sex and pregnancy, have also been relied upon by complainants to seek part time work and other flexible working arrangements.

Indirect discrimination and family responsibilities

41. The effect of the prohibition against indirect discrimination is to forbid '*practices that are fair in form but discriminatory in practice*'.⁷⁰ Indirect discrimination on the basis of sex is proscribed by s 5(2) of the SDA as follows:

5 Sex Discrimination

...

- (2) *For the purposes of this Act, a person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of sex of the aggrieved person if the*

⁶⁸ See, for example, *Evans v National Crime Authority* [2003] FMCA 375, [106]; *Song v Ainsworth Game Technology Pty Ltd* [2002] FMCA 31, [83]. See also, *Mayer v Australian Nuclear Science and Technology Organisation* [2003] FMCA 209, [74].

⁶⁹ For further discussion of the difficulties these pose for complainants see, J von Doussa QC and C Lenehan, 'Barbequed or burned? Flexibility in work arrangements and the Sex Discrimination Act', forthcoming article to be published in the UNSW Law Journal.

⁷⁰ *Griggs v Duke Power* (1971) 401 US 424, 431.

discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person.

(3) *This section has effect subject to sections 7B and 7D.*

42. Section 7B of the SDA sets out the factors to be taken into account in determining whether a condition, requirement or practice that is, or is likely to have, the effect of disadvantaging women employees (who have borne much of the load of family responsibilities) is reasonable in the circumstances. That section provides:

7B Indirect discrimination: reasonableness test

(a) *A person does not discriminate against another person by imposing, or proposing to impose, a condition, requirement or practice that has, or is likely to have, the disadvantaging effect mentioned in section 5(2), 6(2) or 7(2) if the condition, requirement or practice is reasonable in the circumstances.*

(b) *The matters to be taken into account in deciding whether a condition, requirement or practice is reasonable in the circumstances include:*

(i) *the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and*

(ii) *the feasibility of overcoming or mitigating the disadvantage; and*

(iii) *whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.*

43. Therefore the elements of indirect discrimination required to be established by an applicant are as follows:

- (a) the discriminator imposes a requirement, condition or practice;
- (b) the requirement, condition or practice has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person; and
- (c) the requirement condition or practice is not reasonable in all the circumstances.

Insofar as they are relevant to the submissions of HREOC, these elements of indirect discrimination are discussed below.

“Condition, requirement or practice disadvantaging women”

44. While the SDA does not expressly prohibit indirect discrimination on the ground of family responsibilities, there is an established line of (in the context of sex discrimination) that a condition, requirement or practice that employees be available to work full time to maintain their position, status and level of remuneration can constitute a condition, requirement or practice within the meaning of s 5(2) of the SDA. Further, courts have found on numerous occasions that a requirement,

condition or practice to work full time has the effect of disadvantaging women with family responsibilities as the primary carers of children, particularly young children.⁷¹

45. In *Escobar v Rainbow Printing Pty Ltd (No 2)*,⁷² a female employee sought to return from maternity leave on a part time basis. Her request was denied and her employment later terminated. Driver FM found that this amounted to direct discrimination on the basis of family responsibilities (discussed above), and further that ~~but~~ in the event that this finding could not be supported, that the respondent's conduct constituted indirect discrimination on the basis of sex.⁷³ His Honour held that the refusal to countenance part time work involved the imposition of an unreasonable condition that was likely to disadvantage women because of their disproportionate responsibility for the care of children.⁷⁴ Driver FM cited with approval the decision of HREOC (sitting then as it did as a tribunal) in *Hickie v Hunt & Hunt*,⁷⁵ in which Commissioner Evatt had stated:

Although no statistical data was produced at the hearing, the records produced by Hunt & Hunt suggest that it is predominantly women who seek the opportunity for part time work and that a substantial number of women in the firm have been working on a part time basis. I also infer from general knowledge that women are far more likely than men to require at least some periods of part time work during their careers, and in particular, a period of part time work after maternity leave, in order to meet family responsibilities. In these circumstances I find that the condition, requirement that Ms Hickie work full time to maintain her position was a condition or requirement likely to disadvantage women.

46. In *Hickie v Hunt & Hunt*, the complainant had taken maternity leave shortly after having been made a contract partner at the respondent law firm. She complained of a range of less favourable treatment during the period of her maternity leave and following her return to work on a part time basis. Relevantly an area of her practice was removed from her on the basis that it could not be managed working part time.
47. Commissioner Evatt found that the respondent's conduct did not amount to direct discrimination on the basis of family responsibilities. Rather the respondent's conduct constituted indirect sex discrimination:

The removal of Ms Hickie's practice occurred partly because she intended to work part time on her return and could not manage such a large practice without supporting staff. Removing her practice, rather than finding other alternatives to maintain it in whole, or in part, may have appeared the most convenient option to the firm ... more convenient than dividing her plaintiff work, leaving it temporarily with [another partner], or perhaps assigning another member of staff to work with [that partner] until her return to take over. However, if part of the motivation was her intention to work part time, the removal of her practice can be regarded as the consequence of her inability to meet a requirement that she work full time or manage staff while absent as a condition of maintaining her plaintiff practice. What the firm was saying in effect was that because she was not intending to return to full time work for some time, they

⁷¹ *Hickie v Hunt & Hunt* (1998) EOC 92-210, [6.17.10]-[6.17.12]; *Victoria v Shou* (2001) 3 VR 655, [17], [25]; *Escobar v Rainbow Printing Pty Ltd (No 2)* [2002] FMCA 122, [33], [37]; *Mayer v ANSTO* [2003] FMCA 209, [68]-[73]; *Gardiner v New South Wales WorkCover Authority* [2003] NSWADT 184, [61]-[62].

