

## REASONABLE ACCOMMODATION, ADVERSE ACTION AND THE CASE OF DEBORAH SCHOU

### ABSTRACT

This article examines three relatively new legal mechanisms designed to assist workers with care responsibilities. These are a claim of discrimination in the form of a failure by an employer to provide reasonable accommodation under the *Equal Opportunity Act 2010* (Vic) and two legal mechanisms under the *Fair Work Act 2009* (Cth). Those federal avenues involve a request for changed work arrangements, and the capacity to make a claim for redress in relation to adverse action. The well-known case of Deborah Schou is used as a hypothetical to explore possible meanings and issues within, and between, the different legal frameworks. Ms Schou sought to be permitted to work at home two days a week whilst her young son recovered from a temporary medical ailment. Ultimately Schou was not successful in her litigation. The article inquires whether she would now be successful under the three new mechanisms. The examination reveals both possibilities for redress, as well as significant complexity and uncertainty in outcome.

### I INTRODUCTION

In 1996 Deborah Schou requested permission from her employer to work at home two days a week. She sought this as a temporary arrangement whilst her young son recovered from recurrent chest infections, childhood asthma and separation anxiety. The medical advice was to the effect that he would likely grow out of these difficulties within a year or so, as indeed he did. Although Ms Schou's employer, the State of Victoria, initially agreed to her request, 11 weeks later the necessary technology in the form of a modem had not been installed, and finding the conflict between her work and care responsibilities at a crisis point, she resigned.

Schou lodged a complaint of discrimination under the *Equal Opportunity Act 1995* (Vic) ('EOA 1995 (Vic)'), alleging discrimination on the basis of parental status and status as a carer.<sup>1</sup> Schou's case turned on the interpretation and application of the

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<sup>1</sup> The original complaint also relied on the *Equal Opportunity Act 1984* (Vic) in respect to earlier incidents. In addition to parenting and carer grounds, the original complaint also alleged discrimination on the ground of 'industrial activity'. All claims under the 1984 Act were dismissed, and all claims relating to 'industrial activity' were also dismissed in an early hearing: *Schou v Victoria* (2000) EOC ¶93-100.

indirect discrimination provisions in the *EOA 1995* (Vic), and in particular whether her employer's requirement that she attend on site for all working days was 'not reasonable' in the circumstances.<sup>2</sup> After two tribunal decisions in her favour,<sup>3</sup> and a Supreme Court decision against her,<sup>4</sup> the Victorian Court of Appeal ultimately dismissed her complaint in its entirety.<sup>5</sup>

The course of the Schou litigation was closely followed over the seven years it ran, with the case coming to occupy a central place in the Australian debate regarding work and care conflict, especially as experienced by women workers with young children.<sup>6</sup> Early writings expressed excitement at the radical potential of the first tribunal decision in Schou's favour, only to have that turn to dismay and exasperation when the decisions of the Victorian Supreme Court and then the Court of Appeal were handed down. At the least the Schou litigation raised doubt about the efficacy of the indirect discrimination provisions as they stood at that time in the *EOA 1995* (Vic). More broadly it may continue to raise doubts about the ability of law to challenge long-held and taken-for-granted understandings of work arrangements, including, as in Schou, the place of work.

Numerous changes to the legislative landscape regulating conflict between work and care have occurred since the final decision in Schou was handed down in 2004. The *EOA 1995* (Vic) was itself amended in 2008 to recognise a new type of discrimination in the form of a failure by an employer to make reasonable accommodation for the responsibilities that an employee has as a parent or carer.<sup>7</sup>

<sup>2</sup> *EOA 1995* (Vic) s 9(1)(c). The Act provided that indirect discrimination arose where an employer had imposed a work requirement with which the complainant could not comply, and a higher proportion of people not of the complainant's group could comply, in circumstances in which the imposition of the requirement was not reasonable.

<sup>3</sup> *Schou v Victoria* (2000) EOC ¶93-100; *Schou v Victoria* (2000) EOC ¶93-101 (decision on relief); *Schou v Victoria* [2002] VCAT 375 (24 May 2002).

<sup>4</sup> *Victoria v Schou* (2001) 3 VR 655.

<sup>5</sup> *Victoria v Schou* (2004) 8 VR 120.

<sup>6</sup> See, eg, Therese MacDermott and Rosemary Owens, 'Equality and Flexibility for Workers with Family Responsibilities: A Troubled Union?' (2000) 13 *Australian Journal of Labour Law* 278; K Lee Adams, 'A Step Backwards in Job Protection for Carers' (2002) 15 *Australian Journal of Labour Law* 93; Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26 *Melbourne University Law Review* 325; Marilyn Pittard, 'The Dispersing and Transformed Workplace: Labour Law and the Effect of Electronic Work' (2003) 16 *Australian Journal of Labour Law* 1; Fiona Knowles, 'Misdirection for Indirect Discrimination' (2004) 17 *Australian Journal of Labour Law* 185; Belinda Smith and Joellen Riley, 'Family-friendly Work Practices and the Law' (2004) 26 *Sydney Law Review* 395; Margaret Thornton, 'Sex Discrimination, Courts and Corporate Power' (2008) 36 *Federal Law Review* 31.

<sup>7</sup> *EOA Act 1995* (Vic) ss 13A, 14A, 15A, 31A. These amendments were made by the *Equal Opportunity Amendment (Family Responsibilities) Act 2008* (Vic). See generally, Anna Chapman, 'Care Responsibilities and Discrimination in Victoria: The *Equal Opportunity Amendment (Family Responsibilities) Act 2008* (Vic)' (2008) 21 *Australian Journal of Labour Law* 200.

This amendment may have been prompted by the final decision in Schou.<sup>8</sup> Only a few anti-discrimination statutes in Australia place an obligation of accommodation on employers.<sup>9</sup> These Victorian provisions were re-enacted in substantively identical terms in the *Equal Opportunity Act 2010* (Vic) ('EOA (Vic)').<sup>10</sup> They have moreover been bolstered by new legislative objectives in the 2010 Act which cite 'substantive equality' and refer to 'promoting and facilitating the progressive realisation of equality'.<sup>11</sup> The general trajectory of the *EOA* (Vic) towards a substantive conception of equality is also confirmed in the new and broad positive duty on employers and other duty holders to 'take reasonable and proportionate measures' to eliminate discrimination 'as far as possible'.<sup>12</sup>

In addition to these developments in Victorian anti-discrimination law, the federal *Sex Discrimination Act 1984* (Cth) ('SDA') was amended in June 2011 to extend the protections for 'family responsibilities' to direct discrimination in relation to all aspects of employment.<sup>13</sup> Prior to this, the family responsibilities provisions in

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<sup>8</sup> In the second reading debate on the Equal Opportunity Amendment (Family Responsibilities) Bill some members of Parliament explicitly acknowledged the link between the new provisions and the Schou litigation: Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 2007, 3676 (Mr Clark); 3684 (Mr Wakeling).

<sup>9</sup> See *Anti-Discrimination Act 1992* (NT) s 24; *Equal Opportunity Act 1984* (SA) s 66(d). On the ground of disability, see *Disability Discrimination Act 1992* (Cth) ('DDA') ss 5(2), 6(2). A positive obligation on employers may be imposed by the *Anti-Discrimination Act 1977* (NSW) ss 49V(4), 49U, although this has not been tested judicially. In addition, in the context of indirect discrimination claims and the reasonableness component, the New South Wales tribunal has required employers to at least consider and sometimes to make reasonable efforts to accommodate an employee's request to alter her working arrangements: *Tleyji v The TravelSpirit Group Pty Ltd* [2005] NSWADT 294 (15 December 2005) [105]; *Reddy v International Cargo Express* [2004] NSWADT 218 (30 September 2004) [84].

<sup>10</sup> *EOA* (Vic) ss 17, 19, 22, 32. Note also that the *EOA* (Vic) has altered the meaning of indirect discrimination in important respects: see below n 12. The *EOA* (Vic) also imposes an obligation to make reasonable adjustments in relation to disability: s 20.

<sup>11</sup> *Ibid* s 3.

<sup>12</sup> *Ibid* s 15(2), see pt 3. However this duty cannot be enforced through a claim, but such issues may be the subject of an investigation conducted by the Victorian Equal Opportunity and Human Rights Commission ('VEO&HRC'): ss 15(3), (4). The *EOA* (Vic) also amended the meaning of indirect discrimination in important respects. The new provisions refer to the requirement 'disadvantaging persons' with an attribute, in a way 'that is not reasonable'. Notably the employer has the onus of establishing the reasonableness of the requirement. The new rules also provide a greater articulation of relevant factors in determining reasonableness: *EOA* (Vic) s 9.

<sup>13</sup> *SDA* s 7A. New provisions in relation to 'breastfeeding' were also enacted: s 7AA. The amendments were made to the *SDA* by the *Sex and Age Discrimination Legislation Amendment Act 2011* (Cth). Note that the federal government is proposing to consolidate federal anti-discrimination legislation: Attorney-General's Department, 'Consolidation of Commonwealth Anti-Discrimination Laws' (Discussion Paper, Attorney-General's Department, September 2011).

the *SDA* were more narrowly drawn to cover only direct discrimination leading to dismissal from employment.<sup>14</sup>

Federal industrial legislation has also been reshaped around the issues of work, parents and care. The *Fair Work Act 2009* (Cth) (*FW Act*) extended existing protections in the industrial sphere to provide redress in relation to ‘adverse action’ across all stages of employment, from hiring onwards, on various grounds including ‘family or carer’s responsibilities’.<sup>15</sup> In addition, the *FW Act* introduced a new statutory mechanism for parents and carers to request a change in working arrangements in order to accommodate care responsibilities to young children and children with a disability.<sup>16</sup> Although an employer is only entitled to refuse an employee request on ‘reasonable business grounds’,<sup>17</sup> there are limits on the ability to challenge an employer’s decision.

This article investigates the reasonable accommodation provisions in the *EOA* (Vic), and the ability to seek a remedy in relation to ‘adverse action’ under the *FW Act*. These two new grievance avenues are innovative and their scope is uncertain, and for those reasons an exploration is warranted. They are the obvious alternatives to each other. The request mechanism in the *FW Act* is also examined, as it is likely to be considered and utilised by an employee prior to recourse being made to either the *EOA* (Vic) or adverse action under the *FW Act*.<sup>18</sup>

It remains to be seen whether and how the potential of these relatively new mechanisms is realised. It is early days and case decisions under the Victorian accommodation provisions and the federal adverse action rules are only beginning to emerge. For this reason it is useful to use a hypothetical to explore the likely meaning and operation of the new mechanisms. The facts that emerge from the decisions in the Schou litigation are valuable for these purposes, and especially salient for two reasons. First, by today’s standards Schou’s request is a relatively modest one. It is now not unusual for employees to work remotely, including from home for part of the week.<sup>19</sup> In addition, Schou was a full-time, long standing and

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<sup>14</sup> *SDA* ss 7A, 14(3A) (now repealed).

<sup>15</sup> *FW Act* s 351(1). These provisions commenced on 1 July 2009. They consolidate and expand upon the previous freedom of association protections and unlawful termination provisions in the previous *Workplace Relations Act 1996* (Cth) (*WR Act*).

<sup>16</sup> *FW Act* pt 2-2 div 4. These provisions commenced on 1 January 2010.

<sup>17</sup> *Ibid* s 65(5).

<sup>18</sup> Other possible legal avenues include a claim of indirect discrimination related to ‘parental status or status of a carer’ under the *EOA* (Vic), unfair dismissal under pt 3-2 of the *FW Act* or, less likely, direct discrimination on the attribute of ‘family responsibilities’ under the *SDA*. In contrast to the reasonable accommodation provisions in the *EOA* (Vic) and adverse action under the *FW Act*, there is nothing particularly new or untested in these other avenues, and for that reason they are not explored in this paper.

<sup>19</sup> Australian Bureau of Statistics, ‘Locations of Work’ (Survey No 6275.0, ABS, 8 May 2009). Although a growing number of public and private sector awards and agreements have provided for home based work from the early 1990s, the provisions

senior employee,<sup>20</sup> and as such her claim for accommodation would be expected to be strong.<sup>21</sup> Her circumstances represent a strong claim for legal protection, and so provide a litmus test. If these new legal mechanisms are not able to provide a modern day Schou<sup>22</sup> with accommodation and assistance, what hope is there for the vast numbers of women parents working in vulnerable sectors of the labour market, who are engaged in the private sector by medium and small businesses, and in insecure part-time and casual work?<sup>23</sup>

The claim under the *EOA* (Vic) for failure to accommodate, and the *FW Act* adverse action framework, provide alternative and distinctive paths for grievances.<sup>24</sup> Time frames in which to lodge a claim vary between the two jurisdictions,<sup>25</sup> as does the range of dispute resolution processes through which a claim potentially proceeds,<sup>26</sup>

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tend to give employers much discretion as to whether to permit working from home in any particular instance. Early award and agreement provisions from the early 1990s often specified that home based work was not a substitute for dependant care. See Pittard, above n 6, 69; Marilyn Pittard, 'Rethinking Place of Work: Federal Labour Law Framework for Contemporary Home-Based Work and Its Prospects in Australia' in Jill Murray (ed), *Work, Family and the Law* (Federation Press, 2005) 148.

<sup>20</sup> As an employee of the Victorian public sector, Schou is covered by the *FW Act*, whereas public sector employees elsewhere in Australia are generally not. See below n 57.

<sup>21</sup> Joo-Cheong Tham, 'Towards an Understanding of Standard Employment Relationships under Australian Labour Law' (2007) 20 *Australian Journal of Labour Law* 123; Sara Charlesworth, 'The Sex Discrimination Act: Advancing Gender Equality and Decent Work?' in Margaret Thornton (ed), *Sex Discrimination In Uncertain Times* (ANU E Press, 2010) 133, 137–8.

<sup>22</sup> Throughout this article the pronoun 'she' is used to refer to a modern day, or contemporary, Schou. This approach is taken for grammatical simplicity; it is not intended to suggest that a modern day Schou will necessarily be a woman, although empirically that person is likely to be.

<sup>23</sup> The first and only decision (at the time of writing) under the *EOA* (Vic) accommodation provisions involved a casual prison officer, and her casual status was a strong factor against her claim that her employer had unreasonably refused to accommodate her needs as a parent and carer. The Victorian Civil and Administrative Tribunal ('VCAT') determined that 'the very nature of casual employment which is what Ms Richold is offered by the State grants the fullest possible flexibility': *Richold v Victoria* [2010] VCAT 433 (14 April 2010) [42].

