

**Centre for Employment and Labour Relations Law**

**The University of Melbourne**

**June 2012**

**Student Working Paper No. 12**

**MEASURING THE SUCCESS OF EMPLOYMENT LAW IN  
ADDRESSING THE PROBLEM OF LONG WORKING HOURS  
IN AUSTRALIA**

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MELBOURNE LAW SCHOOL

**ISSN 1837-1418**

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# MEASURING THE SUCCESS OF EMPLOYMENT LAW IN ADDRESSING THE PROBLEM OF LONG WORKING HOURS IN AUSTRALIA

SARAH MOORE

## I INTRODUCTION

The National Employment Standards ('NES') in Part 2-2 of the *Fair Work Act 2009* (Cth) ('*FW Act*') represent one way that employment law has addressed the problem of long working hours in Australia. The different working time provisions in the NES have varying potential for success. This conclusion is demonstrated by an analysis of how the provisions could assist a full-time employee<sup>1</sup> with NES entitlements, who works excessive hours and would prefer to reduce or vary those hours. In this instantiation of the long working hours problem (hereafter called the 'excessive hours problem') the definition of 'excessive' is provided by concepts underlying the *FW Act* itself. For example, there are provisions in the *FW Act* that suggest it is excessive for an employee to work an unlimited number of hours per week (Part 2-2 Division 3), or to work hours that preclude them from caring for themselves or others (Part 2-2, Division 4 and 7) or raising a child (Part 2-2, Division 5). Excessive hours become problematic when they clash with a non-work activity that an employee values. Because the things that an employee values may change over the course of a career, legislation targeting the excessive hours problem will be most successful where it extends the range of choices an employee has over their working time arrangements. This approach is derived from Amartya Sen's 'capabilities approach' and it will be used to assess the strengths and weaknesses of the working time provisions in the NES.

This paper discusses the full-time employee with NES entitlements ('full-time NES employee') in order to draw attention to the fact that the NES, alone, *will* constitute the safety net of employment conditions for some employees.<sup>2</sup> A discernible group of employees in this situation are those who are excluded from the coverage of a modern award or enterprise agreement due to their high income,<sup>3</sup> and who are unable to

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<sup>1</sup> The definition of employee in this paper is the definition that is used for the provisions in Part 2-2 of the *Fair Work Act 2009* (Cth) ('the *FW Act*'). Section 60 states that in Part 2-2 an employee is a 'national system employee'. Section 13 provides that a 'national system employee' is an individual employed by a 'national system employer'. By virtue of ss 30C and D this refers to almost all common law employees in Victoria.

<sup>2</sup> Employees that are covered by modern awards or enterprise agreements, on the other hand, may be able to supplement the NES provisions with improved employment standards negotiated through collective bargaining. It is important to note that there are workers in Australia who do not even have the benefit of the NES. These include some casual employees (for some NES provisions), independent contractors, unpaid workers and illegal workers.

<sup>3</sup> An employee may be excluded from a modern award or an enterprise agreement because they are a 'high income employee' under the *FW Act*. An employee could also be excluded from a modern award or enterprise agreement because their position and income exceed the highest classification of the modern award or enterprise agreement that would otherwise apply to them (even if that level of remuneration does not make them a 'high income employee'). 'High income employee' is defined in s 329 of the *FW Act* and reg 2.13 of the *Fair Work Regulations 2009* (Cth). Currently a full-time employee is a 'high income employee' if they have 'guaranteed annual earnings' that exceed \$118,100 per annum. Section 47(2) of the *FW Act* provides that a modern award does not apply to a high income employee. As mentioned a high income employee, must have 'guaranteed annual earnings': ss 328-32. Section 330(1)(e) provides that a guarantee cannot be given to an employee while an enterprise agreement applies to them. Therefore a high income employee will not be covered by an enterprise agreement either. This interpretation

negotiate working time arrangements that improve upon the NES individually, with their employer.<sup>4</sup> The focus on full-time employees is based on an assumption that full-time employees are less likely to have time to pursue non-work activities than their part-time colleagues. The NES form the ‘floor’ of modern awards and enterprise agreements,<sup>5</sup> so information about the effects of the NES working time provisions on full-time NES employees will provide insight into the experience of employees under collective instruments that reflect or supplement the NES working time provisions.

## II SEN’S CAPABILITIES APPROACH AS A MEANS OF ASSESSING THE NES

It has been proposed that legislation will be most successful in targeting the excessive hours problem where it extends the range of choices available to employees over their working time arrangements. This is in line with Sen’s proposition that a person’s well-being is ultimately concerned with their freedom to achieve various lifestyles. This freedom is referred to as a person’s ‘capability’.<sup>6</sup> Capability is an appropriate tool with which to analyse the working time provisions for two reasons. First, lifestyles are made up of various combinations of ‘functionings’ – things that a person ‘may value doing or being’.<sup>7</sup> Capability increases with the *range* of functioning sets from which a person may choose, so even the sets *not chosen* in a particular instance, are valuable. The static nature of legislation and the fluid nature of human preference make capability an

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of the legislation is affirmed by Andrew Stewart in *Stewart’s Guide to Employment*. Andrew Stewart, *Stewart’s Guide to Employment Law* (The Federation Press, 3<sup>rd</sup> ed, 2011) 115-6.

<sup>4</sup> An employee covered by a modern award or enterprise agreement can benefit from conditions that improve upon the NES that have been incorporated into the award or agreement through collective bargaining. Historically collective actors such as unions have assisted in extending choice over working time arrangements for employees covered by awards by reducing ordinary working hours. Between the early 1900s and the 1980s unions brought a succession of test cases under the federal conciliation and arbitration system which effectively reduced ordinary working time from 48 hours to 38 hours per week. Awards were updated as the cases established new standards. These cases included *Australian Timber Workers Union v John Sharp & Sons Ltd* (1913) 14 CAR 811, *Amalgamated Engineering Union v J Alderdice & Company Pty Ltd* (1927) 24 CAR 755 and *Re Metal Industries Award 1971* (1981) 1 IR 169. For a discussion on how unions made similar gains for employees under agreements including enterprise agreements see Stewart, above n 3, 22. More recently, in the *Working Hours Case* (2002) 114 IR 390 claims by the Australian Council of Trade Unions convinced the Australian Industrial Relations Commission (‘AIRC’) to create a test case provision entitling workers to refuse overtime if the overtime involved working unreasonable hours, risking workplace health and safety or affecting family responsibilities. Under ss 118E and 118F of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) the AIRC lost its power to create award standards through the test case process. As a corollary the unions’ part in this process disappeared. Under the *FW Act*, unions have regained some of their pre-*Work Choices* role. For example ss 157 and 185 provide that a union can make an application to Fair Work Australia (‘FWA’) to vary, revoke or make a modern award in certain circumstances.

<sup>5</sup> A modern award or enterprise agreement cannot exclude the NES, such an instrument may include terms that reflect the NES or terms that *supplement* the NES (for example, a term that *increases* the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under s 87): *FW Act* ss 55(1),(4)(b).