⁷² [2002] FMCA 122.

⁷³ *Ibid*, [37].

⁷⁴ *Ibid*.

⁷⁵ (1998) EOC 92-910.

would not make an effort to find other alternatives to support her in maintaining all or part of her plaintiff practice, but would remove all of it. Here intention to work part time after her maternity leave was seen as a basis for stripping her of her completely of work she had built up over several years.

*The requirement to work full time is, in my view, a requirement with which a substantially higher proportion of men comply or are able to comply. In making this conclusion, I rely on the evidence of the respondent about the substantial number of women in their firm who had periods of maternity leave and part time work as well as my general knowledge and experience of employment in the legal profession. It is a requirement with which the complainant could not comply due to her family responsibilities.*⁷⁶

48. In *Mayer v ANSTO*,⁷⁷ the applicant similarly wanted to work part time following her return from maternity leave. Driver FM found that the respondent's requirement that the applicant work full time, when part time work was available within the organisation, constituted indirect sex discrimination within the terms of s 5(2). In finding that women are disadvantaged by such a requirement his Honour stated that:

*I need no evidence to establish that women per se are disadvantaged by a requirement that they work full time. As I observed in *Escobar v Rainbow Printing (No. 2)* and as Commissioner Evatt found in *Hickie v Hunt & Hunt* women are more likely than men to require at least some periods of part time work during their careers, and in particular a period of part time work after maternity leave, in order to meet family responsibilities.*⁷⁸

49. In the recent decision of the Federal Magistrates Court in *Howe v Qantas Airways Ltd*,⁷⁹ Driver FM stated in obiter that:

*[N]otwithstanding recent advances and societal attitudes, it is open to the court to take judicial notice that as a matter of common observation, women have the predominant role in the care of babies and infant children (including breastfeeding) and it follows from this that any full time work requirement is liable to disproportionately affect women.*⁸⁰

...

*The point is that the present state of Australian society shows that women are the dominant childcarers to young children. While that position remains (and it may well change over time) s 5(2) of the SDA operates to protect women against indirect sex discrimination in the performance of that caring role.*⁸¹

50. The principles in relation to indirect discrimination discussed above were considered by Deputy President Ives when applying s 93 of the WRA in *Community and Public Sector Union v CSL Limited*.⁸² In that case the respondent employer refused to allow the applicant employee to finish at 3pm instead of 4pm to allow her to pick up her child from school. Deputy President Ives held the requirement that the employee finish work at 4pm as being unreasonable in all the circumstances, in breach of the

⁷⁶ Ibid, [6.17.10]-[6.17.10].

⁷⁷ [2003] FMCA 209.

⁷⁸ Ibid, [70].

⁷⁹ [2004] FMCA 242. Note the applicant has filed an appeal from the judgement of Driver FM.

⁸⁰ Ibid, [113].

⁸¹ Ibid, [118].

⁸² [2002] PR21278.

relevant award. In considering the application of s 93 the Deputy President stated that:

The Sex Discrimination Act 1984 (Cth) does not prohibit indirect discrimination on the basis of family responsibilities. However, sections 5 and 14(2) of the Sex Discrimination Act prohibit indirect discrimination in the area of employment on the ground of, amongst other things, the employee's sex. It is arguable that, depending on the reasonableness (or otherwise) of the requirement in the circumstances, imposing a requirement upon an employee to work certain hours which preclude the care of children may amount to indirect discrimination on the basis of the sex of the employee: Hickie v Hunt & Hunt [1998] HREOCA 8 (March 8) Evatt C at 6.17.10; Bogle v Metropolitan Health Service Board (2000) EOC 93-069 – Equal Opportunity Commission of Western Australia at paragraphs 183-192; Esobar v Rainbow Printing Pty Ltd (No 2) [2002] FMCA 122 (5 July 2002) Driver FM – contents Magistrates' Court of Australia at paragraph 37.

51. One exception to this general line of reasoning is the decision in *Kelly v TPG Internet Pty Ltd*,⁸³ Raphael FM held that the refusal to provide Ms Kelly with part time employment was more correctly characterised as a refusal to provide her with a benefit rather than the imposition of a condition, requirement or practice that was a detriment.⁸⁴ Any question as to the reasonableness of the condition did not therefore arise.
52. In *Howe v Qantas Airways Limited* in obiter comments Driver FM agreed with the Sex Discrimination Commissioner intervening in that case as amicus curiae that the decision in *Kelly v TPG Internet Pty Ltd* is confined to its particular facts and should not be followed. In that regard his Honour observed that:

[T]he approach of Raphael FM in Kelly presents some difficulties. The first is that it fails to address the role of the term "practice" in s 5(2). The second is that if the refusal of a benefit does not constitute the imposition of a condition, practice or requirement then there can never be a case of indirect sex discrimination based upon the refusal of a benefit. This would leave s 14(2) with very little work to do, if any, in the case of indirect discrimination. Thirdly, [as the Sex Commissioner] notes that when read together, the decisions of Mayer and Kelly appear to stand for the proposition that an employer who inconsistently provides part time work may be liable under the SDA but an employer who consistently provides part time work can escape liability. Finally [as the Sex Commissioner] submits that by characterising the refusal of the employer to allow Ms Kelly to work part time is a refusal to confer a benefit or an advantage, his Honour conflated the notion of "disadvantage" with the imposition of a condition, requirement or practice. She submits that the two are separate elements of s 5(2) and must remain so if the provision is to operate effectively. Were it otherwise the section could be potentially left with very little work to do as employers sought to define the act the subject of a complaint in a way that resulted in the conferral of a benefit, thereby escaping the purview of the SDA.⁸⁵

...

It follows that I disagree with Raphael FM, to the extent he was saying that in Kelly that a consistent refusal of part time work could never be discriminatory for the purposes of s 5(2) of the SDA.⁸⁶

⁸³ [2003] FMCA 584.

⁸⁴ Ibid, [82].

⁸⁵ Ibid, [124].

⁸⁶ Ibid, [125].

An additional argument against a restrictive interpretation of s 5(2) is that it increases the role of direct at the expense of indirect discrimination, with potential adverse effects.⁸⁷

53. His Honour concluded that, consequently:

In the case of indirect discrimination, an employer may be held liable for refusing access to part time employment upon the basis that it has the effect of disadvantaging women. It does not matter if the employer refuses part time employment to all employees regardless of sex. If an employer adopts a practice of refusing all requests for part time work the consequence may be indirectly discriminatory. This might be characterised as the refusal of a benefit or as the imposition of a detriment for the purposes of s 14(2). It does not follow, as was asserted on behalf of the respondent in Kelly, that an employee would in consequence be able to demand part time employment from an employer. Any employer is entitled to refuse part time employment without breaching the SDA if the refusal is reasonable.⁸⁸

54. The approach of Driver FM in *Howe v Qantas Airways Ltd* to the question of whether a requirement to work full time constitutes a condition, requirement or practice disadvantaging women for the purposes of s 5(2) of the SDA appears to be the preferable approach, and one which more readily accords with the purpose of the legislation and the weight of the authorities.

“Reasonable in the circumstances”

55. As Driver FM noted in *Howe v Qantas Airways Ltd*⁸⁹ refusal to provide part time work or flexible working arrangements will not constitute indirect discrimination under the SDA unless the requirement, condition or practice justifying that refusal is unreasonable in the circumstances. The question of whether a ‘condition, requirement or practice’ is ‘reasonable in the circumstances’ is a question of fact to be determined on the evidence and having regard to the factors, liberally construed, set out in s 7B of the SDA.

56. The following principles can be distilled from the jurisprudence in relation to the concept of reasonableness in discrimination law:⁹⁰

- (a) The test of reasonableness is an objective one, which requires the court to weigh the nature and extent of the discriminatory effect, on one hand, against the reasons advanced in favour of the condition or requirement, on the other.⁹¹
- (b) Though the test is an objective test, the subjective preferences of an aggrieved person or respondent may be relevant in determining whether the condition or requirement is reasonable.⁹²

⁸⁷ Ibid, [126].

⁸⁸ Ibid, [129].

⁸⁹ Ibid, [129].

⁹⁰ See *Catholic Education Office v Clarke* [2004] FCAFC 197, [115] (Sackville and Stone JJ).

⁹¹ *Secretary, Department of Foreign Affairs and Trade v Styles* (1989) 23 FCR 251, 263 (Bowen CJ and Gummow J); *Waters v Public Transport Corporation* (1991) 173 CLR 349, 395-396 (Dawson and Toohey JJ), 383 (Deane J).

⁹² *Commonwealth v Human Rights and Equal Opportunity Commission* (1995) 63 FCR 74, 82-83 (Lockhart J) cited with approval in *Commonwealth Bank v Human Rights and Equal Opportunity Commission* (1997) 88 FCR 78, 111 (Sackville J).

- (c) The test of reasonableness is less demanding than one of necessity, but more demanding than a test of convenience.⁹³ It follows that the question is not whether the decision to impose the requirement or condition was correct (or ‘whether the alleged discriminator could have made a better or more informed decision’), but whether it has been shown not to be objectively reasonable having regard to all the circumstances.⁹⁴
- (d) Reasonableness is a question of fact which can only be determined by taking into account all of the circumstances of the case, which are to be widely drawn and will usually include the reasons advanced for the requirement or condition, the financial or economic circumstances of the respondent and the availability of alternative methods of achieving the alleged discriminator’s objectives.⁹⁵ However the fact that there is a reasonable alternative that might accommodate the interests of the aggrieved person does not of itself establish that a requirement or condition is unreasonable.⁹⁶

The *Disability Discrimination Act 1992*

57. Inflexible working conditions may also amount to indirect discrimination⁹⁷ against carers under the DDA if the conditions impact on or disadvantage greater number of carers of people with disabilities relative to people who are not carers, and are unreasonable in the circumstances.⁹⁸

Conclusion

58. The Full Bench is required to take account of the principles embodied in the SDA relating to discrimination in respect of employment (s 93 WRA). It will be apparent from the above that there are at least three such general principles which are relevant for present purposes:

- First, the family responsibilities discrimination provisions reflect the principle that discrimination against workers with family responsibilities should be eliminated (see the object specified in s 3(ba) SDA).
- Second, the indirect sex discrimination provisions (as interpreted by Australian courts) recognise that women currently bear a disproportionate share of family responsibilities in Australia and are therefore likely to be disadvantaged by inflexible work practices. Proscribing such practices recognises the principle that

⁹³ *Secretary, Department of Foreign Affairs and Trade v Styles* (1989) 23 FCR 251, 263 (Bowen CJ and Gummow J).