<sup>24</sup> Both the *FW Act* and the *EOA* (Vic) attempt to prevent multiple claims in relation to the same conduct: *FW Act* pt 6-1 div 3; *EOA* (Vic) s 116. See *Freeman v Ambulance Victoria* [2011] FCA 1141 (6 October 2011). See also *Birch v Wesco Electrics (1966) Pty Ltd* [2012] FMCA 5 (9 January 2012).

<sup>25</sup> The time frame for lodging in relation to discrimination under the *EOA* (Vic) is generally 12 months (*EOA* (Vic) s 116(a)) whereas for adverse action involving a dismissal it is 60 days after the dismissal took effect (*FW Act* s 366), and for adverse action not involving a dismissal it is six years (*FW Act* s 544).

<sup>26</sup> Under the *EOA* (Vic) dispute resolution by the VEO&HRC is now voluntary (*EOA* (Vic) s 112) whilst VCAT conducts processes of 'compulsory conference' and 'mediation' followed by a hearing (*Victorian Civil and Administrative Tribunal*

and the remedies that may be ordered.<sup>27</sup> In addition, a notable difference lies in the potential role of the Fair Work Ombudsman in enforcing the adverse action provisions in the *FW Act*.<sup>28</sup> In contrast, there is no analogous enforcement agency under the *EOA* (Vic), where employees and others pursue their claims without the formal support of a public enforcement body.<sup>29</sup>

Whilst the focus of the exploration in this article is on the legal rules themselves, it is acknowledged that the meaning and utility of all legal rules, including these new mechanisms, is shaped by the context in which they operate. This includes the dynamics of individual work relations and broader cultural understandings and values of work, care and gender. Also relevant and important is the impact of other legal mechanisms such as the contract of employment, and industrial regulation in the form of National Employment Standards, enterprise agreements and modern awards under the *FW Act*. These will all shape the meaning of the grievance mechanisms of discrimination and adverse action as they operate. As there is no full and direct enforcement mechanism attached to the request mechanism under the *FW Act*, the dynamics of individual work contexts and the broader landscapes of normative understandings regarding work and care may play an even greater role in shaping the meaning of the request provisions, as operationalised in work situations.

The paper first sets out the background and circumstances of Schou's case, as revealed through the eight decisions in the litigation. What is remarkable in this material is the proactive and creative efforts of Schou, under very stressful

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*Act 1988* (Vic) pt 4 div 5, *EOA* (Vic) s 122). In relation to an adverse action claim involving dismissal, Fair Work Australia ('FWA') conducts a compulsory 'conference' (*FW Act* s 368) and a voluntary 'conference' where the claim does not involve dismissal (*FW Act* s 374). This may be followed by a hearing in the Federal Court or the Federal Magistrates Court: *FW Act* s 539(2) item 11.

<sup>27</sup> Whilst orders for damages under Victorian anti-discrimination law have 'generally been low' (Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (Federation Press, 2008) [11.4.18]), the adverse action provisions provide for a broad range of possible orders, including compensation, monetary penalty orders and importantly interim injunctions (*FW Act* ss 545, 546). Costs have generally been awarded less often in relation to Victorian anti-discrimination matters: Rees, Lindsay and Rice, above n 27, [11.10.3]. Adverse action litigation is expected in most instances to be costs-free (*FW Act* s 570).

<sup>28</sup> *FW Act* pt 5-2. See further, Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work* (Oxford University Press, 2<sup>nd</sup> ed, 2011) [12.4.2]–[12.4.3]; Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5<sup>th</sup> ed, 2010) [6.38]–[6.46]. See also Belinda Smith, 'Fair and Equal in the World of Work: Two Significant Federal Developments in Australian Discrimination Law' (2010) 23 *Australian Journal of Labour Law* 199; Therese MacDermott, 'Challenging Age Discrimination in Australian Workplaces: From Anti-Discrimination Legislation to Industrial Regulation' (2011) 34 *University of New South Wales Law Journal* 182, 206–7.

<sup>29</sup> Whilst the *EOA 1995* (Vic) did require the VEO&HRC to assist complainants in formulating their complaints (s 106), that provision has been removed in the current *EOA* (Vic).

circumstances, in trying to find a workable solution for both herself and her employer. Also remarkable is the quite unreceptive and passive approach of her employer. From there the article investigates some main questions that arise under the federal request mechanism. It then moves to consider a claim by a modern day Schou for discrimination in the form of a failure to make reasonable accommodation under the *EOA* (Vic), followed by an argument of adverse action under the *FW Act*.

## II SCHOU AND THE DEPARTMENT

Schou commenced employment with the Department of Victorian Parliamentary Debates, State of Victoria in 1979, working her way up from a trainee parliamentary reporter to a sub-editor.<sup>30</sup> The Department's function was (and remains) to produce Hansard, the record of parliamentary debates.<sup>31</sup> The work of the Department's reporters and sub-editors was described as being 'highly skilled'.<sup>32</sup> Sub-editors such as Schou were responsible to supervise and manage the work of reporters, through editing and liaising with them to produce the final version of Hansard.<sup>33</sup> The Department was relatively small, employing four sub-editors at the relevant time, and around a dozen permanent reporters plus some casual reporters.<sup>34</sup>

The working patterns of Schou and her colleagues reflected the time imperatives involved in producing Hansard. Members of Parliament expected to receive an edited proof of debates within two to three hours of the debate occurring, and Parliament required a hard copy of Hansard by 8.30 am on the day following the debate.<sup>35</sup>

During the relevant period the Victorian Parliament sat in two sessions each calendar year, with each session being between six to ten weeks in duration. From 1994, sitting days were extended from three to four days per week so that in sitting weeks full-time staff in the Department (including Schou) usually worked around 45 hours over four days, although towards the end of the Parliamentary session working hours would reach 60 over the four days.<sup>36</sup> Daily hours were highly

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<sup>30</sup> *Schou v Victoria* (2000) EOC ¶93-100, 74 418–9. Although in *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [11] Duggan J stated that Schou commenced employment in 1977.

<sup>31</sup> Hansard is substantially a verbatim record of all parliamentary speeches and debates, and the work of Parliamentary Committees, although with obvious errors corrected and repetitions removed: *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [7]–[8].

<sup>32</sup> *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [50].

<sup>33</sup> *Ibid* [50]–[51].

<sup>34</sup> Hansard was a relatively small department. In addition to reporters and sub-editors, there were two Assistant Chief Reporters and a Chief Reporter who was the Head of the Department. There were two administrative staff and a clerk: *Victoria v Schou* [No 2] (2004) 8 VR 120 [12].

<sup>35</sup> *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [9].

<sup>36</sup> *Ibid* [14].

irregular. Staff did not usually work on Mondays. On Tuesdays and Wednesdays Schou would commence work between 10am to noon, and finish around 1 am or 2 am the following morning. On Thursdays she would commence around 10am and finish at around 8 pm. Parliament did not sit on Fridays, and as a consequence Schou would usually finish for the week by 2 pm or 3 pm.<sup>37</sup> In contrast, during non-sitting weeks employees were required to work between around 10 am – 4 pm on three days of their choice, although on occasion the requirements of Parliamentary Committees would necessitate working particular days.

In 1994, when Parliamentary sitting days increased to four a week, Schou sought to change her employment from full-time to part-time. Her request was met by her supervisor asking her to ‘hold on’ and ‘stick it out’ until the end of the current session, after which sitting days were expected to revert to 3 days per week.<sup>38</sup> Two years later, in a routine interview with her supervisor, Schou spoke of the recurrent illnesses that her pre-school age son was experiencing, and the medical prognosis that he was expected to grow out of those difficulties within a year or so.<sup>39</sup> Schou requested that for this reason she be permitted to work part-time until his health improved. She was told in response to prepare some part-time work options for her supervisor’s consideration. Schou (and two other employees) put together such a proposal, and engaged an industrial negotiator to pursue the matter on their behalf with the Department. After around six months those discussions with the Department stalled.<sup>40</sup> Schou then requested 12 months leave without pay, but this did not proceed.<sup>41</sup>

At this point Schou raised the possibility of a new arrangement. This involved continuing in full-time employment but being permitted to work from home via a modem on Thursdays and Fridays on sitting days when her son was sick.<sup>42</sup> This became known in the various decisions as the modem proposal. In August 1996 Schou’s supervisors agreed that the modem proposal was the best course and

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<sup>37</sup> Ibid [15].

<sup>38</sup> VCAT determined that Schou did not pursue her request to move to part-time employment, and so her request in this regard lapsed or was withdrawn. On this basis VCAT dismissed this aspect of her complaint: *Schou v Victoria* (2000) EOC ¶93-100, 74 423.

<sup>39</sup> Ibid 74 423. It appears from the decisions that in 1996 Schou’s son was of pre-school age, as in November 1993 she returned from maternity leave following his birth: *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [17].

<sup>40</sup> VCAT took the view that the modem proposal had superseded the part-time work proposal, and that the Department had not as such rejected the part-time work proposal. On this basis Schou’s claim that the Department had rejected her proposal for part-time work was dismissed: *Schou v Victoria* (2000) EOC ¶93-100, 74 425.

<sup>41</sup> VCAT took the view that Schou only floated the idea of leave without pay and did not pursue it when it was not well received by her supervisors. For this reason VCAT dismissed this aspect of the complaint that alleged that the Department had refused to grant her leave without pay: Ibid 74 426.

<sup>42</sup> *Schou v Victoria* (2000) EOC ¶93-100, 74 425. The proviso that her son was sick was omitted from the explicit description of the modem proposal recited in later judgments: *Victoria v Schou [No 2]* (2004) 8 VR 120 [20].

would be implemented. This was approved by the Chief Reporter (who was Head of Department). Other staff were advised of the decision and arrangements were made with the IT section for the installation of the necessary technology.<sup>43</sup> Eleven weeks later the modem had not been installed and Schou resigned.<sup>44</sup> The evidence of Schou's supervisors was that they knew that her situation had reached a 'crisis point' and that if the modem was not installed within a reasonable time she would likely resign.<sup>45</sup>

It is hard to imagine that Schou could have done more to explore the options with her employer over the years that were involved. She went to considerable lengths to find a workable solution for herself and the Department. It was she and her colleagues who produced the part-time work proposal, and engaged a professional negotiator to confer with the Department. It was she who initiated the options of 12 months leave without pay, and the modem proposal. The Department showed itself to be highly passive in the management of this issue. It is as if the Department saw this as solely Schou's problem, and not one that the Department might play a role in managing for their mutual benefit. Notably, the Department demanded and received from its employees flexibility to meet its needs, requiring them to work up to 45 (and sometimes 60) hours over four days, whilst largely refusing even to countenance flexibility in terms that would assist employees.

Schou's legal claim rested on the interpretation and application of the indirect discrimination provisions in the *EOA 1995* (Vic), and in particular whether her employer's requirement that she attend Parliament House on all her working days was 'not reasonable' in the circumstances.<sup>46</sup> The Victorian Civil and Administrative Tribunal ('VCAT') determined twice that the employer's attendance requirement was 'not reasonable' within the meaning of the Act. VCAT drew on a number of matters in reaching this decision, including findings of fact that the needs of the Department would be met with Schou working from home part of the week, and that the modem proposal was inexpensive, especially given the financial circumstances of the employer. In response, both the Victorian Supreme Court and the Court of Appeal determined that VCAT had successively fallen into error in its approach to interpreting and applying the meaning of 'not reasonable' in the test of

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<sup>43</sup> In the second VCAT hearing it was determined that there were no technological barriers to putting the modem proposal into effect: *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [59]–[60].

<sup>44</sup> *Schou v Victoria* (2000) EOC ¶93-100, 74 426. Some nine months after her resignation Schou applied for a position with the Department as Chief Reporter, her son now being back to good health. Schou was not granted an interview, and challenged that decision as discriminatory. VCAT dismissed this aspect of her complaint, not being satisfied that her parent or carer responsibilities were a substantial reason for the decision not to grant her an interview: at 74 429.

<sup>45</sup> *Ibid* 74 427.

<sup>46</sup> *EOA 1995* (Vic) s 9(1)(c). The Act provided that indirect discrimination arose where an employer had imposed a work requirement with which the complainant could not comply, and a higher proportion of people not of the complainant's group could comply, in circumstances in which the imposition of the requirement was not reasonable.

indirect discrimination. These courts took a narrow and technical approach to the task of statutory interpretation, a methodology strongly critiqued in the literature as undermining the beneficial purposes of anti-discrimination legislation.<sup>47</sup>

### III THE REQUEST MECHANISM IN THE *FW Act*

The request mechanism is part of the National Employment Standards, and is contained in pt 2-2 div 4 of the *FW Act*. The Division enables an employee, who falls within certain closely defined categories, to request a change in ‘working arrangements’<sup>48</sup> in order to accommodate care responsibilities to a child under school age,<sup>49</sup> or a child with a disability under the age of 18.<sup>50</sup> The employee’s request must be in writing and ‘set out details of the change sought and of the reasons for that change’.<sup>51</sup> The employer is required to give the employee a written response within 21 days, stating whether the request is granted or refused.<sup>52</sup> If the employer refuses the request the employer’s written response ‘must include details of the reasons for the refusal’.<sup>53</sup> The employer ‘may refuse the request only on reasonable business grounds’.<sup>54</sup> There is no definition of ‘reasonable business

<sup>47</sup> See, eg, Gaze, above n 6; Adams, above n 6; Knowles, above n 6.

<sup>48</sup> The concept of ‘working arrangements’ is undefined, although a legislative note gives the examples of ‘hours of work’, ‘patterns of work’, and ‘location of work’: *FW Act* s 65(1) note.

<sup>49</sup> *Ibid* ss 65(1)(a), (b). On the meaning of ‘school age’ see at s 12. In Victoria the ‘school age’ is six years of age: *Education and Training Reform Act 2006* (Vic) s 2.1.1.

<sup>50</sup> The *FW Act* does not define or explain the meaning of ‘disability’, and the Explanatory Memorandum, Fair Work Bill 2009 (Cth) is silent on the question of how that concept should be interpreted. This lack of statutory definition or explanation may indicate that the concept should be given its ordinary meaning (*Acts Interpretation Act 1901* (Cth) s 15AB) rather than reference made to technical definitions found in anti-discrimination legislation such as the *DDA*. In two recent decisions the word ‘disability’ in the adverse action provisions has been given its ordinary meaning, and not the extended meaning found in the *DDA*: *Hodkinson v Commonwealth* [2011] FMCA 171 (31 March 2011) [145]–[146]; *Stephens v Australian Postal Corporation* [2011] FMCA 448 (8 July 2011) (*Stephens*) [86]–[87]. Requests for accommodation under the National Employment Standards mechanism can only be made by a ‘parent’ of a ‘child’, or a ‘national system employee’ who ‘has responsibility for the care’ of a ‘child’: *FW Act* s 65(1). The concept of ‘parent’ is not defined in the Act, but ‘child’ of a person is defined to include a person who is a child of the person within the meaning of the *Family Law Act 1975* (Cth), and an adopted child or step-child of the person: *FW Act* ss 17, 12 definitions of ‘step-child’. These all provide relatively broad definitions.