<sup>6</sup> In *Development as Freedom* Sen argues that for many purposes the appropriate ‘space’ for evaluating well-being ‘is neither that of utilities (as claimed by welfarists), nor that of primary goods (as demanded by Rawls), but that of substantive freedoms – the capabilities – to choose a life one has reason to value.’ A freedom to choose alternative lifestyles describes the difference between the well-being of an affluent person who chooses to fast, with a destitute person who is forced to starve. Their achievement may be the same, but their well-being is not. In *Commodities and Capabilities* Sen highlights the tendency to associate well-being with a person’s achievement i.e. how ‘well’ is his or ‘being’. To overcome this potential source of confusion, he refers to a more specific term: ‘well-being freedom’. For the purposes of this paper ‘well-being’ is associated with a person’s freedom to achieve various things, rather than the achievement itself. Amartya Sen, *Development as Freedom* (Oxford University Press, 1999) 74-5; Amartya Sen, *Capabilities and Commodities* (North Holland, 1985) 5.

<sup>7</sup> Amartya Sen, *Development as Freedom* (Oxford University Press, 1999) 75.

important measure of legislative function.<sup>8</sup> Second, Sen distinguishes between a formal and substantive freedom to choose various lifestyles. This brings the value of legislation as a ‘conversion factor’ to the fore. Substantive freedom to choose a particular functioning set, for example ‘parenting and working’, only arises when a person has both the commodities required to achieve the functionings (like work, time and money) and the ability to convert the commodities toward that end.<sup>9</sup> Legislation – in our example the parental leave provisions – can convert a formal freedom to choose a lifestyle, into a substantive one. Parental leave allows an employee to dedicate a large portion of their time commodity toward parenting, while protecting the work commodity (avoiding job loss). Social policy conversion factors such as legislative measures are effective where they make the consequences of choosing a lifestyle acceptable to the person making the choice.<sup>10</sup>

The proceeding discussion will focus on how, and for whom, the working time provisions in the NES act as conversion factors. By assessing working time in the context of ‘lifestyle’ the capabilities approach takes account of the multiple dimensions of the excessive hours problem. These dimensions include the health of the individual, and the health of his or her family and the wider community, including the labour market.<sup>11</sup>

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<sup>8</sup> The topic of creating flexibility for decision-making with regard to future choices is explored by Tjalling C Koopmans in ‘On Flexibility of Future Preference’. Tjalling C Koopmans, ‘On Flexibility of Future Preference’ in Maynard W Shelly and Glenn Bryan (eds), *Human Judgments and Optimality* (John Wiley & Sons, 1964) 243.

<sup>9</sup> Sen, *Development as Freedom* above n 6, 75; Sen, *Capabilities and Commodities* above n 6, 9-16.

<sup>10</sup> In *Renewing Labor Market Institutions* Simon Deakin uses Sen’s ‘capabilities approach’ to conceptualize social rights (including rights articulated through legislation) as conversion factors: ‘Sen’s ‘capabilities approach’ envisages a central role for what he calls *conversion factors*. A person’s capability to achieve a particular range of functionings is determined by characteristics of their *person* (such as their metabolism or biological sex), their *society* (such as social norms, legal rules and legal-political institutions), and their *environment* (which could include climate, physical surroundings, and technological infrastructure). In this context, a key role for social rights is to act as conversion factors which extend the range of alternative functionings available to individuals. In particular, social rights may serve to *institutionalize* the process of formation of capabilities.’ Part of Deakin’s project is to resolve the tension between social rights and the market order as described by theorists including T H Marshall and F A Hayek. Simon Deakin, *Renewing Labor Market Institutions* (International Institute for Labor Studies, 2004) 47-48. See also T H Marshall, *Citizenship and Social Class* (Pluto Press, 1992); F A Hayek, *Law, Legislation, and Liberty: a new statement of the liberal principles of justice and political economy* (Routledge & Kegan Paul, 1973-1979). For examples of other ways in which academics have used Sen’s ‘capabilities approach’ to talk about working time see Sangheon Lee and Deirdre McCann ‘Working Time Capability: Towards Realising Individual Choice’ in Jean-Yves Boulin et al (eds), *Decent Working Time: New Trends, New Issues* (International Labour Office, 2006) 65; Didier Fourage and Christine Baaijens ‘Labour Supply Preferences and Job Mobility of Dutch Employees’ in Jean-Yves Boulin et al (eds), *Decent Working Time: New Trends, New Issues* (International Labour Office, 2006) 155.

<sup>11</sup> This is in line with the way judges, policy makers and academics have approached ‘working time’ in the past – as part of the ‘decent work’ concept. In the oft-cited decision *Ex Parte H V McKay* which fleshed out the fair and reasonable test for conditions of remuneration and labour in Australia in 1907, Higgins J used as his reference point ‘the normal needs of the average employee regarded as a human being living in a civilized community...’ *Ex Parte H V McKay* (1907) 2 CAR 1, 3. The link between working conditions (and working time in particular) and civility – the possibility for people to live in community with one another – is also reflected in the International Labour Organization’s Conditions of Work and Employment Program. The International Labour Organisation promotes decent working time through dialogue and research on five dimensions of working time: the health and safety of working time arrangements; the family-friendliness of working time arrangements; the potential for working time to promote gender-equality; to advance the productivity of enterprises and to facilitate worker choice over their hours. Jean-Yves Boulin et al (eds), *Decent Working Time: New Trends, New Issues* (International Labour Office, 2006) 420.

## II THE PROVISIONS

### ***A Additional Hours ss 62-64 FW Act<sup>12</sup>***

#### *1 Content*

Section 62(1) of the Act provides that the maximum number of hours that an employer can request or require a full-time employee to work in a week is 38 hours.<sup>13</sup> Beyond that limit, an employee may work additional hours in two situations: where an employer requests an employee to work additional hours,<sup>14</sup> and where additional hours arise under an averaging arrangement.<sup>15</sup> This type of arrangement allows an employer to average an employee's weekly working hours over a period not exceeding 26 weeks.<sup>16</sup> In both situations the employer is prohibited from requesting or requiring an employee to work 'unreasonable' additional hours.<sup>17</sup> For an employee under an averaging arrangement 'additional hours' could refer to average weekly hours that exceed the 38 hour limit, or hours worked in any particular week that exceed the limit.<sup>18</sup> Whether additional hours are 'reasonable' is determined according to a list of factors set out in s 62(3) of the *FW Act*. The existence of an averaging arrangement is one of those factors.<sup>19</sup> Employees are entitled to refuse to work unreasonable additional hours.<sup>20</sup>

#### *2 Critique*

If a full-time NES employee is working excessive hours in the sense that their weekly hours are unlimited, *prima facie*, the legislation gives the employee a choice not to work unreasonable hours beyond 38 hours. If the additional hours provisions operate as an effective conversion factor, employees will find that the consequences of choosing to convert the portion of their time commodity that represents unreasonable additional hours, to non-work functionings, are acceptable and even desirable. Such functionings may include resting, socialising, exercising and spending time with family. Extending an employee's capability (their freedom to choose various lifestyles, or functioning sets)

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<sup>12</sup> Section 63 of the *FW Act* is not pertinent to this discussion but it does form part of the additional hours provisions.

<sup>13</sup> Further, s 62(4) of the *FW Act* provides that 'the hours an employee works in a week are taken to include any hours of leave, or absence, whether paid or unpaid, that the employee takes in the week and that are authorised: (a) by the employee's employer; or (b) by or under a term or condition of the employee's employment; or (c) by or under a law of the Commonwealth, a State or a Territory, or an instrument in force under such a law.'

<sup>14</sup> *FW Act* s 62(1).

<sup>15</sup> *Ibid* ss 64, 62(1).

<sup>16</sup> *Ibid* s 64.

<sup>17</sup> *Ibid* ss 62, 64.