⁹⁴ *Commonwealth v Human Rights and Equal Opportunity Commission* (1995) 63 FCR 74, 87 (Sheppard J); *Australian Medical Council v Wilson* (1996) 68 FCR 46, 61 (Heerey J); *Commonwealth Bank v Human Rights and Equal Opportunity Commission* (1997) 88 FCR 78, 112-113 (Sackville J).

⁹⁵ *Commonwealth Bank v Human Rights and Equal Opportunity Commission* (1997) 88 FCR 78, 111 (Sackville J); *Waters v Public Transport Corporation* (1991) 173 CLR 349, 395 (Dawson and Toohey JJ), 383-384 (Deane J).

⁹⁶ *Commonwealth Bank v Human Rights and Equal Opportunity Commission* (1997) 88 FCR 78, 88 (Beaumont J); *State of Victoria v Schou* [2004] VSCA 71, [26] (Phillips JA, Buchanan JA agreeing).

⁹⁷ See s 6 which defines ‘indirect discrimination’.

⁹⁸ See s 15 which makes it unlawful for an employer to discriminate against a person on the ground of a disability of an associate of the employee. ‘Associate’ is defined in s 4 to include, a spouse or partner or relative.

discrimination on the ground of sex in the area of work should be eliminated (see the object specified in s 3(b) SDA).

- Third, and perhaps more fundamentally, the elimination of such practices will promote the principle that there should be equality between men and women, including in the area of work (see s 3(d) SDA).⁹⁹

59. The Commission submits that consideration by the Full Bench of those general principles of non-discrimination and promotion of equality should weigh in favour of the insertion of specific award provisions which provide for flexible work practices for men and women with family responsibilities; but which do not in themselves involve any discriminatory practices or conditions (for example, the diminution of employment conditions for employees with family and caring responsibilities as compared with other employees). A similar result follows from a consideration of the principles embodied in the DDA.

PART E: LIMITATIONS OF DISCRIMINATION LAW

60. Discrimination matters determined by the courts and tribunals set a precedent and raise publicity about discrimination issues. As such they may encourage employers to adopt policies and practices which assist employees to balance their work and family responsibilities.¹⁰⁰ However, discrimination law is limited in its capacity to achieve systemic or structural workplace change. This is for two reasons: the individual complaints based character of discrimination law, and the limited coverage afforded to men discriminated against on the basis of their family responsibilities under the SDA. HREOC submits that these limitations are a further reason why the AIRC should introduce provisions into awards which assist employees balance their work and family responsibilities.

Individual complaints-based character of discrimination law

61. Discrimination law provides civil redress to *individuals* who allege they have been discriminated against on a proscribed ground (such as sex or family responsibilities). A representative complaint may also be made to HREOC by a person on behalf of another person or persons aggrieved by the alleged discrimination.¹⁰¹ Individuals or representatives who make a claim do so at their own expense (which in the Federal Court or Federal Magistrates Court includes the risk of an adverse costs order being made against them).¹⁰² Being complaints-based, discrimination law develops on a case by case basis and its development is therefore necessarily piecemeal. Discrimination

⁹⁹ This is one of the core purposes of ILO 156, to which the family responsibility provisions of the SDA seek to give effect (see International Labour Organisation, *General Survey: Workers with Family Responsibilities*, Conference of the International Labour Organisation, 80th sess, Geneva (1993) Report III, Part 4B, at [25] and Explanatory Memorandum, Human Rights and Equal Opportunity Legislation Amendment Bill (No 2) 1992 (Cth), [6]–[8]).

¹⁰⁰ See M Thornton, *The Liberal Promise: Anti-Discrimination Law in Australia*, (1990); B Smith and J Riley, 'Family-friendly Work Practices and The Law', (2004) 26(3) *Sydney Law Review* 395, 416.

¹⁰¹ See ss 46P(2) and 46PB of the HREOC Act.

¹⁰² HREOC notes that pursuant to ss 33C and 33D of the *Federal Court Act 1977* (Cth) representative proceedings in the Federal Court can only be brought by persons aggrieved by the alleged discrimination. This requirement means that special interest groups will be precluded bringing representative complaints in the Federal Court, unless they can establish they are a person aggrieved by the alleged discrimination – which in some cases may be difficult. However the *Federal Magistrates Court Act 1999* (Cth) does not enable representative proceedings to be brought in the Federal Magistrates Court.

jurisprudence therefore does not provide a clear guide to employers and employees as to the scope of their rights and responsibilities. In its report on the inquiry into pregnancy and work, *Pregnant and Productive*, HREOC observed that:

*many employees and employers indicated that they also experienced difficulty with laws and practices relating to post-pregnancy, and considered that explanation and clarification of these issues would be of considerable benefit in the workplace.*¹⁰³

62. HREOC submits that specific provisions in awards which reflect discrimination law standards would systemise discrimination law standards, thereby creating greater certainty for both employers and employees as to their relevant rights and responsibilities. This could also encourage the preservation of employment relationships rather than leave the parties in the position of arguing about an application for discretionary relief, in most cases after the employment has ended, because differences about suitable working conditions could not be resolved.