<sup>51</sup> *FW Act* s 65(3). The Fair Work Ombudsman has formulated a template letter of request for use by employees: [www.fairwork.gov.au/info/workandfamily](http://www.fairwork.gov.au/info/workandfamily).

<sup>52</sup> *Ibid* s 65(4). Note that the legislation does not explicitly identify the time from which the 21 days runs. Presumably time starts to run from when the employer receives the request.

<sup>53</sup> *Ibid* s 65(6).

<sup>54</sup> *Ibid* s 65(5).

grounds' in the Act, or a list of factors that might assist in understanding its meaning.

Not only is the request mechanism narrowly drawn to the care of young children and older children with a disability, it is restrictive in terms of the categories of workers that can use it. It applies only in relation to 'national system employees',<sup>55</sup> and only to those who have completed 12 months 'continuous service' with their employer prior to making the request, or are a 'long term casual employee' with 'a reasonable expectation of continuing employment by the employer on a regular and systematic basis'.<sup>56</sup>

A modern day Schou is entitled to use this request mechanism. Such a person is a 'national system employee',<sup>57</sup> with several years of continuous service.<sup>58</sup> In addition, the care responsibilities are to a pre-school aged child,<sup>59</sup> and the employee's attempts at accommodation relate to 'working arrangements'.<sup>60</sup>

#### A *A Static Legislative Process*

It is interesting to explore how the statutory scheme might operate in practice, and whether the use of the new request mechanism would actually assist a modern day Schou in securing accommodation from her employer. Notably, the legislation establishes a static process comprising of a formal request followed by a written

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<sup>55</sup> Ibid s 60. Generally, only employees in the common law sense of being engaged under contracts of service are included within the concept of 'national system employees': at s 13.

<sup>56</sup> Ibid s 65(2). The concept of 'continuous service' is defined in s 22. The concept of 'long term casual employee' is defined in s 12 to be a casual employee who has been employed by that employer 'on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months'.

<sup>57</sup> Ibid ss 13, 30B, 30C, 30M. A modern day Schou would be covered as a Victorian public sector employee; the type of matters requested are not excluded subject matters: *Fair Work (Commonwealth Powers) Act 2009* (Vic). Schou's status as a (full-time) employee in the common law sense is not put into contention in any of the decisions. In contrast, were a modern day Schou a public sector employee elsewhere in Australia, she would most likely not be a 'national system employee', due to the more limited referrals of power from those states: Andrew Lynch, 'The Fair Work Act and the Referrals Power — Keeping the States in the Game' (2011) 24 *Australian Journal of Labour Law* 1, 16–17.

<sup>58</sup> Deborah Schou took two periods of maternity leave, the last of which occurred a number of years before the modern proposal was raised. Assuming that maternity leave was authorised, which seems most likely, it would count as 'service' for these purposes: *FW Act* s 22(4).

<sup>59</sup> Were Schou's son to be of school age, his care needs would nonetheless be covered if his recurring illnesses and separation anxiety constituted a 'disability'. On the likely meaning of 'disability' see above n 50.

<sup>60</sup> The concept of 'working arrangements' is undefined, although a legislative note gives the examples of 'hours of work', 'patterns of work', and 'location of work': *FW Act* s 65(1) note.

approval or rejection within 21 days. It is not clear how that framework operates in contexts characterised by ongoing discussions between employers and employees, where the settlement of a request for flexibility may emerge over the course of several conversations. Notably, such dynamism appears likely to characterise discussions engaged in by employers who are committed to the legislative objective of flexibility in terms that support employees, and for that reason should be encouraged by the legislative scheme.<sup>61</sup> Schou's situation illustrates how the statutory request mechanism may not align easily with the realities of workplace negotiations over flexibility. For example, would a modern day Schou submit a formal request under the scheme following each occasion on which her supervisor asked her to 'hold on', or discussions stalled, or a proposal put by Schou did not proceed? Alternatively, would she not raise the various options with her supervisor in an informal manner at all, relying instead solely on submitting a formal written request in relation to each of her successive suggestions? A third possibility is that a modern day Schou would only submit a formal request under the scheme once informal discussions with her supervisor or relevant human resource officer had crystallised into an agreement in principle. These different possibilities all point to the need to consider how the federal request mechanism should be operationalised within individual workplaces to best fulfil the legislation's objective of assisting employees with care responsibilities. Desirably, employers would develop their existing policies on discrimination, flexibility and work and care, in order to provide the machinery for the federal request mechanism, and would do so in a way that captures the fluid and sometimes ongoing character of discussions and requests for accommodation. Notably, there is nothing in the legislation that encourages those developments.

### B *Enforceability*

If a modern day Schou did submit a request to the Department under the federal mechanism, would this increase her prospects of being permitted to work from home for part of the week? Notably, the problem for Schou was not simply that her employer refused to grant her request. Rather, it was that her employer changed its mind after initially agreeing to the request. Using the *FW Act* statutory framework centred around a written request and a response within a set time frame may render it more likely that an employer would actually put into place the arrangements that had been requested and that it had agreed to, at least initially. This might be due to the normative force of the federal scheme. It would certainly not be due to the legal

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<sup>61</sup> In its illustrative example the Explanatory Memorandum suggests that processes of negotiation and compromise are desirable: Explanatory Memorandum, Fair Work Bill 2009 (Cth) [270]. Empirical research indicates that negotiations in workplaces around flexible working arrangements are in fact characterised by dynamism: Natalie Skinner and Barbara Pocock, 'Flexibility and Work-Life Interference in Australia' (2011) 53 *Journal of Industrial Relations* 65. In the context of the *EOA* (Vic), guidelines encourage employers and employees to engage in discussions to move towards reasonable accommodation: Industrial Relations Victoria and VEO&HRC, *Building eQuality in the Workplace: Family Responsibilities – Guidelines for Employers and Employees* (Guidelines, 2008) ('Commission Guidelines').

reach of the legislation. This is because an employer's inaction after agreeing to an employee's request would itself be irremediable under the *FW Act* scheme.

Although the requirement on the employer to provide a written response within 21 days is directly enforceable as a civil remedy provision, as is the requirement on the employer (where the request is refused) to 'include details of the reasons for the refusal',<sup>62</sup> the central requirement on the employer to refuse the request 'only on reasonable business grounds' is not directly enforceable.<sup>63</sup> The merits of an employer's refusal cannot be challenged directly, as no cause of action arises where an employer refuses a request on unreasonable grounds.<sup>64</sup> Equally, an employer's change of heart after granting a request is also not able to be directly challenged under the request scheme in the *FW Act*.<sup>65</sup>

### C Concluding Thoughts on the Request Mechanism

It is unclear whether the request mechanism in the *FW Act* would assist a modern day Schou. Much depends on the attitude taken by the employer. Indeed it lies wholly within the employer's discretion as to whether to grant flexibility to the employee, regardless of how reasonable is the claim for accommodation. This is because ultimately the legislation provides very little that can be enforced against an unwilling employer.

Difficult questions arise as to whether a retreat by an employer from an initial agreement to a request might be open to challenge as an unreasonable failure to accommodate under the *EOA* (Vic), or as a form of adverse action under the *FW Act*. The intersections between the federal request mechanism and these two

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<sup>62</sup> *FW Act* ss 65(4), (6), 44(1), 539.

<sup>63</sup> *Ibid* s 44(2). See also at ss 739(2), 740(2). Other indirect avenues may exist though for reviewing the merits of an employer's refusal. These include where the employer has consented, under an enterprise agreement or an employment contract, to dispute resolution over a refusal of an employee's request (at ss 739(2), 740(2)), and where an enterprise agreement contains a term that provides a similar request mechanism, a contravention of that term is able to be pursued as a breach of the enterprise agreement (at s 50). See further Anthony Forsyth et al, *Navigating the Fair Work Laws* (Lawbook Co, 2010) 45.

<sup>64</sup> For an exploration of the limited enforcement framework attaching to the right to request mechanism, see Anna Chapman, 'Requests for Flexible Work under the Fair Work Act' (unpublished manuscript, January 2012).

<sup>65</sup> Scholars have argued though that the request mechanism may offer important potential to generate cultural change around work and care: Sara Charlesworth and Iain Campbell, 'Right to Request Regulation: Two New Australian Models' (2008) 21 *Australian Journal of Labour Law* 116; Jill Murray, 'Work and Care: New Legal Mechanisms for Adaptation' (2005) 15 *Labour & Industry* 67. These authors draw on the experience of earlier similar developments in the United Kingdom granting a right to request which are said to have led to a cultural change in employer attitudes. On the UK developments, see Sue Himmelweit, 'The Right to Request Flexible Working: A "Very British" Approach to Gender (In)Equality?' (2007) 33 *Australian Bulletin of Labour* 246.

grievance procedures are complex and uncertain, especially in relation to adverse action. Importantly, the request mechanism does not exclude the operation of state law such as the *EOA* (Vic) that provides more beneficial entitlements for employees to flexible work arrangements. Indeed, the *FW Act* contains an explicit direction in that regard,<sup>66</sup> indicating perhaps that the *EOA* (Vic) is the preferred form of redress in relation to a refusal by an employer over a claim under the adverse action provisions.

#### IV UNREASONABLE FAILURE TO ACCOMMODATE UNDER THE *EOA* (VIC)

As noted above the *EOA 1995* (Vic) was amended in 2008 to provide for a new type of discrimination, in the form of a failure by an employer to provide reasonable accommodation for the responsibilities that an employee has as a parent or carer.<sup>67</sup> The central provision in the 2008 package stated that an employer ‘must not, in relation to the work arrangements’ of the complainant, ‘unreasonably refuse to accommodate the responsibilities that the person has as a parent or carer’.<sup>68</sup> This was enacted as a third and separate form of discrimination, in addition to direct discrimination and indirect discrimination.<sup>69</sup> These provisions have been continued in substantively identical terms with the replacement of the *EOA 1995* (Vic) by the *EOA* (Vic).<sup>70</sup>

Schou potentially sought accommodation of her responsibilities to her son through her attempts to negotiate a move to part-time work, her offer to take leave without pay, and her final efforts to gain permission to work at home part of the week. The Department’s rejection in relation to each might singularly (and cumulatively) ground a complaint under the Victorian failure to accommodate provisions. A number of preliminary matters in relation to such a complaint are clearly met. Schou was a current employee of the Department of Victorian Parliamentary Debates.<sup>71</sup> The concepts of ‘parent’ and ‘carer’ are both defined (inclusively) in the Act, and Schou is presented in the decisions unproblematically as a person who falls within both definitions.<sup>72</sup> Indeed, one of the decisions reveals that she took

<sup>66</sup> *FW Act* s 66; Explanatory Memorandum, Fair Work Bill 2009 (Cth) [272].

<sup>67</sup> The new provisions, effected by the *Equal Opportunity Amendment (Family Responsibilities) Act 2008* (Vic), applied in relation to conduct occurring after 1 September 2008.

<sup>68</sup> *EOA 1995* (Vic) ss 13A(1), 14A(1), 15A(1), 31A(1).

<sup>69</sup> *Ibid* s 7(1); Chapman, above n 7, 201–2.

<sup>70</sup> See *EOA* (Vic) ss 7(1), 17, 19, 22, 32. The claimant may be an employee in the common law sense of engaged under a contract of service (whether full-time, part-time or casual), or a worker engaged under a contract for services. Whilst the *EOA 1995* (Vic) explicitly excluded unpaid workers and volunteers, those references have been removed from the 2010 Act. See *EOA* (Vic) s 4(1) definition of ‘employee’. The 2010 Act, like the 1995 Act, continues to cover people paid by commission, contract workers, and firms with five or more partners.

<sup>71</sup> *EOA* (Vic) s 4(1) definition of ‘employee’, s 19.

<sup>72</sup> *Ibid* s 4(1). The inclusive definition of ‘parent’ draws on legal concepts of parenthood and as such the statutory definition may not reflect diverse practices of parenting found in, for example, kinship and friendship networks, and same sex relationships.

‘maternity leave’ in relation to her son’s birth.<sup>73</sup> In addition, her responsibilities in that regard to her son were clearly the reason for her requests for flexibility over the years.

Schou’s ‘work arrangements’ as a current employee are defined to mean ‘arrangements applying to the employee or the workplace’,<sup>74</sup> and this clearly countenances the types of accommodation that Schou sought. Indeed, the legislation provides that working from home is an illustrative example of what might be reasonable accommodation under the new provisions.<sup>75</sup> In addition, guidelines produced by Industrial Relations Victoria and the Victorian Equal Opportunity & Human Rights Commission (‘VEO&HRC’) (‘Commission Guidelines’) also list working from home as an example of a flexible work arrangement that might be granted under the *EOA* (Vic).<sup>76</sup> The Commission Guidelines anticipate the possibility of several changes in work arrangements over time, countenancing and reflecting the dynamic character of the accommodation that many worker-carers, including a modern day Schou, might seek.<sup>77</sup>

### A Request and Rejection

The Victorian statutory framework does not explicitly require that there be a request for accommodation by the employee. Notably though, in the first decision under the new rules VCAT has held that the need for a request by the employee ‘is necessarily implicit’ in the legislation, and arises so that the employer is able to fully comprehend the nature of the accommodation sought, and be in a position to consider the request properly.<sup>78</sup> The Commission Guidelines express the view that

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Notably though the VEO&HRC interprets parent to include the ‘domestic partner of a parent’: Commission Guidelines, above n 61, 5. The definition of ‘carer’ requires that there be ‘ongoing care and attention’ in relation to a person who is ‘wholly or substantially dependent’ on the carer (excluding paid care). This may not cover short term care needs towards a person who is not usually dependent on the worker. In its guidelines, the VEO&HRC provides that ‘[c]arers provide care and support to family members and friends with a disability, mental illness or disorder, chronic condition, terminal illness or who are frail. Care giving may occur occasionally, continuously, in the short-term or over the long-term’: Commission Guidelines, above n 61, 5.

<sup>73</sup> *Schou v Victoria* [2002] VCAT 375 [17]. This terminology suggests that she is the birth mother of her son, and not for example a same sex co-parent taking parental leave. It is unclear whether a same sex co-parent would fall within the definition of ‘parent’, although such a parent would in any event be covered as a ‘carer’.