<sup>18</sup> *Ibid* s 64.

<sup>19</sup> Section 62(3) of the *FW Act* states that '[i]n determining whether additional hours are reasonable or unreasonable for the purposes of subsections (1) and (2), the following must be taken into account: (a) any risk to employee health and safety from working the additional hours; (b) the employee's personal circumstances, including family responsibilities; (c) the needs of the workplace or enterprise in which the employee is employed; (d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level or remuneration that reflects an expectation of, working additional hours; (e) any notice given by the employer of any request or requirement to work the additional hours; (f) any notice given by the employee of his or her intention to refuse to work the additional hours; (g) the usual patterns of work in the industry, or the part of an industry, in which the employee works; (h) the nature of the employee's role, and the employee's level of responsibility; (i) whether the additional hours are in accordance with ... an averaging agreement agreed to by the employer and employee under section 64; (j) any other relevant matter.'

<sup>20</sup> *Ibid* s 62(2).

could benefit the health of the employee and, as a corollary, the health of their family and community.<sup>21</sup> Increased capability could also facilitate participation in the labour market by enabling full-time NES employees – who are by definition high earning – to spend more years in the workforce without the risk of burn-out.<sup>22</sup> This is good for employers *and* individuals wanting to enter the labour market. High income earners tend to develop their earning power through accrued expertise and high productivity – this makes them wealth creating employees. Wealth creation grows business and increases demand for employment. If this demand is not satisfied by employees working unreasonable additional hours, employers have an incentive to hire. Further, experienced and skilled employees could efficiently train new employees through everyday instances of knowledge transfer.

The main phenomena which might disrupt the effectiveness of the provisions as conversion factors include: employer preference for over-employment; the employee-onus compliance model embedded in the provisions; the flexible content of the provisions; power dynamics in employer-employee negotiations and the complex factors which tend to inflate employee perception of preferred hours.

#### *(a) Employer Preference for Over-employment*

Studies by the Australian Work and Life Index suggest that the average full-time employee in Australia works additional hours, and would prefer to reduce their hours.<sup>23</sup> Employer preference for a constrained labour supply could make the consequences of using the additional hours provisions unacceptable to a full-time NES employee, despite their preference. In *The Long Work Hours Culture* Lonnie Golden and Morris Altman suggest that employers identify cost incentives in giving additional hours<sup>24</sup> to a small number of employees as compared with sharing the load across a larger workforce.<sup>25</sup> These cost incentives relate to the training of new staff and the cost of contributions to employee benefits.<sup>26</sup> There *are* recognised long-term gains associated with reducing the hours of over-employed staff including reduced absences, reduced staff turnover and improved productivity.<sup>27</sup> However, if employers do not share this long-term view it is conceivable that they might request employees to work unreasonable additional hours, and that they would not welcome refusal of those requests.

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<sup>21</sup> C C Caruso, 'Possible Broad Impacts of Long Work Hours' (2006) 44 *Industrial Health* 44, 531, 531-536.

<sup>22</sup> See generally C C Caruso, 'Possible Broad Impacts of Long Work Hours' (2006) 44 *Industrial Health* 44, 531.

<sup>23</sup> Barbara Pocock, Natalie Skinner and Reina Ichii, 'Work, Life and Workplace Flexibility' (The Australian Work and Life Index 2009, Centre for Work and Life, University of South Australia, July 2009) 30; Barbara Pocock, Natalie Skinner and Reina Ichii, 'How Much Should We Work? Working Hours, Holidays and Working Life: the Participation Challenge' (The Australian Work and Life Index 2010, Centre for Work and Life, University of South Australia, July 2010) 35.

<sup>24</sup> In this chapter Golden and Altman discuss the incentives which cause an employer to 'over-employ.' 'Additional hours' has a similar meaning to 'over-employment' which refers to (among other things) a situation where 'an employer's demand for work hours is escalating beyond the number in the original wage-hour bundle agreed to by the worker.' Lonnie Golden and Morris Altman, 'Why Do People Overwork? Oversupply of Hours of Labor, Labor Market Forces and Adaptive Preferences' in Ronald J Burke and Cary L Cooper (eds), *The Long Work Hours Culture* (Emerald, 2008) 63-4.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Lonnie Golden and Tesfayi Gebreselassie, 'Overemployment Mismatches: the Preference for Fewer Work Hours' (2007) April *Monthly Labor Review* 18, 19.



*(b) Employee-Onus Compliance Model; Flexible Content; Power Dynamics in Employer-employee Negotiations*

The drafting of the additional hours provisions and the inherent problems in employer-employee negotiations could make the consequences of requesting not to work unreasonable additional hours, unacceptable to full-time NES employees. The provisions presuppose that employers will contravene the prohibition on requesting employees to work unreasonable additional hours by entitling employees to refuse such requests.<sup>28</sup> Therefore the onus of regulating unreasonable additional hours lies with the employee. An employee may or may not be willing to refuse a request made by their employer.

If a full-time NES employee does refuse a request to work unreasonable additional hours they may be required to negotiate the meaning of the provisions with their employer. This is because the content of the provisions is 'unfixed'.<sup>29</sup> It is unfixed for two reasons. First, the limits on maximum hours can be supplemented by 'reasonable' additional hours and the test for reasonableness encompasses multiple factors, making the real 'limits' unpredictable. Second, if an employee is party to an averaging arrangement under s 64 of the *FW Act*, the notion of what is reasonable will not only be dependent on the arrangement of hours for that week, but the arrangement of hours over a period up to 26 weeks.<sup>30</sup> This makes the meaning of 'reasonable' even more abstract. The open definition of 'reasonable' will give an employer grounds to negotiate with an employee who refuses an additional hours request. In fact, the case of *MacPherson v Coal & Allied Mining Services Pty Ltd (No 2)*<sup>31</sup> suggests that during a negotiation, an employer can use the pro-employer indicia of reasonableness in s 62(3) to trump the other factors listed there. In that case, 4 hours were added to Mr MacPherson's weekly roster. He claimed these hours were unreasonable under s 226(1) of the *Workplace Relations Act 1996* (Cth) which is substantially identical to its successor, *FW Act* s 62.<sup>32</sup> Federal Magistrate Raphael acknowledged Mr MacPherson's

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<sup>28</sup> *FW Act* s 62(1),(2).

<sup>29</sup> In *The Law of Work* Rosemary Owens and Joellen Riley propose that there are a number of ways to create flexibility in labour law. The first is to remove legal regulation altogether, the second is to create a very low safety net of conditions, so that the degree of interference with market forces is reduced to a minimum. The third way is to 'create standards with no fixed content in the rule itself.' In that case, the content of the rule 'would be a matter for local negotiation or employer fiat, not mandated by the central rule itself.' Rosemary Owens and Joellen Riley, *The Law of Work* (Oxford University Press, 2007) 320-1.

<sup>30</sup> *FW Act* s 64(1).