Limited coverage of men under the SDA

63. The SDA provides limited protection to men. A man may bring a complaint under s 14(3A) of the SDA where his employment is terminated on the basis of his family responsibilities in certain circumstances.¹⁰⁴ Where the discrimination does not lead to termination of employment, it is unlikely that a man could successfully pursue a claim of indirect sex discrimination (given courts accept that a requirement to work full time disadvantages *women* because they continue to bear the majority of the burden of family and household responsibilities).¹⁰⁵ HREOC submits that specific provisions in awards would assist men to balance their paid work and family and caring responsibilities.¹⁰⁶

PART F: HREOC'S COMPLAINT HANDLING ROLE

64. As the federal complaint handling body in respect of complaints of unlawful discrimination under the SDA¹⁰⁷ and DDA,¹⁰⁸ HREOC receives many complaints relating to discrimination relating to parental leave, changes to the job while a person is on parental leave, and the availability of part time work or other flexible work arrangements. For example, in the 2003/2004 financial year 88% of all complaints received under the SDA related to discrimination in the area of employment and

¹⁰³ HREOC, *Pregnant and Productive*, (1999), 225 [14.2].

¹⁰⁴ Men wishing to make a complaint under the SDA must establish that their complaint is covered by one of ss 9(5) to 9(9) or ss 9(11) to 9(20) of the SDA; they cannot rely on s 9(10) of the SDA (sections 9(2) and 9(4) make clear that the SDA is an Act of limited effect. Its terms have effect by the operation of s 9(3) and ss 9(5) to 9(20), which reflect relevant heads of Commonwealth power. Section 9(10) provides that the proscribed provisions of Part II have effect in relation to the discrimination and sexual harassment '*against women*' to the extent that the provisions give effect to CEDAW. Hence the SDA has a wider application to discrimination against women than men).

¹⁰⁵ See discussion in paragraphs 40-45 above.

¹⁰⁶ Indeed some commentators suggest that real change in this area will not occur until men start to take up flexible work options. See B Gaze argues in 'Working Part Time: Reflections on 'Practicing' the Work – Family Juggling Act' (2001) 1(2) *QUTLJ* 199; J von Doussa QC and C Lenehan, 'Barbequed or burned? Flexibility in work arrangements and the Sex Discrimination Act', forthcoming article to be published in the UNSW Law Journal.

¹⁰⁷ See Part IIB of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

¹⁰⁸ *Ibid.*

64% of the total number of complaints made under the SDA related to discrimination on the grounds of sex, pregnancy and family responsibilities.¹⁰⁹

65. Almost half of the complaints received by HREOC settle through the confidential conciliation process; in the 2003/2004 financial year, 47% of complaints under the SDA settled through conciliation.¹¹⁰
66. It is generally acknowledged that complaints processes established by discrimination law are under-utilised and the complaints received by HREOC represent only a very small proportion of the incidence of discrimination.¹¹¹ HREOC notes that over the past four reporting years the number of complaints alleging discrimination on the basis of pregnancy has increased by approximately 19%.¹¹²
67. As noted previously, introducing award provisions that systemise the recent trends in Federal discrimination law would provide clearer guidance for employers and employees as to their rights and obligations.

PART G: RESPONSES TO SPECIFIC SUBMISSIONS

(a) Entitlement to request flexible working arrangements in the UK

68. HREOC notes the parties' contentions in relation to the amendment of employment laws in the UK to allow certain employees to request flexible working arrangements.¹¹³ HREOC seeks to assist the Full Bench by clarifying the nature of those laws and so sets out the relevant legislative provisions and regulations and a summary of the other relevant leave to which employees in the UK are entitled. Also, in response to the parties' contentions, HREOC sets out some of the key results of the UK Department of Trade's (DTI) first survey into the impact of the new provisions.

The *Employment Act 2002* (c.22) (UK)

69. The *Employment Act 2002* (c. 22) (UK) amended the *Employment Relations Act 1999* (c. 26) (UK) to allow employees who have:
 - (a) responsibility for the upbringing of a child under the age of 6 years old, or 18 years old where the child is disabled; and
 - (b) been continuously employed with that employer for at least 26 weeks,¹¹⁴

¹⁰⁹ HREOC, *Annual Report 2003-04*, 2004, 65.

¹¹⁰ Ibid.

¹¹¹ R Hunter, *Indirect Discrimination in the Workplace*, (1992), 75. In a different context, HREOC notes that in its recent national household telephone survey on the incidence and nature of sexual harassment, 28% of all interviewees said that they had personally experienced sexual harassment at some time in an area of public life but only 2% said they had pursued a complaint of sexual harassment through an anti-discrimination body such as HREOC: HREOC, *20 Years On, The Challenges Continue ... Sexual Harassment in the Australian Workplace*, (2004), 8.