<sup>74</sup> *EOA* (Vic) s 4(1) definition of ‘work arrangements’. The definition covers both legally enforceable terms and conditions of engagement, and other practices and requirements of the work arrangement.

<sup>75</sup> *Ibid* s 19 example.

<sup>76</sup> Commission Guidelines, above n 61, 4.

<sup>77</sup> *Ibid* 6.

<sup>78</sup> *Richold v Victoria* [2010] VCAT 433 (14 April 2010) [38], [40]. The need for a request to have been made under the Victorian provisions was approved in the context of an adverse action claim in *Bayford v MAXXIA Pty Ltd* [2011] FMCA 202 (12 April 2011) [144]–[145]. Riley FM considered that a request under the Victorian

a request may be made informally or through a more formal mechanism, whether in writing, or verbally.<sup>79</sup> This appears to assume that a request will have been made by the employee.

Relevantly, the first VCAT decision in Schou provides a strong sense that the more formal a request is, the easier it will be to establish as a factual matter that the employer has rejected the request. This issue arose in relation to Schou's claim that she had applied for 12 months leave without pay, and that her application had been rejected. Schou's evidence was that she raised the idea of leave without pay with her two supervisors on different occasions, and that her suggestion was 'categorically rejected' by them.<sup>80</sup> Schou admitted some ambivalence on her own part in that she was not sure that leave without pay would provide an adequate solution to her situation.<sup>81</sup> The tribunal determined as a matter of fact that Schou had merely 'floated' the idea of 12 months leave without pay, and that she had not made 'an actual formal, albeit oral, application'.<sup>82</sup> For this reason the tribunal was not satisfied as a factual matter that the Department had refused to grant her 12 months leave without pay.<sup>83</sup> This reasoning suggests that were Schou's situation to be pursued under the *EOA* (Vic) accommodation provisions, the Department may not have 'refuse[d] to accommodate' her, at least so far as the proposal for leave without pay goes.

In terms of the idea of part-time work, the evidence as revealed in the decisions indicates strongly that Schou made a formal request, through drawing up (with two colleagues) a proposal for part-time work and engaging an industrial negotiator to pursue the matter with the Department on her behalf. Although a formal request for part-time work is apparent, on the facts VCAT determined that the Department had not actually rejected the part-time work proposal. Rather, for VCAT, the part-time work idea had simply been superseded by the modem proposal. Applying this view of the evidence to the *EOA* (Vic) provisions is likely to lead again to the conclusion that the Department has not 'refuse[d] to accommodate' Schou's responsibilities.<sup>84</sup> This highlights the contrast between the Victorian legislative test of a 'refus[al] to accommodate' and the broader question of whether an employer has failed to reasonably accommodate.

This leaves only the modem proposal as a potential instance of the Department refusing to accommodate Schou's responsibilities. VCAT was 'not satisfied

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legislation 'would have to include a specific proposal for alteration of the existing arrangements': at [144].

<sup>79</sup> Commission Guidelines, above n 61, 8.

<sup>80</sup> *Schou v Victoria* (2000) EOC ¶93-100, 74 425.

<sup>81</sup> *Ibid* 74 425–6.

<sup>82</sup> *Ibid* 74 426.

<sup>83</sup> This aspect of Schou's complaint was dismissed: *Schou v Victoria* (2000) EOC ¶93-100, 74 426.

<sup>84</sup> Potentially Schou and her two colleagues could jointly bring a dispute to the VEO&HRC alleging an unreasonable failure to accommodate by the Department: *EOA* (Vic) s 113.

that management's intentions to implement the modem proposal survived past September 1996'.<sup>85</sup> It seems likely that such an abandonment of the modem proposal reflects a rejection of it by the Department. In addition, the evidence seems likely to establish that a request by Schou to work at home was made, leading to a view that the modem proposal may be the only matter that Schou could rely on to show that she had requested accommodation, and that her request was refused by the Department.

This exploration suggests that a too rigid application of the need to find conduct amounting to a request and then a subsequent rejection may fail to capture adequately the character of dynamic negotiations over flexible work arrangements between employers and employees. Those conversations may be ongoing and informal. Schou showed herself to be conciliatory and flexible throughout the years of discussions, initiating conversations and suggesting successive options when a proposal did not find favour with the Department. It would be undesirable if that approach ultimately counted against her claim of discrimination under the *EOA* (Vic). A preparedness to explore options and consider alternatives in a flexible and informal manner appear to be the markers of a desirable process towards accommodation, and one which the legislation ought to encourage. Informality, adaptability and the consideration of different possibilities should likewise not necessarily be interpreted against an employer as a refusal to accommodate a specific request. The challenge is for interpretations of the accommodation provisions in the *EOA* (Vic) to adequately recognise and take account of the realities of workplace discussions between employees, their supervisors, and human resource managers. At its core this challenge is analogous to that faced in relation to the federal request mechanism — how to interpret these provisions in a way that takes adequate account of the realities of work relations.

### B *Reasonableness Factors*

Apart from the possible need to find a request and then a rejection of it on the evidence, the main issue in a claim that a person in Schou's position might bring today under the *EOA* (Vic) is whether the employer has 'unreasonably' refused to accommodate the responsibilities that the employee has as a parent or carer. The relevant sections provide that in determining whether an employer 'unreasonably refuses to accommodate', all relevant facts and circumstances must be considered, including —

- (a) the employee's circumstances, including the nature of his or her responsibilities as a parent or carer; and
- (b) the nature of the employee's role; and
- (c) the nature of the arrangements required to accommodate those responsibilities; and
- (d) the financial circumstances of the employer; and

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<sup>85</sup> *Schou v Victoria* (2000) EOC ¶93-100, 74 427. In September, no doubt in desperation, Schou requested 12 months' leave without pay. This was not forthcoming: at 74 425.

- (e) the size and nature of the workplace and the employer’s business; and
- (f) the effect on the workplace and the employer’s business of accommodating those responsibilities, including—
  - (i) the financial impact of doing so;
  - (ii) the number of persons who would benefit from or be disadvantaged by doing so;
  - (iii) the impact on efficiency and productivity and, if applicable, on customer service of doing so; and
- (g) the consequences for the employer of making such accommodation; and
- (h) the consequences for the employee of not making such accommodation.<sup>86</sup>

This provides an inclusive articulation of the concept of reasonableness. None of the listed matters are determinative on their own, and other factors not included in the list may be highly relevant and important in assessing reasonableness in any particular case.<sup>87</sup> The Explanatory Memorandum and second reading speech to the 2008 legislation themselves suggest some additional factors that are apparent in the Schou decisions — how long the proposed work arrangements are to continue; the ability of the employer to reorganise the employee’s work, including whether there are any legal or other constraints that affect the feasibility of accommodating those responsibilities.<sup>88</sup>

There are many factors that point to the Department’s refusal of the modern proposal as being unreasonable in all the circumstances. Schou’s circumstances were that she had (to the knowledge of her supervisors) reached a ‘crisis point’ in managing her responsibilities to her young son and her work commitments.<sup>89</sup> Also, her request was for a limited time, expected to be a year or so until his health improved.<sup>90</sup> The evidence does not directly reveal whether Schou was the sole or main carer of her child, although certainly it seems clear that she had run out of options for his care.

Both VCAT decisions investigated the nature of Schou’s role, the nature of the arrangements required to accommodate her responsibilities to her son, and the

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<sup>86</sup> *EOA* (Vic) ss 17(2), 19(2), 22(2), 32(2).

<sup>87</sup> Explanatory Memorandum, Equal Opportunity Amendment (Family Responsibilities) Bill 2007 (Vic) 4–6; Victoria, *Parliamentary Debates*, Legislative Assembly, 11 October 2007, 3468 (B Cameron).

<sup>88</sup> Explanatory Memorandum, Equal Opportunity Amendment (Family Responsibilities) Bill 2007 (Vic) 5; Victoria, *Parliamentary Debates*, Legislative Assembly, 11 October 2007, 3468 (B Cameron). For other similar articulations of factors, see Commission Guidelines, above n 61, 8. The 2008 legislation is the *Equal Opportunity Amendment (Family Responsibilities) Act 2008* (Vic).

<sup>89</sup> *Schou v Victoria* (2000) EOC ¶93-100, 74 427.

<sup>90</sup> In the second hearing VCAT determined this was relevant to the meaning of reasonableness under indirect discrimination: *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [44]. Schou’s son’s health issues did resolve themselves less than a year after she resigned: *Schou v Victoria* (2000) EOC ¶93-100, 74 429.

effect of providing the accommodation on the employer's operational interests and concerns. VCAT examined the feasibility of the modem proposal, and explored the impact of the proposal on work flow and the supervision responsibilities of Schou. In addition, concerns over confidentiality and security were examined. VCAT found as matters of fact that security concerns were met, and that the accurate and timely production of Hansard would not be compromised by adoption of the modem proposal.<sup>91</sup> Notably, the Department had itself investigated the work from home proposal including in terms of its health and safety legal obligations, and had not found any legal impediments to it.<sup>92</sup> The initial support for the proposal within the Department was strong evidence that the employer's needs and concerns, including those relating to efficiency and productivity, were able to be met in the work from home proposal.<sup>93</sup> In addition, the Department's own policy documents that promised flexibility to employees were seen by VCAT as relevant in assessing the reasonableness of the Department's refusal.<sup>94</sup>

The modem proposal was described by VCAT as presenting a 'modest cost', and this description is apt regardless of whether the budgetary unit is seen as the Department itself, or the Victorian State public sector as a whole.<sup>95</sup> In either case, the cost of the modem would have very little financial impact on the employer. It is noted in the decisions that Schou's workplace itself was relatively small, in comprising four sub-editors, and around a dozen permanent reporters. It appears that Schou's Department Head (and the Departmental Heads more broadly) were concerned that granting flexibility to Schou would open the floodgates to similar claims by other employees.<sup>96</sup> In the second VCAT hearing, Judge Duggan noted that in any event Schou was at that time the only sub-editor with children, the inference being that she was likely to be the only employee seeking to work from home due to care responsibilities towards children.<sup>97</sup> Importantly though, granting accommodation to Schou would not necessarily tie the Department's hands in relation to subsequent requests to work from home. The Commission Guidelines

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<sup>91</sup> *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [59]–[60].

<sup>92</sup> *Ibid* [21]. Industrial agreements that provide for home based work commonly address occupational health and safety aspects, sometimes prescribing that those requirements be taken into account prior to permission being given by the employer, and sometimes specifying those requirements as a reason to terminate the home based work agreement: Pittard, above n 6, 173.

<sup>93</sup> *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [58].

<sup>94</sup> In the second hearing VCAT expressed the view that the Parliamentary Officers' Employment Agreement, which included a promise for the 'adoption of flexible and progressive work practices and reasonable changes in the way work is organised', shaped the meaning of reasonableness in indirect discrimination: *Ibid* [40], [43].

<sup>95</sup> *Schou v Victoria* (2000) EOC ¶93-100, 74 427. The modem proposal was costed by the Department as being between \$2 000–2 500 in total.

<sup>96</sup> The Chief Reporter's evidence was that he 'took every step to implement the proposal in the face of opposition ... [from his] Departmental Head Colleagues': *Schou v Victoria* (2000) EOC ¶93-100, 74 426.

<sup>97</sup> *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [43].

confirm this,<sup>98</sup> and encourage employers to ‘[c]onsider each request individually ... [as] [e]ach will have different facts and circumstances’.<sup>99</sup> This confirms that it may be lawful under the Victorian provisions to grant one request for a particular type of accommodation but not another for the same accommodation, due to the different contexts in which those decisions will inevitably be made. Interestingly though, the approach of treating employees differently in this way may not, at first glance, sit well with the adverse action provisions in the *FW Act* which articulate one form of adverse action as arising where an employer ‘discriminates between the employee and other employees of the employer’.<sup>100</sup> This is discussed further below.

Schou was a senior long-standing and highly specialised employee who her immediate supervisors recognised was ‘for all practical purposes irreplaceable’.<sup>101</sup> Her efforts to find a feasible solution for herself and the Department reveal much good will on her part. So too do her attempts to ‘hold on’ and ‘stick it out’ as she was requested to do in 1994,<sup>102</sup> and this in the face of the unusually onerous working hours regime that operated in the Department during sitting weeks. The consequences for Schou in not being granted accommodation was the loss of her job and moreover the loss of a highly specialised career that she had built over 18 years. For the Department the consequence was the loss of an irreplaceable employee who was one of only four sub-editors working in the Department.

### C Reasonableness as a Legal Standard

Although the facts of Schou as revealed in the decisions do appear to provide a strong case indicating that accommodation in the form of the modem proposal ought to have reasonably been provided by the Department, the use of a reasonableness concept in a legal rule never permits a high level of confidence in the likely outcome of the rule’s application.

The concept of reasonableness in anti-discrimination law has tended to be interpreted by judges in ways that reinforce the status quo. This is seen in the

<sup>98</sup> The Guidelines pose a hypothetical question by an employer: ‘[i]f I have an ongoing flexible work arrangement with one employee with family responsibilities, am I also required to provide the same arrangement to other employees?’ In response the Guidelines provide: ‘[e]ach case should be assessed individually. Depending on the circumstances it may be reasonable to accept one person’s request for a changed work arrangement and refuse another person.’ The Guidelines conclude ‘[e]xplain to employees the reasons behind any decisions, and address any concerns about equity in work arrangements’: Commission Guidelines, above n 61, 14.

<sup>99</sup> Ibid 8.

<sup>100</sup> *FW Act* s 342.

<sup>101</sup> This was the conclusion of her supervisors in their initial agreement with her request to work at home two days per week: *Schou v Victoria* (2000) EOC ¶93-100, 74 427.

<sup>102</sup> VCAT determined that Schou did not pursue her request to move to part-time employment, and so her request in this regard lapsed or was withdrawn. On this basis VCAT dismissed this aspect of her complaint: *Schou v Victoria* (2000) EOC ¶93-100, 74 423.

Schou litigation itself where both the Victorian Supreme Court and a majority of the Court of Appeal interpreted the meaning of reasonableness in a way that gave great weight to the Department's interests as identified by it in the hearings, and little (if any) weight to Schou's concerns and position.<sup>103</sup> Considerable deference to managerial authority was reflected in particular in the judgment of Harper J in the Supreme Court.<sup>104</sup> The judgments in both courts reveal a deep focus on the employer's preference for the status quo, and a dismissal of alternatives that might provide a less discriminatory way of meeting the employer's needs.