<sup>31</sup> *MacPherson v Coal & Allied Mining Services Pty Ltd (No 2)* (2009) 189 IR 50. ('*MacPherson*')

<sup>32</sup> Section 226 of the *Workplace Relations Act 1996* (Cth) provided that '(1) An employee must not be required or requested by an employer to work more than: (a) either: (i) 38 hours per week; or (ii) subject to subsection (3), if the employee and the employer agree in writing that the employee's hours of work are to be averaged over a specified averaging period that is no longer than 12 months—an average of 38 hours per week over that averaging period; and (b) reasonable additional hours' and '(4) For the purposes of paragraph (1)(b), in determining whether additional hours that an employee is required or requested by an employer to work are reasonable additional hours, all relevant factors must be taken into account. Those factors may include, but are not limited to, the following: (a) any risk to the employee's health and safety that might reasonably be expected to arise if the employee worked the additional hours; (b) the employee's personal circumstances (including family responsibilities); (c) the operational requirements of the workplace, or enterprise, in relation to which the employee is required or requested to work the additional hours; (d) any notice given by the employer of the requirement or request that the employee work the additional hours; (e) any notice given by the employee of the employee's intention to refuse to work the additional hours; (f) whether any of the additional hours are on a public holiday; (g) the employee's hours of work over the 4 weeks ending immediately

argument that the hours disrupted his family life, but concluded that ‘the benefits to the employer of the new rosters outweighs [sic] the detriment to Mr MacPherson.’<sup>33</sup>

The prospect of participating in an unsuccessful negotiation may prevent a full-time NES employee from utilizing the additional hours provisions to refuse a request to work extra hours. In *The Law of Work* Rosemary Owens and Joellen Riley suggest that, in general, employers are likely to succeed in employer-employee negotiations because they are better resourced (in terms of workplace knowledge and even access to legal counsel) than their employees.<sup>34</sup> Another reason is that employees generally have more to lose than their employers. It is possible that, at the end of an unsuccessful negotiation, an employee could choose to pursue their employer for a breach of a provision of the NES or a breach of Health and Safety.<sup>35</sup> However these actions would involve civil and criminal litigation respectively and therefore require time and money.<sup>36</sup> A select few employees will be so highly valued that they have good negotiating prospects,<sup>37</sup> but many full-time NES employees will not have those assets or the resources to pursue an unsuccessful negotiation.

### *(c) Employee Perception of Preferred Work Hours*

The perception a full-time NES employee has about their preferred work hours will also inform the employee’s choice of whether to use the additional hours provisions. This is unlikely to interfere with an employee’s freedom to choose various lifestyles if the perception is based upon a relationship between measurable things, like work hours and the wage rate. However, where the perception is based upon the relationship between work hours and intangible commodities such as status or reputation, there is a danger that the employee will overestimate the work hours required to achieve that commodity, thereby compromising their capability.<sup>38</sup> Golden and Altman affirm the reality of this occurrence. They submit that it is caused by ‘social, cultural and institutional forces’ that ‘push out an individual’s desired work hours, beyond that which would be desired if the individual were living in isolation...’<sup>39</sup> One such force could be workplace competition. Being a high-earner, a full-time NES employee might

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before the employee is required or requested to work the additional hours.’ The indicia of ‘reasonableness’ under s 62(3) of the *FW Act* are included in footnote 18.

<sup>33</sup> *MacPherson* (2009) 189 IR 50, 63. In coming to his decision Raphael FM took into account compensation that was offered by the employer along with the new roster. This included overtime payments and rostered days off. It is notable that these compensations were unlikely to assist Mr MacPherson in achieving the family lifestyle he desired, specifically, the ability to participate in regular activities such as attending meal times and participating in his son’s sporting activities. *MacPherson* (2009) 189 IR 50, 47.

<sup>34</sup> Owens and Riley, above n 29, 322.

<sup>35</sup> Under s 44(1) of the *FW Act* an employer must not contravene a provision of the NES. This is a civil penalty provision. An employee, employee organization or a Fair Work Inspector can apply to the Federal Court, Federal Magistrate’s Court or an eligible State or Territory Court under s 539(2) for a range of orders including injunctions and compensation. Under the *Work Health and Safety Act 2011* (Cth) an employee who is subjected to unreasonable additional hours could pursue the person enforcing those hours for breach of ss 19 or 27 (depending on the position of the person). Breach of these provisions is a criminal offence under Part 2 Division 5 of the Bill.

<sup>36</sup> Further, litigating an employer could have negative consequences for the employee’s career with that employer (despite the presence of unfair dismissal and discrimination legislation).

<sup>37</sup> Rosemary Owens and Joellen Riley state that ‘an important, valued worker with special skills may be able to secure her or his preferred flexible arrangements.’ Owens and Riley, above n 29, 322.

<sup>38</sup> Golden and Altman, above n 24, 68-73.

<sup>39</sup> *Ibid* 68.

decide not to refuse unreasonable hours in order to signal to their employer that they are a productive worker, worthy of their salary.<sup>40</sup> This perception about what the employer is likely to believe, would disrupt the role of the provisions in converting an employee's formal choice not to work unreasonable additional hours into a substantive choice.

## **B Parental Leave ss 67-85 FW Act**

### *1 Content*

Section 70 of the *FW Act* provides that certain employees are entitled to 12 months unpaid parental leave ('parental leave') from an employer, where the leave is associated with the birth or adoption of a child.<sup>41</sup> The entitlement extends to an employee who is the biological or adoptive parent, and their spouse or de facto partner (where that person is also an employee), provided the leave-taker has or will have a responsibility for the care of the child, and the employee meets the continuous service requirement.<sup>42</sup> For a non-casual employee this requirement is fulfilled (in a simple case) if the employee has been employed by the employer for at least 12 months before the birth or placement of the child.<sup>43</sup>

Parental leave must generally be taken in a single continuous period.<sup>44</sup> Where two employees take parental leave in relation to a child, each leave period runs end to end.<sup>45</sup> However, the second leave-taker may take a period of 'concurrent leave' during the first leave-taker's leave period, for three weeks or less.<sup>46</sup> An employee taking parental leave may request to extend their leave for up to 12 months.<sup>47</sup> Sections 83-4 of the *FW Act* provide protection regarding return to work conditions for employees who have taken parental leave.

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<sup>40</sup> Lonnie Golden and Morris Altman describe this behaviour as relative positioning and signalling at work. They submit that it is most common when 'output quantity cannot be observed directly' leaving 'input time' to serve as a proxy productivity marker for employers. *Ibid* 70.

<sup>41</sup> Section 68 of the *FW Act* qualifies this to the extent that adoption of a child refers to adoption of a person under 16.

<sup>42</sup> *FW Act* ss 67,70. Further section 12 of the *FW Act* provides that a 'de facto partner' includes a person living with the employee, of the same or different sex 'in a relationship as a couple on a genuine domestic basis.'

<sup>43</sup> This is provided in sub-s 67(1),(3)(a) of the *FW Act* but paras 67(3)(b)-(c) state that if the leave period is to begin after the birth or placement, the continuous service requirement must be met immediately before the date on which the employee's leave period is to start.

<sup>44</sup> *FW Act* ss 71(1),(2); 72(1),(2).

<sup>45</sup> *Ibid* ss 72(3),(4).

<sup>46</sup> *Ibid* s 72(5). Further, a period of concurrent leave is an exception to the rule that an employee must take unpaid parental leave in a single continuous period. *FW Act* s 72(6)(a).

<sup>47</sup> *Ibid* s 76(1). Sections 76(2)-(4) set out the formal process for requesting an extension: '(2) The request must be in writing, and must be given to the employer at least 4 weeks before the end of the available parental leave period. (3) The employer must give the employee a written response to the request stating whether the employer grants or refuses the request. The response must be given as soon as practicable, and not later than 21 days, after the request is made. (4) The employer may refuse the request only on reasonable business grounds. (5) If the employer refuses the request, the written response under subsection (3) must include details of the reasons for the refusal.' Paragraph 76(6)(c) states that if an extension is granted, the amount of unpaid parental leave that another eligible employee could access in relation to the same child is reduced by the period of the extension.