¹¹² See HREOC, *Annual Report 2002-03*, 2003.

¹¹³ See ACTU, *Outline of Contentions*, 30 April 2004, [8.4]-[8.6]; ACCI/NFF, *Outline of Contentions in response to ACTU Applications*, 30 July 2004, [4.70]-[4.81], [6.65]-[6.77].

¹¹⁴ See reg 3 of the *Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002* (UK).

to request a flexible working pattern to enable them to care for that child. The new laws commenced on 6 April 2003.

70. The right of employees to seek a flexible working pattern is set out in the new s 80F as follows:

80F Statutory right to request contract variation

(1) *A qualifying employee may apply to his employer for a change in the terms and conditions of employment if:*

(a) *the change relates to:*

- (i) *the hours he is required to work;*
- (ii) *the times when he is required to work;*
- (iii) *where, as between his home and a place of business of his employer, he is required to work; or*
- (iv) *such other aspect of his terms and conditions of employment as the Secretary of State may specify by regulations; and*

(b) *his purpose in applying for the change is to enable him to care for someone who, at the time of application, is a child in respect of whom he satisfies such conditions as to the relationship as the Secretary of State may specify by regulations.*

(2) *An application under this section must:*

- (a) *state that it is such an application;*
- (b) *specify the change applied for and the date on which it is proposed the change should become effective;*
- (c) *explain what effect, if any, the employee thinks making the change applied for would have on his employer and how, in his opinion, any such effect might be dealt with; and*
- (d) *explain how the employee meets, in respect of the child concerned, the conditions as to relationship mentioned in subsection (1)(b).*

(3) *An application under this section must be made before the fourteenth day before the day on which the child concerned reaches the age of six or, if disabled, eighteen.*

71. Employers who receive an application for flexible working conditions under s 80F must consider that application in accordance with the new s 80G which provides that:

80G Employer's duties in relation to application under section 80F

(1) *An employer to whom an application under section 80F is made:*

- (a) *shall deal with the application in accordance with regulations made by the Secretary of State; and*
- (b) *shall only refuse the application because he considers that one or more of the following grounds applies:*

(i) *the burden of additional costs;*

- (ii) detrimental effect on ability to meet customer demand;
- (iii) inability to re-organise work among existing staff;
- (iv) inability to recruit additional staff;
- (v) detrimental impact on quality;
- (vi) detrimental impact on performance;
- (vii) insufficiency of work during the periods the employee proposes to work;
- (viii) planned structural changes; and
- (ix) such other grounds as the Secretary of State may specify by regulations.

72. The *Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002* (UK) and the *Flexible Working (Procedural Requirements) Regulations 2002* (UK) were made pursuant to the amendments (together, the Regulations). The Regulations set out in further detail the procedure for making and considering applications for flexible working arrangements, including time limits and employees' rights of appeal.
73. Relevantly the Regulations provide that upon receiving an application for flexible working arrangements, employers must hold a meeting to discuss the request with the employee within 28 days (or other time as agreed by the parties).¹¹⁵ Within 14 days of that meeting (or other time as agreed by the parties) the employer must inform the employee as to his or her decision with written reasons.¹¹⁶ Upon receiving the employer's decision an employee may appeal the employer's decision within 14 days using internal grievance procedures.¹¹⁷ Within 14 days of receiving any such appeal notice (or other time as agreed by the parties) the employer must arrange a meeting with the employee.¹¹⁸ In the event the parties cannot agree the employee may be able to make a complaint to the UK Employment Tribunal. However appeals are limited to appeals on the ground that the employer has failed to follow proper procedure in considering the application or the decision to reject an application was based on incorrect facts.¹¹⁹
74. In February 2004 the DTI published an information kit for employees and employers setting out their respective rights and responsibilities under the new legislation and some case studies indicating the manner in which it expects the provisions ought to be interpreted and applied. A copy of that kit has been admitted into evidence as **Exhibit #ACTU 3**.¹²⁰

Other relevant UK leave entitlements

75. HREOC notes that ACCI/NFF appear to contend that women in the UK are only entitled to 13 weeks maternity leave.¹²¹ HREOC wishes to clarify for the Full Bench that that was the position prior to the commencement of the *Employment Act 2002* (ch.22) (UK). HREOC notes that the right to request flexible working arrangements is in addition to any right a UK employee may have to take maternity, paternity, adoption or parental leave, as follows:

¹¹⁵ See regs 3 and 12 of the *Flexible Working (Procedural Requirements) Regulations 2002* (UK).

¹¹⁶ Ibid, regs 4, 5 and 12.

¹¹⁷ Ibid, regs 6 and 7.

¹¹⁸ Ibid, regs 8 and 12.

¹¹⁹ See s 80H(1) of the *Employment Act 2002* (ch.22) (UK).

¹²⁰ See Transcript of Proceedings, 1 September 2004, PN951.

¹²¹ See ACCI/NFF, *Outline of Contentions in Response to ACTU Applications*, 30 July 2004, [6.68].