Although on the face of it such judicial approaches to interpreting reasonableness do not bode well for employees seeking to challenge long standing norms of work organisation, there are good reasons to confine the Supreme Court and Court of Appeal judgments to the indirect discrimination provisions as they existed under the *EOA 1995 (Vic)*.<sup>105</sup> Importantly, the wording of the new accommodation provisions now in the *EOA (Vic)* focuses the issue of reasonableness on the employer's refusal, and not the reasonableness of the original requirement or condition to work full time on site (as the indirect discrimination provisions in the *EOA 1995 (Vic)* did). Clearly a balancing process is envisaged under the *EOA (Vic)*, between the interests of the employer and those of the employee.<sup>106</sup> The accommodation provisions are intended to offer an additional entitlement to employees, above the protection afforded by indirect discrimination. As noted above, they are part of a general theme in the *EOA (Vic)* regarding the desirability of moving towards a substantive conception of equality in the workplace. Substantive equality looks beyond an ideal of treating people the same as each other, looking to equality in terms of outcomes and results. In contrast, formal equality sees equality as lying in consistency, or sameness, of treatment

<sup>103</sup> See, eg, *Victoria v Schou* (2001) 3 VR 655 [12], [17], [24]; *Victoria v Schou* (2004) 8 VR 120 [24], [37], [39] (Phillips JA). For example, great weight was given to the contract term identifying parliament house as the location of the position, and little weight was given to the promise regarding flexibility contained in the Parliamentary Officers' Employment Agreement: *Victoria v Schou* (2001) 3 VR 655 [20]–[22]; *Victoria v Schou* (2004) 8 VR 120 [24] (Phillips JA). In contrast, VCAT gave considerably more weight to the promise of flexibility: *Schou v Victoria* (2000) EOC ¶93-100, 74 428; *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [66]–[72].

<sup>104</sup> *Victoria v Schou* (2001) 3 VR 655 [30] where Harper J cautioned that courts and tribunals 'must act with an appropriate degree of diffidence. The expertise of judges and tribunal members does not generally extend to the management of a business enterprise or the reporting of parliamentary debates'. '[C]ourts and tribunals concerned with equal opportunity legislation should resist the temptation unnecessarily to dictate to persons who manage, and work on, the shop floor.' See also at [17] where great deference is shown to employment law, awards and agreements. For a contrasting approach of VCAT, see *Schou v Victoria* [2002] VCAT 375 (24 May 2002) [76]–[79].

<sup>105</sup> Notably, there is much force in the argument that in various respects the decisions of the Supreme Court and Court of Appeal are not in line with earlier High Court authority on these matters, and for that reason are not sound: Knowles, above n 6, 192–3.

<sup>106</sup> Such an approach was taken in *Richold v Victoria* [2010] VCAT 433 (14 April 2010) [41]–[45].

of employees. The accommodation provisions in the *EOA* (Vic) evidence a clear attempt to move beyond a formal equality understanding of discrimination, an approach that has plagued the interpretation of both direct discrimination and indirect discrimination across Australia. It is this formal equality framework of understanding that appeared to underlie much of the thinking of Harper J and the Court of Appeal.<sup>107</sup> For example, Harper J described that Schou had ‘sought a favour; one which (it would seem) had not been granted by her employer to any other employee’. His honour went on to say that Schou’s situation was not discrimination within the meaning of the Act as ‘Schou was simply treated as all other sub-editors were and are treated: not better, but certainly not worse’.<sup>108</sup> In furthering substantive equality, this third form of discrimination is of a different character to the indirect discrimination provisions that were before the Supreme Court and the Court of Appeal, and for that reason those judgments should not be seen as applicable in interpreting these new provisions on reasonable accommodation.

#### D *The Victorian Charter*

Victoria has enacted a human rights statute since the final decision in the Schou litigation.<sup>109</sup> The *Charter of Human Rights and Responsibilities Act 2006* (Vic) (*‘Charter’*) is likely to take effect to strengthen the claim of a modern day Schou. The *Charter* requires that all Victorian legislation, including the *EOA* (Vic) must, so far as is possible consistently with its purpose, be interpreted ‘in a way that is compatible with human rights’.<sup>110</sup> In addition, the *Charter* provides that it is unlawful for a ‘public authority’ ‘to act in a way that is incompatible with a human right’ or ‘to fail to give proper consideration to a relevant human right.’<sup>111</sup> The Department of Parliamentary Debates and its officers are within the definition of a ‘public authority’.<sup>112</sup>

<sup>107</sup> *Victoria v Schou* (2001) 3 VR 655 [12], [13]–[15], [17], [24]; *Victoria v Schou* (2004) 8 VR 120 [27], [30]–[32] (Phillips JA). See also Buchanan J (concurring with Phillips JA): [47]–[48]. Anti-discrimination cases at the Commonwealth level regarding work and care conflict also evidence the strong normative pull of formal equality. See, eg, *Evans v National Crime Authority* [2003] FMCA 375 (5 September 2003); *Thomson v Orica Australia Pty Ltd* (2002) 116 IR 186.

<sup>108</sup> *Victoria v Schou* (2001) 3 VR 655 [24]. Harper J continued that ‘the Act forbids discrimination. It does not compel the bestowing of special advantage. The unreasonable refusal to extend a benefit to an individual or individuals where that benefit is, with good reason, not available to others, is not discrimination’: at [24]. Contrast the Commission Guidelines on the reasonable accommodation provisions which encourage employers to ‘[c]onsider each request individually ... [as] [e]ach will have different facts and circumstances’: Commission Guidelines, above n 61, 8.

<sup>109</sup> The ACT is the only other state or territory in Australia to have a human rights statute requiring that legislation be interpreted in a way that respects certain rights recognised under international law: *Human Rights Act 2004* (ACT).

<sup>110</sup> *Charter* s 32(1).

<sup>111</sup> *Ibid* s 38. Section 4 contains a definition of ‘public authority’.

<sup>112</sup> Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and the ACT Human Rights Act* (LexisNexis, 2008) [1.59]–[1.62]. In

The human rights that are possibly engaged in a complaint brought by a contemporary Schou are several, including the ‘right to enjoy human rights without discrimination’, and the right to ‘effective protection against discrimination’.<sup>113</sup> In addition, every eligible person ‘has the right, and is to have the opportunity, without discrimination’, ‘to have access, on general terms of equality, to the Victorian public service’.<sup>114</sup> Importantly, the human right to equality in the *Charter* has been interpreted to mean a substantive conception of equality, and not merely equality in a formal sense.<sup>115</sup> In addition to non-discrimination, the *Charter* provides that:

[f]amilies are the fundamental group unit of society and are entitled to be protected by society and the State’ and that ‘[e]very child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.’<sup>116</sup>

In ensuring that the refusal to accommodate provisions in the *EOA* (Vic) are interpreted in a human rights-compatible way, a person in Schou’s position today would be strengthened in her claim that her employer unreasonably refused to accommodate her request to work at home for two days each week. In addition, because Schou’s employer was a ‘public authority’, a modern day Schou has additional options arising out of a breach by the public authority of its direct responsibilities regarding human rights.<sup>117</sup>

### E *Concluding Thoughts on Reasonable Accommodation*

It seems most likely that a person in Schou’s position would have a strong claim today under the *EOA* (Vic) for discrimination in the form of an unreasonable failure to accommodate her parenting and care responsibilities. No exemptions or exceptions appear to be relevant to such a claim.<sup>118</sup> Two points though remain

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*Richold v Victoria* [2010] VCAT 433 (14 April 2010) [47], VCAT determined that the Department of Justice, and its officers that made the impugned decision are within the definition of ‘public authority’ in s 4 of the *Charter*.

<sup>113</sup> *Charter* ss 8(2), (3), (4). Section 3 defines ‘human rights’ as the civil and political rights set out in Part 2 of the *Charter*.

<sup>114</sup> *Charter* s 18(2)(b).

<sup>115</sup> *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869 (22 September 2009) [107], [290]. This understanding of equality and non-discrimination is in keeping with international law, which can be used in construing the human rights in the *Charter*. See *Charter* s 32(2); *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869 (22 September 2009) [105]–[303].

<sup>116</sup> *Charter* s 17.

<sup>117</sup> *Ibid* s 39. Section 39(3) provides that remedies for breach of s 38 of the *Charter* by a public authority cannot include damages. Evans and Evans argue that breach of s 38 does not give rise to a new cause of action. Rather it may play a role in supplementing existing legal claims. See Evans and Evans, above n 112, [4.22]–[4.28].

<sup>118</sup> The *EOA* (Vic) contains some exemptions and exceptions that may be potentially relevant to a failure to reasonably accommodate, including hiring for personal or

to be made. First, a claimant broadly bears the evidentiary onus of establishing all aspects of the claim are made out, including that the employer's refusal of accommodation was unreasonable within the meaning of the legislation. It has proven to be particularly difficult for claimants under anti-discrimination law to establish discrimination, including unreasonableness, as claimants are not generally privy to the employer's reasons for its decisions, policies and requirements, and especially at the outset of a claim. For this reason there have been many calls, and subsequent legislative amendments in some jurisdictions, to shift the onus — in the context of indirect discrimination — so that the employer is obliged to justify the reasonableness of its own requirements.<sup>119</sup> Notably, although the *EOA* (Vic) does shift the onus on reasonableness in the new indirect discrimination provisions,<sup>120</sup> an analogous shift of onus in relation to an unreasonable failure to accommodate has not occurred. This will mean that a claimant relying on discrimination in the form of a failure to accommodate will continue to face a difficult task in identifying and then establishing the factual basis of the claim, especially as it relates to unreasonableness. Where a claimant has earlier used the request mechanism under the *FW Act*, the employer ought to have provided a written response rejecting the request that included 'details of the reasons for the refusal'.<sup>121</sup> This statement by the employer will be relevant in an evidentiary sense and may provide assistance to a modern day Schou in factually establishing her claim for an unreasonable failure to accommodate under the *EOA* (Vic).

The second point to be made is that the individual grievance framework typical of anti-discrimination law across Australia has posed many challenges and difficulties for claimants, including disparities in resources and knowledge between employee and employer.<sup>122</sup> The *EOA* (Vic) contains a number of innovations in dispute resolution, including direct access to VCAT and early dispute resolution services by the VEO&HRC. These will apply in relation to claims regarding an unreasonable failure to accommodate. It remains to be seen how these new mechanisms will shape dispute resolution processes. The reactive and largely individual grievance

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domestic services in the employer's own home (s 24) and religious conduct and beliefs (ss 81–84).

<sup>119</sup> See, eg, Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report* (2008) [5.32]–[5.43]. The onus has been shifted to the employer under the *SDA* s 7C; *Age Discrimination Act 2004* (Cth) s 15(2); *Anti-Discrimination Act 1991* (Qld) s 205.

<sup>120</sup> *EOA* (Vic) s 9(2). The Explanatory Memorandum suggests that the reason for this shift is that the employer has access to the relevant information: Explanatory Memorandum, Equal Opportunity Bill 2010 (Vic) 13.

<sup>121</sup> *FW Act* s 65(6).

<sup>122</sup> Beth Gaze and Rosemary Hunter, 'Access to Justice for Discrimination Complainants: Courts and Legal Representation' (2009) 32 *University of New South Wales Law Journal* 699; Beth Gaze and Rosemary Hunter, *Enforcing Human Rights: An Evaluation of the New Regime* (Themis Press, 2010); Anna Chapman and Gail Mason, 'Women, Sexual Preference and Discrimination Law: A Case Study of the NSW Jurisdiction' (1999) 21 *Sydney Law Review* 525; Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990).

path, albeit with these new and as yet untested innovations,<sup>123</sup> remains the mode of enforcement for the reasonable accommodation provisions.

## V ADVERSE ACTION UNDER THE *FW ACT*

The adverse action provisions, contained as part of the General Protections in pt 3-1 of the *FW Act*, enable certain employees to seek a remedy in relation to adverse treatment they experience at work. The interaction of the adverse action rules with the federal request mechanism gives rise to a number of questions. Although prior unsuccessful use of the request mechanism does not on the face of the *FW Act* exclude a subsequent claim under the adverse action provisions, it is possible that attempting to use the adverse action rules to indirectly enforce a request against an employer may be seen to run counter to Parliamentary intention.<sup>124</sup> The argument would be that Parliament decided against including a direct enforcement mechanism by which an employee can challenge the merits of an employer's refusal of their request.<sup>125</sup> It is unclear how an indirect challenge to those merits under the adverse action provisions would be received by a court.

Leaving aside that issue of interaction, the adverse action protections are themselves complex and uncertain in scope. As a starting point, a modern day Schou is a worker who is entitled to lodge a claim under the adverse action provisions.<sup>126</sup> Her rights under the provisions will centre around whether it is established that she experienced 'adverse action' within the meaning of the legislation, and whether such conduct was 'because' of one of the prescribed grounds. These matters all give rise to much doubt.

### A *Grounds of Adverse Action*

The *FW Act* provides that an employer must not take 'adverse action' against an employee on a range of grounds.<sup>127</sup> There are two main grounds of potential relevance to Schou's situation. The first is that Schou has, or proposes to exercise, a 'workplace right'.<sup>128</sup> A person has a 'workplace right' where the person:

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<sup>123</sup> Those innovations include the ability of the VEO&HRC to undertake an investigation under *EOA* (Vic) pt 9.

<sup>124</sup> Given this, might it be better for a modern day Schou to go directly to initiating an adverse action claim, and not use the request mechanism first? The potential downside of that approach is that an employer may then credibly argue that it was not aware of her request and was not given an opportunity to respond to the issue.

<sup>125</sup> As noted above, arguably the *FW Act* indicates that state legislation (such as the *EOA* (Vic)) may be the preferable form of redress in relation to a refusal by an employer under the request mechanism, over an application under the adverse action provisions: *FW Act* s 66.

<sup>126</sup> *FW Act* ss 15, 30G, 335. Note that Inspectors of the Fair Work Ombudsman also have power to initiate a court application: *FW Act* s 539(2) item 11.

<sup>127</sup> *FW Act* ss 340(1), 351(1).

<sup>128</sup> *Ibid* s 340. The provisions also cover not exercising, and not proposing to exercise, a 'workplace right'.