Section 79 of the *FW Act* provides that an employee can combine parental leave with some types of paid leave. This does not include paid personal/carer's leave or compassionate leave,<sup>48</sup> but an employee could combine parental leave with an entitlement to parental leave pay under the *Paid Parental Leave Act 2010* (Cth) (*PPL Act*).

## 2 Critique

If a full-time NES employee is working excessive hours in the sense that they are precluded from parenting a child (with whom they have the type of relationship described in the legislation), *prima facie*, the parental leave provisions give that employee a choice not to work for a period of 12 months or more, while they raise a child and retain their employment position. If the provisions operate as an effective conversion factor, employees will find that the consequences of choosing not to work for the period are acceptable and even desirable. The provisions could benefit the health of a parent and child by enabling the parent to provide the intensive care that young children require in their first years of life.<sup>49</sup> Extending an employee's capability by including a 'working *and* parenting' option in the range of lifestyles from which they may choose, could also prevent them from leaving the workforce permanently in order to parent. The benefits of retaining (in particular) high-earning full-time NES employees in the workforce have been mentioned.

The main phenomena which might disrupt the effectiveness of the provisions as conversion factors include: the interaction of these provisions with the *PPL Act* and the direct and indirect exclusion of certain employees from the provisions' operation.

### (a) *The FW Act and the PPL Act*

Whether a full-time NES employee could tolerate the consequences of choosing not to work for a significant period may depend upon their ability to obtain financial assistance. Therefore any barrier to accessing parental leave pay ('PLP') could disrupt the capability enhancing potential of the provisions. Ideally an employee who takes parental leave in the first year of a child's life, will draw on the maximum entitlement of 18 weeks PLP (at the rate of the national minimum wage) under the *PPL Act*.<sup>50</sup> However it is possible that an employee may qualify for parental leave but not PLP. For example, an employee earning more than \$150,000 per annum may be eligible for parental leave, but they would not satisfy the income test in the *PPL Act*.<sup>51</sup> Conversely an employee may be eligible for PLP but not parental leave. For example, an employee with an irregular work history, may qualify for PLP, but would not satisfy the 'continuous

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<sup>48</sup> Ibid s 79(2).

<sup>49</sup> See generally Suzanne M Bianchi and Vanessa R Wright, 'The Long Reach of the Job: Employment and Time for Family Life' in Kathleen Christensen and Barbara Schneider (eds), *Realigning 20<sup>th</sup>-Century Jobs for a 21<sup>st</sup>-Century Workforce* (Cornell University Press, 2010) 17, 36-42.

<sup>50</sup> Section 11 of the *Paid Parental Leave Act 2010* (Cth) (*PPL Act*) provides that the maximum period for which parental leave is payable to a person is 18 weeks. Subsection 11(5) of the *PPL Act* states that the paid parental leave period must end before the child's first birthday.

<sup>51</sup> Part 2-3, Division 4 of the *PPL Act* provides that a person who earns more than \$150,000 (indexed from 1 July 2014) in the income year prior to the birth or adoption of a child, or the day they made a claim for parental leave pay in relation to a child (depending on the circumstances of the claim) is ineligible for parental leave pay ('PLP').

service requirement' in the *FW Act*.<sup>52</sup> If that employee was unable to combine PLP with some other type of leave<sup>53</sup> it is not clear how they would exercise their entitlement to the payments. Academics, and Fair Work Australia itself, have suggested that in this situation the employee's employer should provide a reasonable alternative to parental leave, lest they discriminate against the employee.<sup>54</sup> However it is not clear whether following the letter of the *FW Act* could constitute discrimination.<sup>55</sup> Previously, this paper has discussed phenomena that might prevent an employee who is eligible to exercise rights under provisions of the NES from exercising them. The potential for employees to be refused parental leave where they satisfy the criteria for receiving PLP illustrates a different threat to the effectiveness of working time provisions. It is necessary to consider whether the pool of employees who are eligible to exercise rights under the parental leave provisions is so small that the provisions could not significantly increase the capability of employees across the workforce, even if they were effective for the eligible employees.

### *(b) The Direct and Indirect Exclusion of Certain Employees*

The parental leave provisions directly and indirectly exclude employees from their operation. An example of direct exclusion is the specification of particular relationships between employee and child, which entitle an employee to parental leave.<sup>56</sup> The limited scope of the *FW Act* is highlighted by the broader scope of the *PLP Act*. The *PLP Act* recognises the birth mother or adoptive parent and their spouse or de facto, like the *FW Act*, but also includes, as potential PLP claimants, the father of a child, not in a relationship with the birth mother, and the father's partner.<sup>57</sup> In addition, a person who has no specific relationship with the child may claim PLP in 'exceptional circumstances'.<sup>58</sup> The success of a claim for PLP from any person depends on how it fits into the hierarchy of primary, secondary and tertiary claims.<sup>59</sup> This structure, and the

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<sup>52</sup> The 'continuous service requirement' is described in the paper. The *PLP Act* has a 'work test' as part of its eligibility criteria. Under this test a person claiming PLP must have worked 330 hours of 'qualifying work' within the 392 days before the birth of the child (or expected date of birth in some instances). Further, there should be 295 consecutive days within that period where the claimant either performed qualifying work or took a 'permissible break'. Qualifying work may consist of one hour of paid work on a day. Overall the test provides for a very diverse range of work histories. *PPL Act* Part 2-3, Division 3.

<sup>53</sup> Such as annual leave or long service leave.

<sup>54</sup> Breen Creighton and Andrew Stewart, *Labour Law* (The Federation Press, 5<sup>th</sup> ed, 2010) 393 [13.110]; Fair Work Ombudsman et al, 'Workers' Rights: Parental Leave' (Media Release, 18 October 2011) [http://www.lsc.sa.gov.au/resources/8\\_Parental%20leave.pdf](http://www.lsc.sa.gov.au/resources/8_Parental%20leave.pdf).

<sup>55</sup> While an employer cannot take 'adverse action' or discriminate against a person because of their pregnancy, their family or carer's responsibilities or parental status, under state and Federal discrimination legislation including the *FW Act*, the *Equal Opportunity Act 2010* (Vic) and the *Sex Discrimination Act 1984* (Cth). It is unclear whether following the letter of the *FW Act* could be discriminatory. The *Sex Discrimination Act 1984* (Cth) is the only Act (from those mentioned) that does not expressly exempt discrimination consisting of an act authorised by a Commonwealth Act. See e.g. *FW Act* s 342(3); *Equal Opportunity Act 2010* (Vic) s 75(1)(a).

<sup>56</sup> Provided other eligibility matters are satisfied.

<sup>57</sup> *PPL Act* s 54(2)(b),(c).

<sup>58</sup> *Ibid* ss 54(1)(c),(2)(d),(3); *Paid Parental Leave Rules 2010* (Cth) Subdivisions 2.4.1.1-2.4.1.3.