(i) Maternity leave

Women are entitled to 26 weeks maternity leave regardless of how long they have worked for their employer. Some women may also be entitled to Statutory Maternity Pay or Maternity Allowance during that time. Women who have worked for their employer for at least 26 weeks as at the date of the start of the 14th week before her child is due will also be entitled to an additional 26 weeks of unpaid maternity leave.¹²²

(ii) Paternity leave

Men who have worked for their employer for at least 26 weeks as at the date of the start of the 14th week before his child is due is entitled to take up to 2 weeks paternity leave. Men earning above a certain amount may be entitled to Statutory Paternity Pay during this period.¹²³

(iii) Adoption Leave

Parents who adopt a child are entitled to 52 weeks adoption leave. Employees earning above a certain amount may be entitled to Statutory Adoption Pay for 26 of those 52 weeks.¹²⁴

(iv) Parental leave

Both parents may be entitled to 13 weeks (or 18 weeks if the child is disabled) unpaid parental leave to look after their child or make arrangements for its welfare. In general parents will be entitled to parental leave if they have worked for their employer continuously for one year prior to taking parental leave. Parental leave can be taken by parents any time up until the child attains 5 years of age, or 18 years if the child is disabled.¹²⁵

DTI Survey results

76. HREOC also seeks to assist the Full Bench by clarifying the key findings of the DTI's first flexible working survey taken after the introduction of the flexible

¹²² See *Maternity and Parental Leave Regulations 1999* (UK) (as amended by *Maternity and Parental Leave Amendment Regulations 2001* and *Maternity and Parental Leave Amendment Regulations 2002*) made pursuant to the *Employment Rights Act 1996* (ch.18) (UK) as that Act has been amended by the *Employment Relations Act 1999* (ch.26) (UK) and *Employment Act 2002* (ch.26) (UK). For further explanation of these entitlements see: <<http://www.dti.gov.uk/er/index.htm>>

¹²³ See *Paternity and Adoption Leave Regulations 2002* (UK) and *Statutory Adoption Pay and Statutory Paternity Pay Regulations 2002* (UK) made pursuant to the *Employment Relations Act 1996* (ch.18) (UK) as amendment by the *Employment Act 2002* (ch.26) (UK). For further explanation of these entitlements see: <<http://www.dti.gov.uk/er/index.htm>>

¹²⁴ See *Employment Rights Act 1996 (Application of s 80B to Adoptions from Overseas) Regulations 2003* (UK), *Paternity and Adoption Leave (Adoption from Overseas) Regulations 2003*, *Paternity and Adoption Leave Regulations 2002* and made pursuant to the *Employment Rights Act 1996* (ch.18) (UK) as that Act has been amended by the *Employment Act 2002* (ch.20) (UK). For further explanation of these entitlements see: <<http://www.dti.gov.uk/er/index.htm>>

¹²⁵ See *Maternity and Parental Leave Regulations 1999* (UK) (as amended by *Maternity and Parental Leave Amendment Regulations 2001* and *Maternity and Parental Leave Amendment Regulations 2002*) made pursuant to the *Employment Rights Act 1996* (ch.18) (UK) as that Act has been amended by the *Employment Relations Act 1999* (ch.26) (UK). For further explanation of these entitlements see: <<http://www.dti.gov.uk/er/index.htm>>

working provisions.¹²⁶ That survey was conducted in April 2004 to assess the impact of the new laws for *employees*.¹²⁷ A copy of that survey is marked and attached as **Annexure 1**.

77. The DTI surveyed a total of 3 485 employees throughout the UK over a 4 month period and had a 65% response rate. On the basis of that survey sample the DTI relevantly report that, since the introduction of the new laws on 6 April 2003:

(i) Requests to work flexibly

- (a) 52% of all employees were aware of the new laws;¹²⁸
- (b) 16% of all female employees requested flexible working arrangements and 10% of all male employees had requested flexible working arrangements (which constituted 13% of all employees);¹²⁹
- (c) 37% of women with children under 6 years old requested flexible working arrangements as compared with 10% of their male counterparts;¹³⁰
- (d) 27% of women with children under 16 years requested flexible working arrangements as compared with 10% of their male counterparts;¹³¹
- (e) the most common flexible work arrangements sought by all employees were part time work (38%), flexitime (25%), reduced hours for a limited period (13%) and to work from home (10%);¹³²
- (f) a greater number of women than men requested part time work (41% to 31% respectively);¹³³
- (g) 43% of all employees gave meeting childcare needs as the reason for requesting to work flexibly. 98% of employees with a child under 6 years old and 87% with a child under 16 years old gave childcare as the main reason for requesting flexible working arrangements. Women were more likely to cite childcare as the main reason for requesting flexible working arrangements (58% to 17% respectively);¹³⁴

¹²⁶ HREOC notes that none of the parties refers to this survey: the parties only refer to the survey of *employers* carried out by DTI in April 2003 (prior to the introduction of the new employment laws): see ACTU, *Outline of Contentions*, July 2004, [8.4]-[8.6]; ACCI/NFF, *Outline of Contentions in Response to ACTU Applications*, July 2004, [4.73]-[4.76]. ACCI/NFF also refer to the Lovell's survey (again, of *employers*) which was undertaken some 6 months after the new employment laws commenced operating: see [4.77]-[4.79].

¹²⁷ Department of Trade and Industry, *Results of the first flexible working employee survey*, Employment Relations Occasional Papers, London 2004.