- is entitled to the benefit of ‘a workplace law’;
- is able to initiate, or participate in a process or proceeding under a ‘workplace law’;
- is able to make a complaint to a body having the capacity under a ‘workplace law’ to seek compliance with that law; or
- ‘is able to make a complaint or inquiry’ ‘in relation to his or her employment’.<sup>129</sup>

The *FW Act* explicitly provides that when a parent or carer makes a request to alter working arrangements under that statute’s request mechanism, this amounts to initiating a process or proceeding under a ‘workplace law’.<sup>130</sup> The concept of ‘workplace law’ is defined more broadly to include the *FW Act*, and any ‘law of the Commonwealth, a State or Territory that regulates the relationships between employers and employees’.<sup>131</sup> Even though the *EOA* (Vic) is not solely concerned with the relationships between ‘employers and employees’ in the common law sense, and regulates broader work contexts, in addition to the commercial provision of goods, services and accommodation for example, the *EOA* (Vic) appears to be a ‘workplace law’ in that it is a statute that directly impacts on the legal rights and obligations between employers and employees.<sup>132</sup> Accordingly, Schou has a ‘workplace right’ in the form of being entitled to initiate a grievance under the *EOA* (Vic) in relation to an unreasonable refusal to accommodate her care responsibilities. Finally, she also has a ‘workplace right’ in the form of being ‘able to make a complaint or inquiry’ ‘in relation to ... her employment’.<sup>133</sup> Schou clearly did make inquiries with her employer in relation to flexibility and her employment, and this appears sufficient to constitute this last type of ‘workplace right’.<sup>134</sup>

The second prohibited reason potentially relevant to a claim made by a modern day Schou is ‘family or carer’s responsibilities’.<sup>135</sup> The *FW Act* does not define

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<sup>129</sup> Ibid s 341.

<sup>130</sup> Ibid s 341(2)(i).

<sup>131</sup> Ibid s 12. In this context ‘employee’ and ‘employer’ have their ordinary meanings: at s 11.

<sup>132</sup> It has been determined that the *EOA 1995* (Vic) is a ‘workplace law’ within the *FW Act* meaning: *Bayford v MAXXIA Pty Ltd* [2011] FMCA 202 (12 April 2011) [141]. Occupational health and safety legislation has also been determined to be a ‘workplace law’: *Stephens* [2011] FMCA 448 (8 July 2011) [16]; *AFMEPKIU v Visy Packaging Pty Ltd (No 2)* [2011] FCA 953 (31 August 2011) [10]. See also *ALAEA v International Aviations Service Assistance Pty Ltd* [2011] FCA 333 (8 April 2011) [234].

<sup>133</sup> *FW Act* s 341(1)(c)(ii).

<sup>134</sup> It is sufficient that the inquiry or complaint was made to the employer: Explanatory Memorandum, Fair Work Bill 2009 (Cth) [1370]; *ALAEA v International Aviations Service Assistance Pty Ltd* [2011] FCA 333 (8 April 2011) [347]; *George v Northern Health (No 3)* [2011] FMCA 894 (28 November 2011) [50]–[55].

<sup>135</sup> The full list is: the ‘person’s race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin’: *FW Act* s 351. The

or explain the meaning of that concept, and the Explanatory Memorandum does not assist in this regard. While the ground of ‘family responsibilities’ has been part of industrial law since 1993, it has never been defined, and cases have not explored its parameters. The insertion of the reference to carer into the statutory formula indicates that Parliament intended to broaden the ground beyond ‘family responsibilities’. Two main interpretative options present themselves for understanding ‘family or carer’s responsibilities’ - the ordinary meaning of the words,<sup>136</sup> or anti-discrimination law’s understanding of similar family and carer grounds.<sup>137</sup> Regardless of which approach is adopted or emphasised, it seems that Schou’s situation would fit comfortably within the concept of family or carer’s responsibilities.

### B *Causal Link and Onus*

In order for a modern day Schou to succeed, it would need to be established that a causal link existed between at least one of the grounds discussed above, and the Department’s ‘adverse action’ (discussed below). In short, was any ‘adverse action’ taken by the Department ‘because of’ her ‘family or carer’s responsibilities’ or ‘because’ she has, or proposes to exercise, a ‘workplace right’?

The legislation does not require that the identified reason be the sole or dominant reason for the employer’s adverse conduct. It must however be an operative reason.<sup>138</sup> In addition, and importantly, a reversed onus of proof applies so that once

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decisions do not reveal whether any of these subjectivities are also relevant to Schou. None of these concepts is defined or explained in the *FW Act*.

<sup>136</sup> To date there has been little exploration of the meaning of ‘family or carer’s responsibilities’: See, eg, *Uchino v Acorp Pty Ltd* [2012] FMCA 9 (27 January 2012). Decisions of the Federal Magistrates Court have however given the word ‘disability’, as it appears in the adverse action provisions, its ordinary meaning: *Hodkinson v Commonwealth* [2011] FMCA 171 (31 March 2011) [145]–[146]; *Stephens* [2011] FMCA 448 (8 July 2011) [86]–[87]; *Cugura v Frankston City Council* [2012] FMCA 340 (24 April 2012) [163]. Disability is also not defined and its meaning is not explained in the *FW Act*. See above n 50.

<sup>137</sup> ‘[F]amily responsibilities’ is defined in the *SDA* around the concept of a two adult couple: Anna Chapman, ‘Industrial Law, Working Hours, and Work, Care and Family’ (2010) 36 *Monash University Law Review* 190; Anna Chapman, ‘Employment Entitlements to Carer’s Leave: Domesticating Diverse Subjectivities’ (2009) 18 *Griffith Law Review* 453, 464–5. Anti-discrimination statutes of some states and territories, including the *EOA* (Vic) provide for a broader recognition of care responsibilities per se, and do not require that the care take place in any particular setting, other than it not be provided for commercial reward: *EOA* (Vic) ss 6(i) (status of being a ‘carer’), 4(1) (definition of ‘carer’).

<sup>138</sup> *FW Act* s 360. In contrast, the *EOA* (Vic) s 8(1)(2)(b) provides that the prohibited ground must be ‘a substantial reason’ for the direct discrimination. This aspect of the adverse action provisions is a factor in favour of claimants opting to lodge under the *FW Act*: Carol Andrades, ‘Intersections Between “General Protections” under the *Fair Work Act 2009* (Cth) and Anti-Discrimination Law: Questions, Quirks and Quandaries’ (Working Paper No 47, Centre for Employment and Labour Relations Law, University of Melbourne, December 2009) 11.

Schou establishes her factual case, in that she possessed a relevant ground and that ‘adverse action’ within the meaning of the legislation factually occurred, the onus shifts to the Department to show, on the balance of probabilities, that the ground was not a reason for its conduct.<sup>139</sup> This placement of the onus on the employer stands in stark contrast to the provisions on discrimination in the form of an unreasonable failure to accommodate in the *EOA* (Vic), and is a strategic attraction for employees to use the adverse action provisions rather than the *EOA* (Vic).<sup>140</sup>

In the first, and to date only, appellate decision dealing with adverse action, the Full Federal Court (by majority) held that in determining whether the conduct of the employer was ‘because’ of a prohibited reason, the subjective intention of the employer is ‘centrally relevant, but it is not decisive’. The search is for the ‘real reason’ for the employer’s conduct, which is a search for ‘what actuated the conduct’ of the employer, and not a search for what the employer thinks its conduct was actuated by. The ‘real reason’ may be conscious or unconscious.<sup>141</sup> In order to exonerate itself of liability, the employer must show that the real reason is ‘disassociated from the circumstances’ that the applicant had the prohibited reason.<sup>142</sup> The majority of the court came to this interpretation by drawing on the purpose and protective objective of the adverse action provisions, the ordinary or usual meaning of the word ‘because’, and the approach taken to the causal nexus in anti-discrimination cases.<sup>143</sup>

<sup>139</sup> *FW Act* s 361. A reverse onus of proof has been a long-standing feature of the freedom of association and unlawful termination protections in industrial law. The Explanatory Memorandum acknowledges that in the absence of such a reverse onus, ‘it would often be extremely difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason’: Explanatory Memorandum, Fair Work Bill 2009 (Cth) [1461]. The reversed onus in relation to adverse action still requires an applicant to prove the factual case that adverse action occurred and that they possessed a relevant ground: *Ramos v Good Samaritan Industries [No 2]* [2011] FMCA 341 (24 August 2011) [44] (*‘Ramos’*); *Hodkinson v Commonwealth* [2011] FMCA 171 (31 March 2011) [130]; *Jones v Queensland Tertiary Admissions Centre Ltd [No 2]* (2010) 186 FCR 22.

<sup>140</sup> Creighton and Stewart, above n 28, [17.39]; Andrades, above n 138, 11; Simon Rice and Cameron Roles, “‘It’s a Discrimination Law Julia, But Not as We Know It’”: Part 3-1 of the *Fair Work Act*’ (2010) 21(1) *The Economic and Labour Relations Review* 13, 20. The lack of a reverse onus of proof presents difficult challenges for complainants in anti-discrimination law: Dominique Allen, ‘Reducing the Burden of Proving Discrimination in Australia’ (2009) 31 *Sydney Law Review* 579.

<sup>141</sup> *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 [28] (Gray and Bromberg JJ) (*‘Barclay’*) (contra Lander J) [197]–[199], [208]. Note that an appeal has been heard by the High Court: Transcript of Proceedings, *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCATrans 83 (29 March 2012).

<sup>142</sup> *Barclay* (2011) 191 FCR 212 [32] (Gray and Bromberg JJ), citing *Bowling v General Motors-Holden Pty Ltd* (1975) 8 ALR 197, 617 (Mason J).

<sup>143</sup> *Barclay* (2011) 191 FCR 212 [29] (Gray and Bromberg JJ), citing *Purvis v New South Wales* (2003) 217 CLR 92 and *Toben v Jones* (2003) 129 FCR 515. Lander J in dissent also cited *Purvis v New South Wales* (2003) 217 CLR 92 as authority: [199].

*C Adverse Action and Dismissal, Injury, Prejudice and Discrimination*

The concept of ‘adverse action’ is articulated to mean a number of matters, namely, that the employer:

- ‘dismisses the employee’;
- ‘injures the employee in his or her employment’;
- ‘alters the position of the employee to the employee’s prejudice’; or
- ‘discriminates between the employee and other employees of the employer’.<sup>144</sup>

Threatening to do any of those things, and organising to that end are also included within the concept of ‘adverse action’.<sup>145</sup>

The concept of ‘dismisses’ is not defined in pt 3-1, although ‘dismissed’ in the general definitions section of the *FW Act* references the unfair dismissal meaning of dismissal to include a situation where although a person resigned from their employment, they were ‘forced to do so because of conduct’ of the employer.<sup>146</sup> This definition has been applied in the adverse action context.<sup>147</sup> The Explanatory Memorandum explains that this description includes a situation ‘where the employee quits their job in response to conduct by the employer which gives them no reasonable choice but to resign’.<sup>148</sup> It does seem that factually a modern day Schou faced, in the words of the Explanatory Memorandum, ‘no reasonable choice but to resign’.<sup>149</sup> The evidence is clear that, to the knowledge of her supervisors, Schou’s situation had reached a ‘crisis point’ and that if the modem was not installed within a reasonable time she would likely resign.<sup>150</sup> There is no evidence that the employer intended that Schou resign, but such an intention is not, in any event, required.<sup>151</sup> The Department’s omission in its failure to install the modem constitutes ‘conduct’ under the *FW Act*,<sup>152</sup> and it can be credibly claimed that omission was such that ‘resignation was the probable result or that the ...

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<sup>144</sup> *FW Act* s 342.

<sup>145</sup> *Ibid* s 342(2). Adverse action does not however include action that is authorised by the *FW Act* or any other law of the Commonwealth, or a law of a state or territory prescribed by the Regulations: s 342(3). At the time of writing no such laws have been prescribed.

<sup>146</sup> *Ibid* ss 12 definition of ‘dismissed’, s 386(1)(b).

<sup>147</sup> *Ramos* [2011] FMCA 341 (24 August 2011) [47]–[54].

<sup>148</sup> Explanatory Memorandum, Fair Work Bill 2009 (Cth) [1530]. The Explanatory Memorandum states that s 386(1)(b) is designed to reflect the common law concept of constructive dismissal: [1530].

<sup>149</sup> Explanatory Memorandum, Fair Work Bill 2009 (Cth) [1530].

<sup>150</sup> *Schou v Victoria* (2000) EOC ¶¶93-100, 74 427.

<sup>151</sup> *Australian Hearing v Peary* (2009) 185 IR 359 [30]; *O’Meara v Stanley Works Pty Ltd* [2006] AIRC 497 (11 August 2006) [23]; *Mendicino v Tour-Dex Pty Ltd* [2010] FWA 9114 (1 December 2010) [9], [46].

<sup>152</sup> *FW Act* s 12 definition of ‘conduct’.

[employee] had no effective or real choice but to resign.<sup>153</sup> Importantly though, decisions emphasise that the employer's conduct must be weighed objectively, and that all the circumstances and not only the action of the employer must be considered in determining whether the employer's conduct 'forced' the resignation of the employee.<sup>154</sup> That involves a consideration of all 'the circumstances giving rise to the termination, the seriousness of the issues involved, and the respective conduct of the employer and the employee.'<sup>155</sup> The argument is likely to be made by the Department that it was Schou's own pressing responsibilities to her son that was the primary factor accounting for her lack of choice leading to her resignation, and not the Department's conduct in withdrawing agreement to the modem proposal.<sup>156</sup> It is unclear whether that argument would succeed. Notably, recent decisions under the *FW Act* indicate that a high level of misconduct by an employer may be required in order to conclude that a resignation was 'forced' by the employer's conduct. For example, in one case involving close supervision of an employee which was alleged by the applicant to constitute bullying, it was asked whether the employer's conduct was 'oppressive' or 'repugnant' such that it 'could not reasonably be endured.'<sup>157</sup>

Finally, even if it were able to be said that Schou's situation amounted to adverse action in the form of dismissal, it would still need to be established that the dismissal was causally linked to one of the grounds identified above, namely, her 'workplace right' or her 'family or carer's responsibilities', and not for example, the business needs of the Department.

Leaving aside the issue of whether Schou was dismissed within the meaning of the adverse action provisions, the Department may have 'injure[d]' her in her employment, or, altered her position to her 'prejudice'. These two items have been part of industrial law for some time, in the form of freedom of association,

<sup>153</sup> *O'Meara v Stanley Works Pty Ltd* [2006] AIRC 497 (11 August 2006) [23].

<sup>154</sup> *ABB Engineering Construction Pty Ltd v Doumit* (unreported, AIRCFB, 9 December 1996, Print N6999); *Australian Hearing v Peary* (2009) 185 IR 359 [36]; *O'Meara v Stanley Works Pty Ltd* [2006] AIRC 497 (11 August 2006) [23]; *Ramos* [2011] FMCA 341 (24 August 2011) [50].

<sup>155</sup> *Pawel v Advanced Precast Pty Ltd* (unreported AIRCFB, 12 May 2000, Print S5904) [13].