<sup>59</sup> This is described in Part 2-2 of the *PPL Act* which sets out the rules about when parental leave is payable to a person. There can be three types of claim: primary, secondary and tertiary. Secondary and tertiary claims will not succeed unless a primary claim has been established and that primary claim does not exhaust the entitlement. Part 2-4 Division 2 of the *PPL Act* provides that a primary claim can be made by a birth mother or an adoptive parent of a child; a secondary claim can be made by a partner of the primary claimant, or a person who is the parent of the child (and is not the primary claimant), or that parent's partner; a tertiary claim (or a primary or secondary claim) can be

‘exceptional circumstances’ rules, evidence a preference for children to be parented by someone who is their biological or adoptive parent, or a person connected to a parent through partnership.<sup>60</sup> If, as Anna Chapman suggests in ‘The New National Scheme of Parental Leave Payment’,<sup>61</sup> the *FW Act* provisions promote a two adult ‘couple’ as part of the ideal care framework for children,<sup>62</sup> that theme is reflected in the *PLP Act*. However, as noted by Chapman, the *PLP Act* recognises the existence of diverse caring arrangements and carers.<sup>63</sup> The fact that some of those carers will not be eligible to take parental leave suggests that the *FW Act* provisions, and the themes underlying them, need to be re-evaluated, or risk irrelevance in the employee capability space.

Indirect exclusion of employees from the parental leave provisions includes the mandating of what Chapman calls, a ‘primary caregiver model’.<sup>64</sup> This arises from the stipulation that leave must be taken in a single continuous period<sup>65</sup> and the restriction of concurrent leave (for an employee couple) to three weeks. A full-time NES employee who wanted to care for their child using alternating primary carers or shared caring (such that there is no ‘primary’ carer), could be indirectly excluded from utilising the provisions. Academics have identified people in same-sex relationships and people living in indigenous communities as being among those who might choose non primary caregiver parenting models (discussed below). The current parental leave provisions may not assist employees from these groups to convert their time and work commodities to a lifestyle of ‘working and parenting’.

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made by a person satisfying the ‘exceptional circumstances’ described in Subdivisions 2.4.1.1-2.4.1.3 of the *Paid Parental Leave Rules 2010* (Cth) (*PPL Rules*).

<sup>60</sup> The fact that secondary and tertiary claims are contingent on primary claims (usually made by the child’s birth mother or an adoptive parent of the child) demonstrates the importance of the ‘parent’. Subdivisions 2.4.1.1-2.4.1.3 of the *PPL Rules* highlight the importance of ‘partnership’, for example, where the birth mother or adoptive parent is incapable of caring for a child, a person that has no specific relationship with the child can only make a primary claim for PLP if (among other things) a partner of the birth mother or adoptive parent is incapable of caring for the child. A similar rule applies in relation to secondary claims. Partnership has a similar meaning under the *PPL Act* and the *FW Act*. In the *FW Act* a de facto partner (of an employee) is defined in s 12 as ‘a person who ... lives with the employee in a relationship as a couple on a genuine domestic basis (whether the employee and the person are of the same or different sexes)...’ The meaning of ‘partner’ in the *PPL Act* is taken from the *Social Security Act 1991* (Cth) s 4. The relevant criteria in determining whether people are in a same or different sex partnership for the purposes of that Act include shared financial and domestic arrangements as well as the social and sexual aspects of their relationship.

<sup>61</sup> Anna Chapman, ‘The New National Scheme of Parental Leave Payment’ (2010) 24 *Australian Journal of Labour Law* 60.

<sup>62</sup> Chapman makes an ancillary observation about the privileging of a heterosexed understanding of ‘couple’ and ‘partner’. In both the *FW Act* and the *PPL Act* the terms ‘de facto partner’ or ‘partner’ are defined by aspects of shared financial and living arrangements (among other things). These aspects are in turn adapted from what is common in a marriage or marriage-like relationship. Chapman questions ‘the appropriateness of using such normative values of heterosexual marriage to recognise same sex relationships...’ To what extent the definition of same-sex relationships interferes with the accessibility, and therefore the transformative potential, of the parental leave provisions is an area for further research. Ibid 68-9.

<sup>63</sup> Ibid 67.

<sup>64</sup> Anna Chapman, ‘Employment Entitlements to Carer’s Leave: Domesticating Diverse Subjectivities’ (2009) 18(2) *Griffith Law Review* 453, 455.

<sup>65</sup> With the exclusion of the concurrency period.

## **C Personal and Carer's Leave**

### **1 Content**

#### **(a) Paid Personal/Carer's Leave**

Pursuant to ss 95 and 96 of the *FW Act* non-casual employees are entitled to 10 days paid personal/carers' leave for each year of service with their employer, accruing progressively during each year and accumulating from year to year.<sup>66</sup> An employee is eligible to take paid personal/carers' leave if they are affected by an illness or injury, or for the purpose of caring for or supporting an immediate family or household member who is affected by illness, injury or an unexpected emergency.<sup>67</sup>

#### **(b) Unpaid Carer's Leave**

Where paid personal/carers' leave is not available, an employee is entitled to two days of unpaid carers' leave for each 'permissible occasion'.<sup>68</sup> A permissible occasion arises when a member of the employee's immediate family, or household, requires care or support due to an illness, injury or unexpected emergency affecting the member.<sup>69</sup> The leave must be taken for the purpose of providing care or support to the member.<sup>70</sup>

### **2 Critique**

If a full-time NES employee is working excessive hours in the sense that they are precluded from caring for themselves or others, *prima facie*, the personal and carers' leave provisions give that employee a choice not to work for a period without losing their position (or income, unless paid carers' leave is exhausted). That period will be 'short term' relative to parental leave. If the provisions operate as an effective conversion factor, employees will find that the consequences of choosing not to work for the period are acceptable and even desirable. The analysis in this section will focus on whether the provisions extend an employee's capability so that they may choose to care for *others*. This functioning will benefit the employee's immediate family or household *and* the employee. Participating in the provision and receipt of care is recognised as an activity which improves a person's sense of human-connectedness which, in turn, increases longevity (in life and work).<sup>71</sup>

The main phenomena which might disrupt the effectiveness of the provisions as conversion factors include the direct exclusion of non-family, non-household relationships from the definition of who may be cared for. It is important to assess

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<sup>66</sup> Section 99 of the *FW Act* provides that the rate of pay is the employee's base rate of pay for the employee's ordinary hours of work.

<sup>67</sup> *FW Act* s 97.

<sup>68</sup> *Ibid* s 102.

<sup>69</sup> *Ibid* s 102.

<sup>70</sup> *Ibid* s 103(1). Further, s 103(2) provides that the two days can be taken continuously or as agreed between the employee and employer.

<sup>71</sup> Howard S Friedman and Leslie R Martin, *The Longevity Project: Surprising Discoveries for Health and Long Life From the Landmark Eight Decade Study* (Hudson Street Press, 2011) 23-32, 67-78.

whether such exclusion will render the transformative potential of these provisions insignificant when applied across an entire workforce.