¹²⁸ *Ibid.*, 1. HREOC notes that ACCI/NFF contend that the public awareness campaign in the UK was instrumental in the sound implementation of the new laws. In that regard HREOC submits that there is no reason precluding a similar nation wide campaign being implemented in Australia: See, ACCI/NFF, *Outline of Contentions in Response to ACTU Applications*, July 2004, [4.80], [6.74].

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ *Ibid.*

(h) the other most commonly cited reasons by employees for requesting flexible working conditions were to make life easier (13%), more time with family (11%) and fulfil family and caring responsibilities (7%);¹³⁵

(ii) Employer responses to requests to work flexibly

(i) a total of 86% of all requests were fully or partly met by employers. 77% of all requests for flexible working conditions were fully met by employers and 9% partly met. The report notes that this is a 'marked improvement' on the overall employer acceptance of flexible working arrangements of 77% immediately prior to the introduction of the new laws. In this regard the report suggests that '*the new employment rights have significantly increased employer's willingness to consider seriously employee requests*';¹³⁶ and

(iii) Reasons for not requesting to work flexibly

(j) of those employees who had not requested flexible work arrangements:

- 75% stated that they were content with their present arrangements;
- 6% said they did not request flexibility as they believed their job did not allow flexibility;
- 5% were unaware of the new right;
- 3% said that it did not suit their domestic arrangements; and
- 2% believed that their employer would not agree to such a request.¹³⁷

Interestingly those in sales and customer service roles were *most* likely (82%) and managers and senior executives the *least* likely (69%) to report being content with their present arrangements.¹³⁸

78. HREOC submits that irrespective of the legislative and regulatory distinctions to be drawn between Australia and the UK, the similarities in workplace culture are such that the flexible working employment laws in the UK provide a useful indication of possible outcomes should similar provisions be inserted into the relevant awards.¹³⁹ In particular the relatively limited requests for flexible working conditions by employees indicates that it is likely that only a small number of employees would seek flexible working arrangements.

¹³⁵ Ibid, 8-9.

¹³⁶ Ibid, 1.

¹³⁷ Ibid, 10-11.

¹³⁸ Ibid, 11.

¹³⁹ See G Whitehouse, 'Parenthood and pay in Australia and the UK: evidence from workplace surveys', *Journal of Sociology* (2002) 38(4) 381-397, 386-87. Cf ACCI/NFF, *Outline of Contentions in Response to ACTU Applications*, July 2004, [4.80], [6.65]-[6.66].

(b) Pricing women out of the labour market

79. The AiG contends that the ACTU applications will result in women being priced out of the labour market.¹⁴⁰ In support of that contention the AiG relies on certain comments made by HREOC in its report on its inquiry into paid maternity leave¹⁴¹ entitled *A Time to Value – A Proposal for a National Paid Maternity Leave Scheme*.¹⁴² It also relies on the evidence of several of its witnesses who suggest that, should the ACTU applications be granted, they will be (as employers) forced to discriminate against women of childbearing age or women who have family responsibilities by not employing them.¹⁴³

80. HREOC submits that the fact that some employers may act unlawfully, in breach of federal and state and territory discrimination law, is no reason for the AIRC not to introduce family friendly award provisions. HREOC also notes that the labour market participation rate of women aged between 24 and 35 years has steadily increased in the last twenty years¹⁴⁴ despite the introduction of work entitlements such as maternity leave¹⁴⁵ and family leave¹⁴⁶ (which HREOC notes were, at the time, equally as controversial as the current applications before the AIRC).¹⁴⁷

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Solicitor for the Human Rights and Equal Opportunity Commission

19 November 2004

¹⁴⁰ See, AiG, *Outline of Contentions*, 30 July 2004, [126]-[127]. See also, ACCI/NFF, *Outline of Contentions in Response to ACTU Applications*, July 2004, [3.69]; ACCI/NFF, *Opening Statement*, Transcript of Proceedings 6 September 2004, [PN3680].

¹⁴¹ See, AiG, *Outline of Contentions*, 30 July 2004, [127].

¹⁴² HREOC, *A Time to Value – A Proposal for a National Paid Maternity Leave Scheme*, (2002).

¹⁴³ See, for example, AiG Witness Statements: A Schiller 5 [21]; D Taylor 11 [22]; J Bishop 12-13 [17], 14 [22]-[23], 19 [36]; A Israel 7-8 [23]; C Maloney 6 [24]; L Stafford 7 [24]. See also, evidence of J Bishop, Transcript of Proceedings, 6 September 2004, [PN 3437], [PN3489]; evidence of A Israel, Transcript of Proceedings, 7 September 2004, [PN 4643-4644]; and evidence of C Maloney, Transcript of Proceedings, 7 September 2004, [PN 4747-4748].

¹⁴⁴ See Australian Bureau of Statistics, *Labour Force Australia 2004*, cat no 6203.0. See also, HREOC, *Pregnant and Productive*, (1999), 10 [2.7].

¹⁴⁵ Introduced by the *Maternity Leave Test Case* (1979) 218 CAR 120.

¹⁴⁶ Introduced by the *Family Leave Test Case* (1994) 57 IR 129.

¹⁴⁷ In addition, HREOC notes that the comments referred to in *A Time to Value – A Proposal for a National Paid Maternity Leave Scheme* were made in respect of proposals for paid maternity leave.