<sup>156</sup> The AIRC Full Bench has used the example of an employee who sought a pay rise and then resigned when that was not forthcoming to illustrate the point that not all terminations of employment which can be said to result from the act of the employer are accurately described as terminations at the initiative of the employer: *Pawel v Advanced Precast Pty Ltd* (unreported, AIRCFB, 12 May 2000, Print S5904) [13]. In a similar vein, the AIRC Full Bench has stated that '[w]here the conduct of the employer is ambiguous, and the bearing it has on the decision to resign is based largely on the perceptions and subjective response of the employee made unilaterally, considerable caution should be exercised in treating the resignation as other than voluntary': *ABB Engineering Construction Pty Ltd v Doumit* (unreported, AIRCFB, 9 December 1996, Print N6999) 12. Both these quotations have been cited with approval in a recent decision: *Ramos* [2011] FMCA 341 (24 August 2011) [50].

<sup>157</sup> *Ramos* [2011] FMCA 341 (24 August 2011) [53]. See also *Mendicino v Tour-Dex Pty Ltd* [2010] FWA 9114 (1 December 2010) [10], [52], [64], [66] on unfair dismissal law.

and both have been interpreted in a relatively broad manner.<sup>158</sup> There is no reason to suppose that these concepts in the adverse action provisions will be interpreted more narrowly than their history in industrial law suggests.<sup>159</sup> Whilst injury in employment has been interpreted to mean harm of ‘any compensable kind’, the concept of altering a person’s position to their prejudice is a ‘broad additional category’ that covers both ‘legal injury’ and ‘any adverse affection of, or deterioration in, the advantages enjoyed by the employee before the conduct in question.’<sup>160</sup> The Department’s conduct was its failure to install the modem. This might be recognised as a harm of a ‘compensable kind’ in the sense of giving rise to a claim of discrimination in the failure to reasonably accommodate under the *EOA* (Vic). In addition, the withdrawal or abandonment by the Department of its earlier promise to provide this form of accommodation to Schou clearly caused deterioration in her position. Prior to the change of mind Schou was the beneficiary of an agreement or at least a promise by her employer that she would be permitted to work from home once the modem was installed. After the Department’s conduct she no longer had the benefit of that promise. From there it would need to be assessed whether that injury in employment or prejudicial altering of her position (through the abandonment of the promise by the Department) were linked in terms of causation to Schou’s ‘workplace right’, or her ‘family or carer’s responsibilities’. As with dismissal, the Department is likely to credibly assert that the reason for its change of mind was solely operational need, and that Schou’s ‘workplace right’ and her family and carer responsibilities played no role at all in the change of mind.

There is in addition the complex and difficult question of whether the Department has engaged in adverse action by ‘discriminat[ing] between ... [Schou] and other employees of the employer’.<sup>161</sup> The concept of ‘discrimination’ (and its derivatives) is not defined in the *FW Act*. Nor has that concept been defined in federal industrial legislation since it first appeared some thirty years ago. It has however been interpreted from the early days to include both direct and indirect discrimination, articulated in ways that broadly captured the meanings of anti-discrimination law.<sup>162</sup> Anti-discrimination law meanings of discrimination have continued to be adopted by Fair Work Australia (‘FWA’) in a number of recent decisions across

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<sup>158</sup> Creighton and Stewart, above n 28, [17.78].

<sup>159</sup> The Explanatory Memorandum appears to confirm this: Explanatory Memorandum, Fair Work Bill 2009 (Cth) [1384]. Case decisions under the adverse action provisions confirm this: *ALAEA v International Aviations Service Assessment Pty Ltd* [2011] FCA 333 (8 April 2011) [289]–[301]; *Qantas Airways Ltd v ALEA* [2012] FCAFC 63 (4 May 2012) [30]–[40].

<sup>160</sup> *Patrick Stevedores Operations No 2 Pty Ltd v MUA* (1998) 195 CLR 1, [4]. This case was cited in *Automotive, Food, Metals, Engineering, Printing and Kindred Union v Visy Packaging Pty Ltd* [2011] FCA 1001 (12 August 2011) [46].

<sup>161</sup> *FW Act* s 342(1) item 1.

<sup>162</sup> See, eg, *Flight Attendants’ Association of Australia v Qantas Airways Limited* (2006) AIRC 282 (10 May 2006) [36]–[52]; *Flight Attendants’ Association of Australia v Qantas Airways Limited* (2006) AIRC 537 (1 September 2006) [11]–[15]; *Sapevski v Katies Fashions (Australia) Pty Ltd* (1997) IRCA 219 (8 July 1997). Direct and indirect discrimination have also been used in interpreting the equal remuneration principles in federal industrial law: Meg Smith, ‘Gender Pay Equity Reform in

different provisions in the *FW Act*.<sup>163</sup> In contrast, another recent decision used a dictionary to ascertain the ordinary meaning of the concept of discriminate in terms of adverse action.<sup>164</sup> Importantly though, none of these recent decisions were directly on the adverse action provisions themselves. In contrast, in two decisions directly on point, the Federal Magistrates used a combination of a dictionary meaning and the Federal Magistrates' understandings of direct discrimination.<sup>165</sup>

One of the main exceptions to the listed grounds of race, sex and so on requires reference to anti-discrimination law and so there is a clear linking between the adverse action concept and anti-discrimination law in this regard.<sup>166</sup> Some

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Australia: What is the Way Forward?' (2009) 35 *Australian Bulletin of Labour* 652, 659–60.

<sup>163</sup> See, eg, *Deng v Inghams Enterprises Pty Ltd* [2010] FWA 8797 (23 November 2010) [55]–[56] where in the context of an unfair dismissal hearing, FWA interpreted the concept of discrimination in the pt 3-1 General Protections as involving direct and indirect discrimination; *Australian Catholic University Limited T/A Australian Catholic University* [2011] FWA 3693 (10 June 2011) [11]–[14] where 'discriminatory term' under the *FW Act* s 195 was interpreted to mean both direct and indirect discrimination; *Shop, Distributive and Allied Employees Association* [2011] FWAFB 6251 (14 September 2011) [30] where the prohibition in the *FW Act* s 153 on modern awards containing terms 'that discriminate' was assumed (without a firm view being expressed) to include indirect discrimination.

<sup>164</sup> *D H Gibson Pty Limited* [2011] FWA 911 (10 February 2011) [27] where in the context of an application for approval of an agreement, FWA relied on the *Macquarie Dictionary* definition of 'discriminate' to interpret the meaning of s 342 adverse action. Section 15AB of the *Acts Interpretation Act 1901* (Cth) indicates that words are to be given their ordinary meaning. The *Macquarie Dictionary* provides (in part) that 'discriminate' means 'to make a distinction, as in favour of or against a person or thing: to discriminate against a minority', 'to note or observe a difference; distinguish accurately: to discriminate between things': *Macquarie Dictionary* (Macquarie Dictionary Publishers, 5th ed, 2009). In *Street v Queensland Bar Association* (1989) 168 CLR 461, 570 Gaudron J stated that in its ordinary meaning discrimination 'refers to the process of differentiating between persons or things'. See further Rice and Roles, above n 140, 22.

<sup>165</sup> *Ramos* [2011] FMCA 341 (24 August 2011) [59]–[62]. The Federal Magistrate determined that as the claimant alleged direct discrimination, he was required to prove that the employer 'deliberately treated him less favourably than its other employees': at [62]. With respect this appears to misunderstand the role of the reverse onus of proof, and the decision of the majority in *Barclay* (2011) 191 FCR 212 on intention and consciousness. In *Hodkinson v Commonwealth* [2011] FMCA 171 (31 March 2011) [178] the Federal Magistrate concluded that discrimination in s 342 'involves an employer deliberately treating an employee, or a group of employees, less favourably than others of its employees'.

<sup>166</sup> Interestingly, the Fair Work Ombudsman appears to use anti-discrimination law to understand the meaning of discrimination, interpreting the adverse action provisions as prohibiting both direct and indirect discrimination: Fair Work Ombudsman, *Guidance Note No 6 — Discrimination Policy* (2009) [5.4]. Notably the *Guidance Note* also refers to 'systemic discrimination', which is not a term used in anti-discrimination statutes themselves. The *Note* does not refer to the 2008 Victorian developments, or the post 2009 meaning of discrimination under the *DDA* as a

commentators have suggested that the legislative formula of discrimination as ‘between the employee and other employees of the employer’ is quite narrowly drawn and may indicate that only the idea of direct discrimination is covered.<sup>167</sup> The suggestion is that the formula ‘between the employee and other employees’ invokes a methodology of comparison, examining how the claimant was treated in comparison to other employees.<sup>168</sup> Support for this approach is found in the main decision to date on adverse action, although the decision was not on the discrimination provisions. The Full Federal Court (by majority) indicated that the adverse action discrimination provisions involve a comparator test of the kind applied in direct discrimination in anti-discrimination law.<sup>169</sup> Adopting such an approach leads to the view that so long as the employer treats the claimant the same as its other employees, as the Department did with Schou, there will be no adverse action in the form of ‘discriminat[ing] between’ within the meaning of the legislation.<sup>170</sup>

In addition, or alternatively to referencing domestic anti-discrimination law, international conventions may be used to flesh out the bare framework of the *FW Act* on discrimination. Although the adverse action provisions do not rely on the external affairs head of power in the Australian Constitution for their support, ‘taking into account Australia’s international labour obligations’ is an objective of the *FW Act*.<sup>171</sup> The Discrimination (Employment and Occupation) Convention 1958 (No 111) of the International Labour Organisation (‘ILO’) has been, and remains, directly relevant in understanding the meaning of the unlawful termination provisions in the former *WR Act* and the current *FW Act*.<sup>172</sup> ILO Convention 111 defines discrimination broadly to include ‘any distinction, exclusion or preference

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failure to make reasonable adjustments in relation to a disability. Assertions that there are conventional or standard meanings of direct and indirect discrimination in Australian anti-discrimination law are becoming more problematic, perhaps especially since the enactment of the 2008 Victorian amendments. In reality there are now many variations in the definitions and meanings of discrimination throughout Australian anti-discrimination law: See generally, Rees, Lindsay and Rice, above n 27, [4.1.3]–[4.1.5].

<sup>167</sup> The formula is contained in *FW Act* s 342(1) item 1(d). See Owens, Riley and Murray, above n 28, 464.

<sup>168</sup> It is unclear how the adverse action discrimination prohibition operates in situations where the employer has only one or two employees: Andrades, above n 138, 7; Rice and Roles, above n 140, 23.

<sup>169</sup> *Barclay* (2011) 191 FCR 212 [35]–[36] (Gray and Bromberg JJ). That understanding has been echoed in *Ramos* [2011] FMCA 341 (24 August 2011) [64]–[66]; *Stephens* [2011] FMCA 448 (8 July 2011) [83]–[84]; *Farah v Ahn* [2012] FMCA 44 (3 February 2012) [75].

<sup>170</sup> Andrades, above n 138, 7–8.

<sup>171</sup> *FW Act* s 3(a). Note that extrinsic material can be used to aid interpretation: *Acts Interpretation Act 1901* (Cth) s 15AB.

<sup>172</sup> *WR Act* s 659(2); *FW Act* s 772(1)(f). These provisions rely on the external affairs head of power in the Australian Constitution. A person is not entitled to lodge a claim under the unlawful termination provisions where they are entitled to challenge the dismissal as adverse action: *FW Act* s 723.

made on the basis of’ a number of grounds, and ‘such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation’.<sup>173</sup> Some commentators draw on ILO Convention 111 (as well as other material) to support an argument that the adverse action discrimination provisions may cover the broad idea of indirect discrimination as it is known in anti-discrimination law.<sup>174</sup>

In addition, the ILO Workers with Family Responsibilities Convention 1981 (No 156) is potentially relevant to understanding the meaning of discrimination and equality in relation to a modern day Schou. This Convention acknowledges the desirability of taking into account the special needs of workers with family responsibilities in terms and conditions of employment.<sup>175</sup> ILO Convention No 156 speaks of ‘creating effective equality of opportunity’ for workers with family responsibilities.<sup>176</sup> Each member state under this Convention, including Australia, has undertaken to:

make it an aim of national policy to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities.<sup>177</sup>

Recourse to such broad understandings of discrimination and the need to provide accommodation to workers with family responsibilities will take effect to strengthen the claim of a modern day Schou under the *FW Act*.

The lack of a legislative definition of discrimination in the *FW Act* opens up the possibility for the development of a more nuanced understanding of that concept in the context of adverse action. The Explanatory Memorandum may acknowledge this prospect by recognising that the adverse action provisions are not merely a consolidation of previous understandings of freedom of association and unlawful termination, and that they do expand the scope of unlawful conduct by employers.<sup>178</sup> In choosing not to define or specify a meaning of discrimination, Parliament deliberately left this field open, leaving the task of assigning meaning to claimants and employers, their representatives, FWA, and ultimately the courts. Principles of statutory interpretation indicate that the new rules ought to

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<sup>173</sup> Art 1(a), (b). It has been determined that this form of words (which appeared in the *Human Rights and Equal Opportunity Commission Act 1986* (Cth)) includes anti-discrimination law meanings of both direct discrimination and indirect discrimination: *Commonwealth v Human Rights and Equal Opportunity Commission* (2000) 108 FCR 378 [53].

<sup>174</sup> Rice and Roles, above n 140, 24–7.

<sup>175</sup> ILO Convention 156 arts 3.2, 4.

<sup>176</sup> *Ibid* art 3.1. See also Preamble.

<sup>177</sup> *Ibid* art 3.1. In Convention 156 ‘discrimination’ is defined to have the same meaning as in ILO Convention 111: ILO Convention 156 art 3.2.

<sup>178</sup> Explanatory Memorandum, Fair Work Bill 2009 (Cth) [1336].

be interpreted in a way that promotes the objects of the legislation, and the Full Federal Court has reminded us of the importance of this approach in the context of interpreting pt 3-1 of the *FW Act*.<sup>179</sup> The objects of the Act include advancing the ‘social inclusion of all Australians’, to assist employees ‘to balance their work and family responsibilities by providing for flexible working arrangements’ and to prevent discrimination. In addition, the objects of pt 3-1 refer to providing protection from workplace discrimination, and providing ‘effective relief’ from discriminatory harms.<sup>180</sup>

The factual context of Schou illustrates the potential impact of different interpretations of the phrase ‘discriminates between the employee and other employees of the employer’. If that formula countenances the ILO Convention 100 meaning of discrimination, then Schou may be able to successfully argue that she experienced ‘exclusion’ by reason of her forced resignation, which had the ‘effect of nullifying or impairing equality of opportunity ...in [her] employment or occupation’. ILO Convention 156 supports such an interpretation. Schou might also be successful if the adverse action provisions are interpreted to encompass a broad understanding of indirect discrimination, as some commentators argue it might. She may be able to establish that the policy of her employer — that all employees must work on site all sitting days — substantially disadvantages parents and carers and does so unreasonably.