*(a) Direct Exclusion of Non-Family, Non-Household Relationships*

The limitation of care recipients to ‘immediate family’ or ‘household’ members has the potential to exclude employees from utilising the provisions where the person they wish to care for is not: a child, parent, grandparent or sibling of the employee *or of their spouse or de facto partner*; or the spouse or defacto partner of the employee;<sup>72</sup> or a person connected to the employee by a ‘residence-type link’.<sup>73</sup> Academics have suggested that this is likely to affect (among others) employees connected to same-sex relationships and employees that are part of an indigenous community.<sup>74</sup>

In ‘Employment Entitlements to Carer’s Leave: Domesticating Diverse Subjectivities’ Chapman refers to the diverse pathways that lead people in same sex relationships to parenting.<sup>75</sup> These pathways produce a wide network of care relationships. A full-time NES employee within such a network would be excluded from the choice to care for another person within the care network if their relationship with the person did not fall within the *FW Act* provisions. In a study of 151 Australian lesbian parents, Amaryll Perlesz and Ruth McNair found that these parents viewed extended kinship network as something which strengthened their families.<sup>76</sup> This statement was echoed in Kath Reid’s summary of the Queer Families Project.<sup>77</sup> The functioning of caring is an integral part of kinship,<sup>78</sup> therefore it is likely employees *are* being excluded from caring for others within their care network (but beyond the traditionally conceived family or household) who are faced with unpredicted sickness or injury, despite their preference to care.

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<sup>72</sup> This reflects the definition of ‘immediate family’ in s 12 of the *FW Act*.

<sup>73</sup> There is no definition of ‘household’ in the *FW Act* but Chapman proposes that the ‘entitlement in relation to a member of the employee’s ‘household’ ... appears to require a residence-type link.’ Chapman, ‘Employment Entitlements to Carer’s Leave: Domesticating Diverse Subjectivities’, above n 64, 465.

<sup>74</sup> See generally Anna Chapman, ‘Challenging the Constitution of the (White and Straight) Family in Work and Family Scholarship’ (2005) 23(1) *Law In Context* 65.

<sup>75</sup> ‘People in same-sex relationships come to parenting through diverse pathways, sometimes with children from an earlier heterosexual relationship, sometimes (and increasingly) through a birth within a lesbian relationship, and sometimes through foster parenting. This potentially creates wide networks of care relationships.’ (citations omitted). Chapman, ‘Employment Entitlements to Carer’s Leave: Domesticating Diverse Subjectivities’, above n 64, 454-5.

<sup>76</sup> Amaryll Perlesz and Ruth McNair, ‘Lesbian Parenting: Insiders’ Voices’ (2004) 25(2) *Australian and New Zealand Journal of Family Therapy* 129, 129, 136.

<sup>77</sup> The Queer Families Project consisted of many group narrative therapy sessions involving members of queer families. The themes of these sessions generated a narrative which was shared among and reflected upon by participants and their families. One of the expressions generated from the project stated ‘[i]t has been important for us to come together with other people creating and doing families to talk, to share our stories of unique challenges and common issues as queer families, and to learn from others. We want people around us who will support, nourish, and honour what we are doing and understand some of the tricky bits. For many of us, this theme is about wanting a diversity of people in our lives and our children’s lives. This desire for community has been long-held by many of us and has a history to it.’ Kath Reid, ‘Dancing Our Own Steps: A Queer Families’ Project’ (2008) 2 *The International Journal of Narrative Therapy and Community Work* 61, 65-6.

<sup>78</sup> In ‘The Longevity Project’ Friedman and Martin found that, not only are social ties necessary for long-life, the most important benefit people gained from being part of a large social network was the ability to care for others, rather than being cared for. Howard S Friedman and Leslie R Martin, *The Longevity Project: Surprising Discoveries for Health and Long Life From the Landmark Eight Decade Study* (Hudson Street Press, 2011) 23-32.



A similar problem could face an indigenous employee living in an extended family. The limitations of the 'immediate family' category were raised in a submission from the NSW Aboriginal Women's Legal Resources Incorporation (the 'NSW AWLRI') during the *Family Leave Test Case – November 1994*<sup>79</sup> – one of a number of hearings that standardised the provision of leave for the purpose of providing care and support in Australia.<sup>80</sup> The NSW AWLRI was concerned that limiting the right to family leave to 'immediate family' would not cater for the extended family living arrangements within their community.<sup>81</sup> The decision by the Australian Industrial Relations Commission to include 'household' members as care recipients was (in part) a response to this concern; a decision reiterated in the *FW Act*. However, the inclusion of household members as care recipients will not assist indigenous employees in all situations. For example, indigenous families interviewed by J Page for the research paper 'Who Cares? A Study of Diverse Care Arrangements in Australian Society,' identified a cultural obligation to care for children 'as they arrived from others.'<sup>82</sup> This was a reference to children from other families who came to be with them for a period – a circumstance that might be too transient to bring the child or children within the 'household' category of care recipients. The families saw barriers to fulfilling their caring obligations as a source of tension.<sup>83</sup> This is a concrete expression of non-freedom, a concept the working time provisions were designed to address.

#### *D Requests for Flexible Working Arrangements ss 65-66 FW Act*<sup>84</sup>

Section 65 of the *FW Act* provides that certain employees can make a written request to their employer for a change in working arrangements to assist them in caring for a child under school age,<sup>85</sup> or under 18 and suffering a disability. An employee is eligible to make a request under s 65 if they are a parent of the child or the person with responsibility for the care of the child,<sup>86</sup> and they meet the continuous service requirement. For a non-casual employee the continuous service requirement (in a simple case) is at least 12 months employment with the employer immediately before making the request.<sup>87</sup> The employer is required to give the employee a written response stating whether the request is granted, within 21 days.<sup>88</sup> Section 65(5) provides that a request can only be refused on reasonable business grounds. Details of the reasons for a refusal should be included in the written response pursuant to s 65(6).

<sup>79</sup> *Family Leave Test Case – November 1994* (1994) 57 IR 121, 130.

<sup>80</sup> *Family Leave Test Case – November 1994* (1994) 57 IR 121, 130; *Family Leave Test Case, Supplementary Decision* (1995) AIR 3-060; *Personal/Carer's Leave Test Case – Stage 2 – November 1995* (1995) 62 IR 48; *Personal/Carer's Leave Test Case – Stage 2 – March 1996* (1996) 66 IR 138.

<sup>81</sup> *Family Leave Test Case – November 1994* (1994) 57 IR 121, 130.

<sup>82</sup> J Page, 'Who Cares? A Study of Diverse Care Arrangements in Australian Society' (A Paper Summarising the Findings of the 'Diverse Care Project', Commonwealth Department of Family and Community Services, July 2000) [www.aifs.gov.au/conferences/aifs7/page.html](http://www.aifs.gov.au/conferences/aifs7/page.html).

<sup>83</sup> Ibid.

<sup>84</sup> Section 66 of the *FW Act* is not pertinent to this discussion but it does form part of the 'right to request' provisions. It states that the *FW Act* 'is not intended to apply to the exclusion of laws of a State or Territory that provide employee entitlements in relation to flexible working arrangements, to the extent that those entitlements are more beneficial to employees than the entitlements under this Division.'

<sup>85</sup> Section 12 of the *FW Act* states that 'school age, for a child, means the age at which the child is required by a law of the State or Territory in which the child lives to start attending school.'

<sup>86</sup> *FW Act* s 65(1).

<sup>87</sup> Ibid s 65(2)(a).

<sup>88</sup> Ibid s 65(4).

## 2 Critique

If a full-time NES employee is working excessive hours in the sense that they are precluded from caring for the type of child described in the legislation, *prima facie*, the 'right to request' provisions give the employee a choice to request alternative working arrangements that will facilitate their role as carer. If the provisions operate as an effective conversion factor, employees will find that the consequences of choosing to request a change in their working time or location (for example)<sup>89</sup> are acceptable and even desirable. Extending an employee's capability in this way could benefit the health of the person receiving care and the health of the carer (as discussed in relation to carer's leave).

There are two types of phenomena that might disrupt the effectiveness of the provisions (as conversion factors). Both categories have been mentioned in this essay. The first category includes things that may affect an employee's choice to use or not use the provisions. The second category includes things that may affect an employee's ability to access the provisions when that access is desired. Both types of phenomena provide insight into the utility of the provisions. With regard to the 'right to request' provisions examples of the first category include the flexible content of the provisions and the lack of a compliance mechanism. An example of the second category is the direct exclusion of certain care relationships. The following brief comments attempt to pick up some themes that have been laid down in previous sections of the paper.

### *(a) Flexible Content of the Provisions*

It has been submitted that provisions with 'unfixed' content tend to gain their meaning or definition through workplace negotiation and that the prospect of negotiation may dissuade a full-time NES employee from utilising the provision. The flexibility in the right to request provisions arises from the stipulation that requests can only be refused on 'reasonable business grounds'.<sup>90</sup> That phrase is not defined in the *FW Act* and employers wishing to refuse a request for flexible arrangements could take advantage of this by interpreting it broadly. The 2009 Australian Work and Life Index suggests that employers are not alone in feeling that flexible work arrangements are not good for business. Of the 2691 workers surveyed (including 2307 employees)<sup>91</sup> 13.1 per cent of full-time employees felt their job was not suitable for flexible arrangements.<sup>92</sup> However, in the year prior to the survey 18.4 per cent of full-time employees made a request for flexible arrangements,<sup>93</sup> and 12.6 per cent of those requests were made to accommodate childcare needs.<sup>94</sup> The success of requests was seen to differ by personal income. The report states that: 'workers in the highest income group (\$90,000+) are

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<sup>89</sup> The 'note' to s 65 of the *FW Act* states that '[e]xamples of changes in working arrangements include changes in hours of work, changes in patterns of work and changes in location of work.'

<sup>90</sup> *FW Act* s 65(5).

<sup>91</sup> Pocock, Skinner and Ichii, 'Work, Life and Workplace Flexibility', above n 23, 16.

<sup>92</sup> In 2009 the Australian Work and Life Index focused its survey questions on the topic of work, life and workplace flexibility. In the report, table 27 displays the reasons why employees who did not make a request for a change in work arrangements in the year preceding the survey, did not make a request (by gender and work hours). Pocock, Skinner and Ichii, 'Work, Life and Workplace Flexibility', above n 23, 66.

<sup>93</sup> *Ibid* 56.

<sup>94</sup> *Ibid* 60.

least likely to have their request fully granted (61 per cent) compared to around 70 per cent of requests fully approved for those on lower incomes.’<sup>95</sup> These requests were not made under the current provisions and the reasons for approval or refusal were not provided in the survey, but where there is an incentive to refuse a request, the drafting of the provisions will assist the employer. This is particularly problematic for full-time NES employees who (by definition) are unlikely to be represented by an employee organisation which could assist in pursuing the employer for compliance.

### *(b) Lack of a Compliance Mechanism*

However enforcing compliance with the right to request provisions would not be a simple matter even for an employee organisation, such as a union, applying for a civil remedy on behalf of an employee under s 539(2) of the *FW Act*. Pursuant to s 44, contravening a provision of the NES is a civil penalty provision but orders based on a contravention (or alleged contravention) of s 65(5) are specifically excluded from the scope of s 44. There is an untested possibility that an action might lie where the employer refused a request for flexible working arrangements, and failed, in their written communication with the employee, to include details of the reasons for the refusal. An application based on ss 44 and 65(6) is not expressly excluded by the terms of the *FW Act* however the meaning of ‘details of reasons’ has not been interpreted.

### *(c) Direct Exclusion of Certain Care Relationships*

Restricting the care recipients to the type of children described in the right to request provisions, diminishes the potential of the provisions to open up lifestyle choices to employees across the labour market. There have been calls to include children generally and the elderly as potential care recipients.<sup>96</sup> These appeals suggest that the right to request provisions could go beyond facilitating the ‘work/care collisions’<sup>97</sup> of those involved in raising young children (a traditional concern of working time policy).<sup>98</sup> The business benefits of allowing employees to manage the way they convert their time to work and care activities, were recognised by the Productivity Commission when they recommended that the Government alter the provisions so that parents of significantly disabled children over the age of 18 could apply for alternative working

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<sup>95</sup> Ibid 63.

<sup>96</sup> Adam Bandt, ‘Beyond the Fair Work Act: From ‘Flexibility’ to ‘Sustainability’ In Australia’s Workplaces’ (Paper Presented at the Workforce Conference, 23 November 2010) 14-15; Ged Kearney, ‘A Vision for the Australian Union Movement’ (Speech delivered at the National Press Club, Canberra, 6 October 2010) <http://www.workplaceexpress.com.au/files/06KearneyNPC.pdf>.

<sup>97</sup> The term ‘work/care collision’ is taken from Barbara Pocock’s book *The Work/Life Collision*. She reports that ‘[m]ost workers with dependents identify the times when their dependents are sick as moments when they feel the greatest collision of caring and work.’ Pocock then elaborates on the issues arising from work/care collisions. Barbara Pocock, *The Work/Life Collision* (The Federation Press, 2003) 192.

<sup>98</sup> The first piece of public policy which provided employees an opportunity to take leave for the purpose of providing care was the *Maternity Leave (Commonwealth Employees) Act 1973* (Cth). The Federal award test case *Federated Miscellaneous Workers Union of Australia v ACT Employers Federation* (1979) 218 CAR 120 provided an entitlement to unpaid maternity leave in the private sector. As mentioned, leave for the purposes of providing care *not* associated with the birth or adoption of a child, was not standardized through the Commonwealth award test case system until 1994-96.

arrangements. They reported that '[i]ncreased flexibility generally has the advantage of reducing stress on carers, but also of encouraging their workforce participation.'<sup>99</sup>

#### IV CONCLUSION

The working time provisions in the NES address the excessive hours problem by attempting to ameliorate the negative consequences of choosing to reduce working time, or requesting a reduction or variation in working time, for those employees who are forced to rely on them. In this essay those employees have been described as full-time NES employees but the group also includes employees under a modern award or enterprise agreement that reflects the NES. The conceptualisation of working time provisions as factors which assist an employee to convert their time and other commodities into a range of potential lifestyles, implicitly brings to light the existence of all the other factors that could influence an employee's control over their commodities. This essay suggests that working time provisions will better address the excessive hours problem if their content is solid. This principle could extend to prescriptive rules about how flexible arrangements will be negotiated in the workplace, or greater supervision of workplace negotiations by a third party such as a Fair Work Inspector.<sup>100</sup> Further, the provisions will assist employers and employees if they are drafted broadly so that employees with an interest in using the provisions will be eligible to do so. Good working time conditions benefit the individual and the wider community including businesses and the labour market, therefore, where a modern award or enterprise agreement proposes to supplement one of the NES working time provisions, the likely impact of that change on the overall effectiveness of the provision should be assessed with these broad guidelines in mind.

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<sup>99</sup> Australian Government Productivity Commission, 'Disability, Care and Support' (Productivity Commission Inquiry Report Volume 2, No 54, Australian Government Productivity Commission, 31 July 2011) 728-9.

<sup>100</sup> Pursuant to s 653(1)(c)(i) of the *FW Act* there is an obligation on the General Manager of FWA to conduct research into the operation of s 65(1) (requests for flexible working arrangements) however there is no guidance as to what this should involve or how frequently it should be carried out.

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