Alternatively, if the *FW Act* formula countenances only direct discrimination in the form of less favourable treatment, as others predict, then Schou was not treated differently to, or less favourably than, her co-workers. Indeed, that Schou was treated the same as her colleagues in the sense that the Department required all sub-editors to work on site all sitting days, was noted by both the Supreme Court and the Court of Appeal.<sup>181</sup> None of the employees in the Department were provided with flexibility as they were all expected to conform to the normative work arrangement of working on site. This may also be the outcome if the ordinary meaning of discrimination is adopted.<sup>182</sup> Such a narrow interpretation of the legislative phrase ‘discriminates between the employee and other employees’ provides very little potential to challenge status quo work arrangements and understandings that detrimentally impact on workers such as mothers, and more broadly workers with family or carer’s responsibilities.

#### D *Exceptions*

A number of exceptions apply in relation to the adverse action protections. These exceptions appear to be potentially applicable in relation to all four forms

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<sup>179</sup> *Acts Interpretation Act 1901* (Cth) s 15AA; *Barclay* (2011) 191 FCR 212 [18].

<sup>180</sup> *FW Act* ss 3, 336(c), (d).

<sup>181</sup> *Victoria v Schou* (2001) 3 VR 655 [12], [24]; *Victoria v Schou* (2004) 8 VR 120 [39] (Phillips JA).

<sup>182</sup> Some articulations of the ordinary meaning of discriminate emphasise differentiating *between* employees, or treating a person differently: see above n 165. See further Rice and Roles, above n 140, 22.

of adverse action, and not merely adverse action in the form of discrimination, although that context might be their more obvious application.<sup>183</sup> One exception covers action that is taken because of the ‘inherent requirements of the particular position’.<sup>184</sup> This exception applied in the past in relation to the unlawful termination provisions, and in that context was interpreted to refer to the essential requirements of the position in question, rather than an aspect of the position that is non-essential or peripheral.<sup>185</sup> A similar exception exists in anti-discrimination law, although in that context it is frequently paired with a requirement on the employer to make reasonable adjustments to assist the employee to fulfil the inherent requirements of the job.<sup>186</sup> No such obligation on the employer appears in the *FW Act* ‘inherent requirements’ exception. Drawing on the findings of VCAT, it seems that this exception would not be applicable in relation to the case of a modern day Schou. Working on site all sitting days was not an essential requirement of the position, and Schou clearly could continue to perform the essential requirements of the position whilst working at home.<sup>187</sup>

Another exception applies in relation to action that is ‘not unlawful under any anti-discrimination law in force in the place where the action is taken’.<sup>188</sup> The concept of ‘anti-discrimination law’ in this last exception is defined for this purpose, and includes predictably Commonwealth statutes such as the *SDA*, and relevant state and territory anti-discrimination statutes such as the *EOA* (Vic).<sup>189</sup> Much uncertainty attaches to the scope of this exception.<sup>190</sup> Two alternative interpretations of this *FW Act* exception are possible.<sup>191</sup> The *FW Act* formula might mean that conduct that is covered by a specific exemption or exception in a relevant

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<sup>183</sup> *FW Act* s 351(2).

<sup>184</sup> *Ibid* s 351(2)(b).

<sup>185</sup> *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, 295 (Gaudron J), 305 (McHugh J), 318–19 (Gummow J), 340–1 (Kirby J). See also *X v Commonwealth* (1999) 200 CLR 177 on the similar inherent requirements exemption in the *DDA*.

<sup>186</sup> See, eg, *DDA* s 21A(1)(b); *EOA* (Vic) ss 20, 23.

<sup>187</sup> There is also an exception in relation to religious institutions, which again also applied in relation to the previous unlawful termination provisions: *FW Act* s 351(2)(c). Like the inherent requirements exception, this religious institutions exception has no relevance to Schou’s employment.

<sup>188</sup> *FW Act* s 351(2)(a). Note also the separate exception that an employer’s conduct will not constitute ‘adverse action’ where it ‘is authorized by or under’ the *FW Act*, a Commonwealth law, or a prescribed state or territory law: at s 342(3).

<sup>189</sup> *FW Act* s 351(3). Although s 351(3) refers to the repealed *EOA 1995* (Vic), s 10A of the *Acts Interpretation Act 1901* (Cth) provides in effect that the reference to the 1995 Act should be taken to include a reference to the *EOA* (Vic).

<sup>190</sup> Owens, Riley and Murray, above n 28, 463; Creighton and Stewart, above n 28, [17.38]; Rice and Roles, above n 140, 27–9; Smith, above n 28, 215–6. Commentators have noted that the need to inquire into and determine the applicability of the ‘not unlawful’ exception is likely to produce significant implications in terms of legal cost and delay: Rice and Roles, above n 140, 29.

<sup>191</sup> Notably both interpretations concede that the protection offered by adverse action varies from state to state and territory, as each jurisdiction’s anti-discrimination legislation varies in important respects. That outcome sits uneasily with Parliament’s

anti-discrimination statute (such as a positive measure or temporary measures exemption)<sup>192</sup> will not constitute ‘adverse action’ under the *FW Act* provisions.<sup>193</sup> Alternatively, it might exempt from the adverse action provisions additional broader conduct, such as that which falls outside the scope of anti-discrimination law (perhaps because discrimination on that ground and in those circumstances is not rendered unlawful,<sup>194</sup> or that the evidence does not establish that the ground was ‘a substantial reason’ for the conduct).<sup>195</sup>

Unfortunately the passage of this provision through Parliament does not shine much light on the correct interpretation. As introduced into Parliament, the Bill worded the exemption as action that is ‘authorised by, or under, a State or Territory anti-discrimination law’.<sup>196</sup> As enacted, the provision exempts action that is ‘not unlawful under any anti-discrimination law in force in the place where the action is taken’. The Supplementary Explanatory Memorandum explained the change in wording as follows:

This exception is intended to ensure that where action is not unlawful under a relevant anti-discrimination law (e.g., because of the application of a relevant statutory exemption) then it is not adverse action under subclause 351(1). The word ‘authorised’ may not capture all action that is not unlawful under anti-discrimination legislation, especially if the legislation does not specifically authorize the conduct but has the effect that the conduct is not unlawful. These amendments ensure the exception operates as intended.<sup>197</sup>

This passage is ambiguous. On the one hand the deletion of the word ‘authorised’, suggests a conscious decision to broaden the exemption to cover conduct that, for whatever reason, is not rendered unlawful under anti-discrimination law.<sup>198</sup> On

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intention that the *FW Act* provide a national approach: Owens, Riley and Murray, above n 28, 463.

<sup>192</sup> See, eg, *SDA* ss 7D, 44; *EOA* (Vic) ss 12, 89.

<sup>193</sup> It has been aptly written that ‘[i]n cross-referencing to exemptions and exceptions the *FW Act* has unwittingly stumbled into the most incoherent corner of Australia’s anti-discrimination laws’: Rice and Roles, above n 140, 28. As these authors note, there is little consistency across Australian anti-discrimination statutes regarding exemptions and exceptions.

<sup>194</sup> For example, discrimination on the ground of sexuality or gender identity that takes place within the Commonwealth public sector and Commonwealth statutory agencies is not rendered unlawful under either Commonwealth or state anti-discrimination law: *Commonwealth v Anti-Discrimination Tribunal (Tas)* (2008) 169 FCR 85.

<sup>195</sup> See, eg, *EOA* (Vic) s 8(2)(b). Under the *SDA* the prohibited reason need be only one of the operative reasons: *SDA* s 8.

<sup>196</sup> Fair Work Bill 2008 (Cth) (as presented and read a first time in the House of Representatives on 25 November 2008) cl 351(2)(a).

<sup>197</sup> Explanatory Memorandum, Fair Work Bill 2009 (Cth) [220].

<sup>198</sup> Interestingly, the word ‘authorised’ was unaltered in the Bill in the context of the exception that applies to action that is ‘authorised by or under’ the *FW Act* or other law of the Commonwealth (*FW Act* s 342(3)(a)). The Explanatory Memorandum provides an illustration of this exception as being where an employer is authorised to

the other hand, the first sentence in the passage seems to reinforce the narrower interpretation of this *FW Act* exception. That is, that conduct that is not unlawful under anti-discrimination law because it falls within a relevant statutory exemption cannot be challenged under the *FW Act* as adverse action. On balance it seems that the broader interpretation is more likely to be correct.<sup>199</sup> That outcome seems to best represent the thinking behind the decision to remove the word ‘authorised’ from the Bill’s provision. Notably, the wide wording of the legislative provision itself suggests such a broader interpretation.<sup>200</sup>

This provision that exempts conduct that is ‘not unlawful under any anti-discrimination law’ will clearly be of relevance to a claim by Schou of adverse action on the ground of ‘family or carer’s responsibilities’, as it is likely to be under any claim on a ground covered by anti-discrimination law. Schou’s situation does not fall within any of the specific exceptions in the *EOA* (Vic) or the *SDA*, therefore on the narrower interpretation the *FW Act* exception will not apply. If the broader interpretation of the *FW Act* exception is adopted, it must be noted that the Department’s conduct was determined to be ‘not unlawful’ under the direct and indirect discrimination provisions in the *EOA 1995* (Vic), as they stood at that time. Notably though a relatively strong argument can be made that the Department’s conduct would be unlawful under the current provisions regarding discrimination in the form of an unreasonable failure to accommodate the responsibilities of a parent or carer. This argument has been explored above, and if it is correct, the Department’s conduct cannot be described as ‘not unlawful’ under anti-discrimination law, with the result that the *FW Act* exception will not apply.<sup>201</sup>

### E Concluding Thoughts on Adverse Action

A person in Schou’s position today faces much uncertainty in pursuing a remedy under the adverse action provisions in the *FW Act*. Even if it is established that she did experience ‘adverse action’ within the meaning of the legislation, was that ‘adverse action’ ‘because’ she had a ‘workplace right’, or ‘because of’ her ‘family or carer’s responsibilities’, or was it unrelated to those matters? Would the

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stand down an employee under s 524(1): Explanatory Memorandum, Fair Work Bill 2009 (Cth) [1388]. This provides support for the view that the broader interpretation should be given to the exception in s 351(2)(a).

<sup>199</sup> For a support of this view, see Rice and Roles, above n 140, 27–9. Contra Smith, above n 28, 215–16.

<sup>200</sup> If the more expansive interpretation is correct, it means that the *FW Act* provisions add nothing substantively new to the overall legal framework, albeit that the Act establishes a new forum for existing discrimination grievances: Owens, Riley and Murray, above n 28, 463–4.

<sup>201</sup> Notably, were Schou located in a state or territory where the anti-discrimination statute does not impose an obligation on employers to accommodate the care responsibilities of an employee, such as Queensland, Tasmania, Western Australia, and perhaps New South Wales, the employer’s conduct would most likely be ‘not unlawful’ under anti-discrimination law, with the result that the *FW Act* exception would apply and the employer would not be liable under the adverse action provisions.

Department be able to discharge the reverse onus of proof in this regard by showing that its change of mind on the modern proposal was solely prompted by business concerns, with Schou's 'workplace right' or 'family or carer's responsibilities' playing no operative role at all?

Clearly much about these new provisions remains to be mapped through future cases. The examination above illustrates the many questions and uncertainties a potential litigant and their legal advisor faces in the adverse action framework.<sup>202</sup> Nonetheless, the advantages for claimants of the *FW Act* framework of adverse action over the *EOA* (Vic) mechanism of discrimination, in the form of a failure to accommodate, are pronounced and attractive. These include the reversed onus of proof, a need for the prohibited ground to be only a reason for the adverse action, whether or not the dominant or a substantial reason, and the potentially pro-active enforcement role of Inspectors of the Fair Work Ombudsman. Whether these attractions outweigh the considerable uncertainty attaching to key concepts in the jurisdiction remain to be assessed on an individual basis.

## VI CONCLUSION

This article has shed light on three new legal mechanisms designed to assist workers with care responsibilities. The well known case of Deborah Schou, with her relatively modest request to work from home two days a week, was used as a vehicle to explore the legal frameworks. Being located in Victoria and so now covered by the accommodation provisions in the *EOA* (Vic), the situation of a modern day Schou represents the best case scenario in favour of accommodation. As a Victorian public sector employee, a contemporary Schou has recourse to both the request provisions and the adverse action protections in the *FW Act*, whereas employees of other state public sectors most likely do not.<sup>203</sup> Given these matters it is surprising and of concern that the legal rights of a modern day Schou are not both more straightforward, and clearly in her favour.

Ultimately the investigation conducted in the article reveals that it is uncertain whether a person with care responsibilities such as Schou could successfully use these legal rights in order to claim accommodation in the form of different treatment to those without care responsibilities. The ability to request a change in working arrangements under the *FW Act* provides a limited enforcement mechanism, and is silent on the situation where, as here, an employer initially agreed to a request and then later changed its mind. Potential sources of legal uncertainty were uncovered in both the Victorian discrimination jurisdiction and in the federal adverse action framework. The Victorian discrimination provisions on reasonable accommodation raise questions regarding the degree

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<sup>202</sup> Smith explores how the institutional structures of Australian industrial relations, and the tradition of separation of industrial claims from discrimination claims will shape how the adverse action provisions are interpreted: Belinda Smith, 'What Kind of Equality Can We Expect from the Fair Work Act?' (2011) 35 *Melbourne University Law Review* 545.

<sup>203</sup> See above n 57.

of formality required in relation to the employee's request for accommodation. The legal standard of reasonableness in the Victorian provisions also generates methodological questions regarding how different factors should be weighed. It has been shown that vague rules in anti-discrimination law tend to strengthen the hand of those employers who resist the policy objectives of the rules.<sup>204</sup> This does not bode well for the fuzzy reasonableness standard of the accommodation provisions in the *EOA* (Vic). The adverse action jurisdiction under the *FW Act* also contains several grey areas. A notable instance is the use of the concept of discrimination in the *FW Act* framework without definition or explication. The exception for conduct that is 'not unlawful under any anti-discrimination law' also gives rise to many questions.

This article reveals the complexity of the issues and choices confronting both employees and their legal advisors, flagging and exploring main issues of contestation under the *EOA* (Vic) framework and the *FW Act*. One clear message emerges from the examination conducted in this article. It is that there is not an obviously preferable course of action for a modern day Schou. All three avenues present different challenges and risks for an employee.

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<sup>204</sup> Gaze, above n 6, 90.